Submission No 16

INQUIRY INTO REPARATIONS FOR THE STOLEN GENERATIONS IN NEW SOUTH WALES

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ADVOCACY CENTRE LTD

Submission to General Purpose Standing Committee No. 3, *Inquiry into reparations for the Stolen Generations in New South Wales*

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Sophie Farthing, Senior Policy Officer

Level 5, 175 Liverpool Street, Sydney NSW 2000
Phone: 61 2 8898 6500 • Fax: 61 2 8898 6555 • www.piac.asn.au

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1. Introduction

The policy of forcibly removing Aboriginal and Torres Strait Islander children in NSW from their families and communities continues to cast a shadow over survivors, their descendants and entire communities. The official policy of forced removals and assimilation is a stain on the State's history. Its legacy causes on-going pain and cyclical disadvantage, a trend yet to be significantly ameliorated by a comprehensive process of reparation and reconciliation.

For many years, the Public Interest Advocacy Centre (**PIAC**) has worked closely with Aboriginal and Torres Strait Islander people in calling for effective and adequate reparations to be made to members of the Stolen Generations. In the time that has passed since the *Bringing Them Home* report (**BTH report**) was published in 1997,[1] there has been some progress towards reconciliation in NSW and across the country. This has included the repayment scheme established for Stolen Wages in NSW and Queensland, reparations for Stolen Generations in Tasmania, the national apology given by former Prime Minister Kevin Rudd MP and the current debate regarding the need to recognise Aboriginal and Torres Strait Islander people in the Australian Constitution.

Though these developments are not insignificant, the central recommendation of the BTH report (**Recommendation 3**) has only been partially fulfilled. Recommendation 3 was for the establishment of a system of reparations for members of the Stolen Generations consisting of:

- an acknowledgement and apology;
- guarantees against repetition;
- measures of restitution;
- measures of rehabilitation; and
- monetary compensation.[2]

Accordingly, PIAC welcomed the reference to the General Purpose Standing Committee No. 3 (**Standing Committee**) to consider the adequacy of the NSW Government's response to the BTH report's recommendation for reparations to be made and to consider whether potential legislation or policies are required to make reparations to members of the Stolen Generation and their descendants.

The central recommendation in this submission is for the NSW Government to establish, as a matter of urgency, a reparations tribunal to compensate members of the Stolen Generations, their descendants and communities. There is clear desire for the establishment of such a tribunal – as is clear from extensive consultation PIAC has undertaken with Aboriginal and Torres Strait Islander communities across NSW in the wake of the BTH report. Nearly two decades on from this landmark publication, the time has come for action, not further discussion and deliberation.

In addition to a comprehensive reparations tribunal, PIAC recommends in this submission that decisive policy decisions be made to reform current child protection and criminal justice practices in order to avoid the continuing and increasingly disproportionate removal of Aboriginal and

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1 Commonwealth of Australia, *Bringing them home, Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families,* August 1997, available at https://www.humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf.

2 Recommendation 3, BTH report, above note 1.

Torres Strait Islander children from their families and communities. Addressing the contemporary trend of disproportionate removal is vital to fulfil a key component of Recommendation 3: that the devastating policies creating a Stolen Generation of our first peoples are never repeated.

2. About the Public Interest Advocacy Centre

PIAC is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from Trade and Investment NSW for its work on energy and water, and from Allens for its Indigenous Justice Project. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The need to address the specific disadvantage experienced by Aboriginal and Torres Strait Islander people arises in all areas of PIAC's policy and legal work. In addition to its general policy work and legal casework, PIAC has two project areas where Aboriginal and Torres Strait Islander clients are specifically in focus. First, PIAC's Indigenous Justice Project (**IJP**), set up in 2001, aims to:

- identify public interest issues that impact on Aboriginal and Torres Strait Islander people;
- conduct public interest advocacy, litigation and policy work on behalf of Aboriginal and Torres Strait Islander clients and communities; and
- strengthen the capacity of Aboriginal and Torres Strait Islander people to engage in public policy making and advocacy.

The IJP has conducted policy and advocacy work in relation to a wide range of issues, such as policing in Aboriginal and Torres Strait Islander communities, the effectiveness of police complaint systems in NSW, the over-representation of young people in detention, improving access to justice and race discrimination. The IJP has also acted for family members of Aboriginal inmates who have died in custody.

Secondly, PIAC's Homeless Persons' Legal Service (**HPLS**), established in 2004, assists a number of Aboriginal and Torres Strait Islander clients who are experiencing or are at risk of homelessness. The HPLS operates 11 legal clinics based at agencies that provide other services to homeless people and provides legal information, referral, advice and, in some cases, on-going casework, in a large range of areas of law. One new HPLS clinic, for example, is being established at The Shed in Mt Druitt of NSW, a centre that provides support for predominantly Aboriginal and Torres Strait Islander men across a range of areas including mental health, employment and housing. PIAC's HPLS also conducts policy and advocacy work on issues arising from the provision of legal services and its liaison work.

3. PIAC's work on the Stolen Generations

PIAC has been involved in Stolen Generations work since the early 1990s. This work, detailed below, has been undertaken in consultation with Aboriginal and Torres Strait Islander communities throughout NSW. In making the recommendations in this submission, PIAC builds on this work, its current casework and its evidence-based policy submissions. Key pieces of work are annexed to this submission.

3.1 Representation of members of the Stolen Generations (1996 to 1999)

In 1996, PIAC and the (then) Public Interest Law Clearing House NSW (**PILCH**) co-ordinated legal advice and assistance to Aboriginal and Torres Strait Islander people making submissions to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (**National Inquiry**). Following the release of the National Inquiry's Report, *Bringing Them Home*, in 1997, PIAC and PILCH assessed over 50 claims by members of the Stolen Generations.

In 1998-99, PIAC provided legal representation to members of the Stolen Generations who commenced legal action in the Supreme Court of NSW against the NSW Government – the claims were subsequently withdrawn at the request of the claimants. PIAC has also represented members of the Stolen Generations before the NSW Victims Compensation Tribunal in relation to criminal conduct against them while State wards.

3.2 PIAC's Stolen Generations Reparations Tribunal proposal (1997 to 2008)

PIAC first proposed the establishment of a Stolen Generations Reparations Tribunal in 1997.[3] The PIAC proposal recommended the establishment of a reparations tribunal that would meet the key objectives of:

- ensuring that Aboriginal and Torres Strait Islander people were involved in the design and delivery of reparations processes and outcomes;
- validating the specific experience and identity of the Stolen Generations; and
- acknowledging, both symbolically and substantively, the magnitude of the moral wrong perpetuated against the victims of removal policies and the pain and enduring harm borne by the Stolen Generations.

This proposal was developed in consultation with representatives from Link Up (NSW), the Stolen Generations Working Group (NSW), the State Reconciliation Council (NSW), the NSW Department of Aboriginal Affairs, the NSW Attorney General's Aboriginal Justice Advisory Council, the then Human Rights and Equal Opportunity Commission (**HREOC**) National Inquiry Secretariat, the Aboriginal and Torres Strait Islander Commission (**ATSIC**) and Aboriginal Legal Services, Aboriginal Medical Services and focus groups of Stolen Generation members across the country.

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[3] Public Interest Advocacy Centre, *Providing Reparations: A Brief Options Paper* (1997), Appendix C in Durbach, A and Thomas, L *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generations Compensation Bill*, Public Interest Advocacy Centre and the Australian Human Rights Centre, April 2008, available at http://www.piac.asn.au/publication/2008/04/080410-piac-stolengens.

In 2008, following extensive consultation with Aboriginal and Torres Strait Islander communities, PIAC published the Stolen Generations Compensation Bill 2008. This Bill is referred to in detail in this submission, and is attached as **Appendix A**.

3.3 *Restoring Identity* report (2002)

As emphasised above, PIAC's work in this area has always been conducted in close consultation with Aboriginal and Torres Strait Islander communities. During 2001, PIAC conducted various focus groups with Aboriginal and Torres Strait Islander individuals and organisations across Australia in relation to the proposed reparations tribunal. This national consultation project, *Moving forward: achieving reparations*, brought together over 150 Aboriginal and Torres Strait Islander people and PIAC received close to 50 submissions from individuals, churches and organisations. PIAC consulted all Stolen Generations groups that existed in Australia at the time. The consultations and submissions were based on an issues paper developed by PIAC, which provided information about the tribunal proposal and sought responses to key questions about the tribunal functions and processes, eligibility and forms of reparations.

The interim report summarising responses to the issues paper and proposing draft recommendations was presented to the *Moving Forward* conference in August 2001, organised by HREOC, ATSIC and PIAC. The conference, held at the University of New South Wales, attracted over 250 people, including members of the Stolen Generations, government representatives, academics and representatives from key Aboriginal and Torres Strait Islander organisations.

Throughout the *Moving Forward* project, PIAC's work was guided by a reference group of academics, legal practitioners and representatives from the National Sorry Day Committee, ATSIC, Link Up NSW, the Council on Aboriginal Reconciliation and the National Inquiry. The final report of the *Moving Forward* consultation project, *Restoring Identity*, was completed in 2002.[4] This work is referred to throughout this report and the *Restoring Identity* report is attached as **Appendix B** to this submission.

3.4 PIAC's work on Stolen Wages

PIAC's work with Aboriginal and Torres Strait Islander communities led it to investigate the claims of clients denied access to wages, allowances and other entitlements held on trust for them by the NSW Aborigines Protection Board (**Protection Board**), then the NSW Aborigines Welfare Board (**Welfare Board**), and subsequently the NSW Government.

In 2003, PIAC obtained documents from the (then) NSW Department of Community Services (**DoCS**) under the (then) *Freedom of Information Act 1998* (NSW) (**FOI**). The documents revealed that DoCS had previously considered implementing a scheme to repay Aboriginal people unpaid trust fund monies. The draft DoCS scheme, developed in 1998, appears to have formed the basis of a draft Cabinet Minute dated 12 April 2001 and entitled 'Aboriginal Trust Funds Payback Scheme Proposal'. The Minute sought Cabinet's endorsement for the establishment of a scheme to reimburse Aboriginal trust funds monies to rightful claimants at fair value in contemporary currency.

[4] Cornwall, A *Restoring Identity: Final report of the Moving Forward consultation project*, Public Interest Advocacy Centre, 2009, available at http://www.piac.asn.au/sites/default/files/publications/extras/RI_report_final.pdf.

Following the release of this information, PIAC advocated that such a scheme be established. This work culminated in a formal apology in the NSW Parliament by the (then) Premier, the Hon Bob Carr, on 11 March 2004, which included a commitment to repayment of withheld wages.[5] PIAC welcomed the subsequent establishment of the Aboriginal Trust Fund Reparations Scheme (**ATFRS**) and was a strong supporter of and participant in the ATFRS from its inception. PIAC represented eight claimants to the ATFRS and facilitated the referral of 40 claims to pro bono partner firms. PIAC also provided information to descendant claimants, and provided training for all lawyers who represented ATFRS claimants through the Stolen Wages Referral Scheme.

While the issues of Stolen Generations and Stolen Wages are in some ways distinct, PIAC's experience in relation to the ATFRS is helpful for reasons of both practice and principle. This is because many of the relevant issues and challenges are similar, including:

- the paucity of documentary evidence;
- the need to deal with events that occurred a long time ago;
- the effect of raising potentially traumatic memories, including the separation of children and families and the harsh impact of the State's control of Aboriginal and Torres Strait Islander people; and
- the need to design tests for entitlement that adequately and fairly address the particularities of the injustice they are intended to redress.

3.5 PIAC's current policy and legal work

A number of PIAC's current legal clients are Aboriginal and Torres Strait Islander people and they are predominantly young people. A large part of PIAC's current systemic litigation seeks to challenge unlawful police practices in their interactions with Aboriginal and Torres Strait Islander people and to improve the relationship between communities and the NSW Police Force. For example, PIAC is currently finalising a class action representing young people, a number of whom are Aboriginal, who were unlawfully detained for breach of bail by NSW police officers due to inaccurate or out of date information held on the police computer system.[6]

PIAC has also made a number of submissions to government and parliamentary inquiries at both State and Federal levels, and published stand-alone reports in relation to criminal justice policies that disproportionately impact on Aboriginal and Torres Strait Islander communities. These include, for example, submissions in relation to: bail reform;[7] the high incidence of involvement of Aboriginal juveniles in the criminal justice system;[8] justice reinvestment;[9] appropriate diversions

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5 The Hon, Bob Carr MP, New South Wales, House of Representatives, *Parliamentary Debates (Hansard)*, 11 March 2004, at 7164.

6 See Bibby, P 'Wrongful detentions: NSW Police to pay $1.85 million in compensation after settling class action' *Sydney Morning Herald*, 3 August 2015, available at http://www.smh.com.au/nsw/wrongful-detentions-nsw-police-to-pay-185-million-in-compensation-after-settling-class-action-20150802-gipqqu.html

7 See, for example, Bailey, B et al *Review of the law of bail in NSW: submission to the New South Wales Law Reform Commission,* Public Interest Advocacy Centre, 26 July 2011, available at http://www.piac.asn.au/publication/2011/07/review-law-bail-nsw.

8 See, for example, Brown, L and Zulumovski, *A better future for Australia's Indigenous young people: Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs' Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system*, Public Interest Advocacy Centre, 22 December 2009, available at http://www.piac.asn.au/sites/default/files/publications/extras/09.12.22-PIAC-IndigenousYouthSub.pdf.

9 See, for example, Schetzer, L *Value of a Justice Reinvestment approach to criminal justice in Australia, Submission to the Legal and Constitutional Affairs Committee*, Public Interest ADvocayc Centre, 18 March 2013, available at http://www.piac.asn.au/publication/2013/04/value-justice-reinvestment-approach-criminal-justice-australia.

from the criminal justice system;[10] and the need for rehabilitation and support after release from prison.[11]

Finally, much of PIAC's legal and policy work seeks to overcome the significant barriers to accessing justice experienced by our clients, all of whom suffer from some form of disadvantage. This work is obviously directly relevant to any consideration of compensation for wrongs done under the forcible removals policy. In this regard, PIAC has made a number of submissions to government and parliamentary inquiries based on PIAC's legal service provision, including: obstacles to justice in civil litigation;[12] judicial and merits review;[13] and the funding of legal assistance services.[14]

4. Time to act: the response of the NSW Government to the Bringing them home report

Since the publication of the BTH report, the NSW Government has taken some steps to fulfil the central recommendation that reparations be made for the injuries caused by the forcible removals policy. Former NSW Premier, the Hon. Bob Carr, made an apology to Aboriginal people on behalf of the Government and the NSW population on 14 November 1996, while the BTH report was being finalised. In so doing, he

> acknowledge[d] with deep regret Parliament's own role in endorsing the policies and actions of successive governments which devastated Aboriginal communities and inflicted, and continue to inflict, grief and suffering upon Aboriginal families and communities. I extend this apology as an essential step in the process of reconciliation.[15]

The establishment of the ATFRS to repay wages, allowances and other entitlements held on trust for Aboriginal and Torres Strait Islander peoples and never repaid was also an important development. In announcing the commitment to establishing the 'Stolen Wages' scheme Mr Carr 'invited the House to turn its attention to another legacy of misguided paternalism' and stated:

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10 See, for example, Hartley, C *NSW Law Reform Commission – Sentencing Question Papers1-4*, Public Interest Advocacy Centre, 4 June 2012, available at http://www.lawreform.justice.nsw.gov.au/Documents/cref130_se005.pdf.

11 See, for example, Schetzer, L and Streetcare *Beyond the prison gates*, Public Interest Advocacy Centre, 31 July 2013, available at http://www.piac.asn.au/publication/2013/08/beyond-prison-gates.

12 See, for example, Goodstone A et al, *Justice – not a matter of charity: Submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into Access to Justice* (20 May 2009), Public Interest Advocacy Centre, available at http://www.piac.asn.au/publication/2009/05/piac-access-justice-submission.

13 See, for example, Goodstone, A et al *Statutory judicial review – keep it, expand it, Submission to the Administrative Review Council Consultation Paper on Judicial Review in Australia*, 14 July 2011, available at http://www.piac.asn.au/publication/2011/07/statutory-judicial-review-keep-it-expand-it.

14 See, for example, Moor D, Santow E and Roth J *Equal before the law: Submission in response to the Productivity Commission Issues Paper about Access to Justice Arrangements,* Public Interest Advocacy Centre, 4 November 2013, available at http://www.piac.asn.au/publication/2013/11/equal-law; and Goodstone, A and Santow, E *Investing in the community: submission to the NSW Government review of legal assistance services to the NSW community,* Public Interest Advocacy Centre, 28 October 2011, available at http://www.piac.asn.au/sites/default/files/publications/extras/11.10.28_investing_in_the_community_submission_to_the_nsw_government_review_of_legal_assistance.pdf.

15 The Hon. Bob Carr MP, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 14 November 1996 at 6030.

> 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.[16]

The Commonwealth Government has also taken limited steps towards fulfilling Recommendation 3. Most notably this consists of the apology delivered by former Prime Minister the Hon. Kevin Rudd on 13 February 2008.[17] More recently, the Royal Commission into Institutional Responses to Child Sexual Abuse (**the Royal Commission**), while encompassing all children, has highlighted the sexual abuse suffered by a number of Aboriginal and Torres Strait Islander children who were institutionalised and subsequently abused following their removal.[18] The Royal Commission has recently recommended that a redress scheme be set up to compensate individuals injured after suffering child sexual abuse in institutions or in connection with institutions (discussed further below).[19] The recommendation for a redress scheme will be considered at the November 2015 of the Coalition of Australian Governments (**COAG**).[20] It should be noted, however, that the redress scheme the Royal Commission recommends does not take into account how specific groups, including members of the Stolen Generations, should be compensated for abuse suffered while they were in state care.[21]

Overall, however, it is clear that a majority of the BTH recommendations are yet to be fulfilled. With the exception of the $5 million allocated by the Tasmanian Government under the *Stolen Generations of Aboriginal Children Act 2006* to be paid in compensation to members of the Stolen Generations by the Stolen Generations Assessor,[22] there has been no move to fulfil Recommendation 3 in the BTH Report at either state/territory or federal level. In its recent *Scorecard Report*, which comprehensively measures responses to the BTH recommendations by assessing current and historic policies from all jurisdictions, the National Sorry Day Committee (**NSDC**) noted:

> To some extent there have been measures of restitution and rehabilitation through a range of service and program delivery but there has been no attempt, at a national level, to deal with the question of monetary compensation…[23]

In its formal response to the BTH report, the NSW Government stated it was:

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16 The Hon. Bob Carr MP, New South Wales, Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 March 2004 at 7163.

17 The Hon. Kevin Rudd MP, Commonwealth, House of Representatives, *Parliamentary Debates (Hansard),* 13 February 2008 at 167.

18 See, for example, Royal Commission into Institutional Responses to Child Sexual Abuse, *Report of Case Study No. 17, The response of the Australian Indigenous Ministries, the Australian and Northern Territory police force and prosecuting authorities to allegations of child sexual abuse which occurred at the Retta Dixon Home*, July 2015, available at http://www.childabuseroyalcommission.gov.au/getattachment/d256585f-f32b-457a-a215-22ef61f1e69a/Report-of-Case-Study-No-17.

19 Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report*, 14 September 2015, available at https://www.childabuseroyalcommission.gov.au/policy-and-research/redress.

20 AAP, 'Abuse redress will be on COAG agenda', 20 September 2015, *SBS News Online*, available at http://www.sbs.com.au/news/article/2015/09/29/abuse-redress-will-be-coag-agenda.

21 The Royal Commission states 'we do not accept that our Letters Patent allow us to consider redress for all of those who were in state care…who are members of the Stolen Generations, regardless of whether they suffered any child sexual abuse in an institutional context': above, note 19, at page 6.

22 See Department of Premier and Cabinet, Tasmania, *Report of the Stolen Generations Assessor*, February 2008, available at http://www.dpac.tas.gov.au/__data/assets/pdf_file/0004/53770/Stolen_Generations_Assessor_final_report.pdf.

23 Rule, J and Rice, E, National Sorry Day Committee Inc, *Bringing them home: Scorecard Report 2015*, February 2015, available at http://apo.org.au/files/Resource/scorecard_report_2015_with_appendices_11_copy.pdf.

> committed to making reparations to individuals, families and communities by involving Aboriginal organisations and communities in the development and delivery of programs and services for Aboriginal people. The NSW Government will continue to work in partnership with Aboriginal people, communities and organisations to make reparation for past injustices, and to seek to promote social justice, equality and reconciliation.
>
> In *Bringing them home*, the Human Rights and Equal Opportunity Commission recommended the establishment of a National Compensation Fund to administer monetary compensation for members of the Stolen Generations. Monetary compensation is a matter for the Commonwealth Government.[24]

PIAC urges the Standing Committee to re-assess the NSW Government's previous position, which seeks to allocate responsibility for monetary reparations to the Commonwealth Government. There is no apparent basis in principle for such a rigid approach. Certainly, there is no constitutional reason for any such responsibility being confined to the Commonwealth. Nor is there a sound policy basis for such an approach, given the extensive role that state governments, including NSW, have had in this area.

By way of illustration, Tasmania has taken the lead in ensuring eligible Aboriginal and Torres Strait Islander citizens of that state have been able to participate in a compensation scheme.[25] In addition, the NSW Government's apology recognises that responsibility for implementation of the forcible removals policy lies with state governments. While there may be a preference for a national model of reparations to ensure parity for victims across the country, there is now an urgency to meet the needs of the ageing members of the Stolen Generations and their descendants. As noted by the NSDC *Scorecard* report,

> the unfinished business of the Stolen Generations needs to be front and centre in Indigenous affairs and the original *Bringing them home* recommendations offer a sound foundation towards achieving this. …If we fail to implement these recommendations, we not only fail the Stolen Generations and the current generations of Aboriginal and Torres Strait Islander children, we also undermine efforts to reach a lasting settlement among us, and the achievement of the long cherished national ideal of equality of opportunity for all.[26]

In the absence of prioritised, firm commitments at the national level to establish a reparations tribunal, PIAC urges the Standing Committee to recommend a reparations tribunal be established in NSW. This will, most importantly, accord with the wishes and needs of Aboriginal and Torres Strait Islander communities across NSW, as established during PIAC's *Moving Forward* project. Despite the passage of time since the publication of the BTH report, 'a tribunal with a focus on hearings, programs to provide restitution of culture and identity, and prevention of recurrence'[27] remains patently relevant as a means by which to address the needs of Aboriginal and Torres Strait Islander communities in NSW as well as the individuals who were taken.

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24 NSW Department of Aboriginal Affairs (undated) *NSW Government Response: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, at page 8. Available at http://www.aboriginalaffairs.nsw.gov.au/wp-content/uploads/2012/11/NSW-Response.pdf.

25 See above, note 22.

26 Above, note 23, at page 8.

27 See *Restoring Identity*, Appendix B, at page 17.

5. Seeking compensation through the courts

Before detailing the specifics of a new reparations tribunal, it is important to consider the failures of existing avenues of compensation for the psychological and physical injuries incurred by Aboriginal and Torres Strait Islander people as a result of the forcible removals policies. Notably, attempts to rely on civil litigation processes to obtain compensation have proven largely unsuccessful and extremely costly:

- In a recent Western Australian case, Donald and Sylvia Collard failed in their attempt to establish that the State had breached a fiduciary duty owed to them or, alternatively, their children.[28] The seven Collard children were committed to the care of the Child Welfare Department from 1958 and spent little, if any, time with their parents until their teens or early adulthood. Pritchard J rejected the claimants' argument, which relied on precedent in other common law jurisdictions, that the State owed fiduciary duties to Aboriginal people in Western Australia by virtue of its assumption of various duties and powers with respect to Aboriginal people since colonisation.[29] Pritchard J also rejected the argument that the State owed fiduciary duties to the children by virtue of its position as guardian, on the basis that under the relevant legislation the State itself was not the guardian of the children.[30]

- In 2000, Lorna Cubillo and Peter Gunner failed to prove their cause of action in the Federal Court of Australia.[31] Lorna was removed at the age of eight and placed in the Retta Dixon Home, under the auspices of the Aboriginal Inland Mission, where she remained until she turned 18. Peter was removed at the age of seven from his home and placed in St Mary's Hostel, where he remained until he was 14 years of age. O'Loughlin J held that the claimants failed to establish the requisite elements of the torts of false imprisonment and negligence,[32] and failed to establish a breach of a statutory or fiduciary duty. [33]

- In 1999, Joy Williams sought compensation for Borderline Personality Disorder and substance abuse disorder developed as a result of being placed under the control of the Aborigines Welfare Board from birth to 18 years of age.[34] Abadee J in the NSW Supreme Court concluded that Joy failed to establish that the Aborigines Welfare Board owed her a duty of care and that even if there was a duty then breach had not been established.[35] Abadee J also found no breach of a fiduciary duty, assuming one existed, could be established. [36] Further, even if a breach could be proven, Abadee J indicated that equitable compensation would have been denied by reason of prejudice or delay.[37]

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28 *State of Western Australia v Collard* [2015] WASCA 86 & *Collard v State of Western Australia [No 4]* [2013] WASC 455.
29 See, eg, *Collard v State of Western Australia [No 4]* [2013] WASC 455 at [1091], [1130].
30 Ibid [1092], [1183], [1188], [1191].
31 *Cubillo v Commonwealth of Australia* [2001] FCA 1213 & *Cubillo v Commonwealth of Australia* [2000] FCA 1084.
32 *See, eg, Cubillo v Commonwealth of Australia* [2000] FCA 1084 at [1167], [1256], [1269].
33 Ibid, at [1192], [1307].
34 *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843.
35 Ibid, at [824], [845].
36 Ibid, at [746].
37 Ibid, at [755].

The 2007 case of *Trevorrow v State of South Australia* is the outstanding exception to this line of authority suggesting that very major impediments exist to pursuing justice through litigation in this area.[38] That case involved the removal of the plaintiff at the age of 13 months following his admission to hospital with a stomach illness. The plaintiff successfully applied for an extension of time under South Australia's limitation statute,[39] and proved that the public officials involved in his removal knew their acts to be unlawful and to involve a foreseeable risk of harm.[40] He was, accordingly, entitled to damages for breach of the tort of misfeasance in public office.[41] Gray J also held that the plaintiff was entitled to damages on the basis of the tort of false imprisonment.[42] Mr Trevorrow was awarded $450 000 in compensation for his loss and injury, including the emotional deprivation and psychological suffering and loss of his Aboriginal identity and culture.[43] He was awarded a further $75 000 in exemplary damages.[44]

Despite Mr Trevorrow's success, overall civil litigation should not be considered preferable to a reparations tribunal as a means of compensating members of the Stolen Generation. Ultimately, civil litigation is rarely a viable option for this client group and has significant limitations to address the entrenched disadvantage caused by the forcible removals policies. Obstacles to access to justice are well established, particularly for marginalised and disadvantaged members of our community.[45] Litigation is invariably an expensive and lengthy process, often ruled out completely by the imposition of limitation periods. There is also the risk of costs. In the *Williams* case (outlined above), the plaintiff was ordered to pay the State's costs.[46] In the *Collard* case (above), at first instance Pritchard J concluded that while the usual order of costs would allow the State to recover its costs from the claimants, the special circumstances and public interest aspect of the case meant that the usual order should not be made.[47] The Court of Appeal, however, set this decision aside on the basis there was an insufficient basis to justify departure from the usual order as to costs.[48] An appeal of this decision has been lodged with the High Court.[49]

6. A Stolen Generations compensation tribunal

Given the shortcomings of seeking compensation through the usual channels, and the need for reparation to encompass far more than monetary damages, PIAC believes it is vital that the NSW Government respond to the BTH recommendations by establishing a reparations tribunal. In making this assertion, PIAC acknowledges that no amount of money will ever be able to fully

38 *Trevorrow v State of South Australia (No 5)* [2007] SASC 285.
39 Ibid, at [943], [947], [963].
40 Ibid, at [978], [979].
41 Ibid, at [981].
42 Ibid, at [993].
43 Ibid, at [1201], [1239].
44 Ibid, at [1239].
45 For a detailed discussion of obstacles faced in access to justice see Roth, J et al *Equal access: submission to the Productivity Commission Draft Report* Access to Justice Arrangements, Public Interest Advocacy Centre, 22 May 2014, available at http://www.pc.gov.au/inquiries/completed/access-justice/submissions/submissions-test2/submission-counter/subdr246-access-justice.pdf. See also Cunneen, C and Grix, J (2004) *The limitations of litigation in Stolen Generations cases*, Research Discussion Paper, Number 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, available at http://aiatsis.gov.au/publications/products/limitations-litigation-stolen-generations-cases.
46 *Williams v The Minister, Aboriginal Land Rights Act 1983* [1999] NSWSC 843, Orders (Abadee J).
47 *Collard v State of Western Australia [No 4]* [2013] WASC 455 (S) [27].
48 *State of Western Australia v Collard* [2015] WASCA 86 [60], [61].
49 See Human Rights Law Centre, 'Stolen Generations family seeks justice on legal costs', 18 June 2015, available at http://hrlc.org.au/stolen-generation-family-seeks-justice-on-legal-costs/.

compensate Aboriginal and Torres Strait Islander people and their communities for the trauma of being a member of the Stolen Generations or for the on-going impact of those forced removals. Submissions to the National Inquiry, however, recognised that the making of reparations, and the consequential recognition of the wrongs done, would assist in the healing process. Link-up (NSW), for example, emphasised in its submission to the National Inquiry that it is the responsibility of governments to provide reparations for gross violations of human rights:

> Insofar as reparation and compensation can assist us to heal from the harms of separation, it is our right to receive full and just reparation and compensation for the systemic violations of our fundamental human rights.[50]

The PIAC proposal for a Stolen Generations Compensation Tribunal (**the Tribunal**), set out in the attached draft bill (**the Compensation Bill: Appendix A**), seeks to achieve a holistic and enduring resolution. This proposal is grounded in the testimony presented to the National Inquiry, and has been designed in accordance with the needs of potential claimants and the principles of participation and self-determination. A central aspect of the proposal is to ensure that those affected by forcible removal have an active role in shaping the nature and content of reparations rather than 'constantly being the subject of other people's decisions about what is best for you, what you deserve, what you are entitled to'.[51] In addition to the potential benefits for members of the Stolen Generations, this model also offers significant implications for governments, including:

- access by those harmed by removal policies to an agreed from of compensation;
- the existence of a scheme for financing a range of reparations measures;
- the possible containment of litigation, creating finality and certainty for governments and those affected by forcible removal policies; and
- an effective mechanism for providing social justice for Aboriginal and Torres Strait Islander people.

Set out below are the key elements of what PIAC believes a reparations tribunal should look like, with brief explanation including lessons learned from PIAC's experience working with the Stolen Wages scheme.

6.1 Guiding principles

Clause 4 of the Compensation Bill sets out the key principles that should guide the operation of the Tribunal. These include:

- acknowledgement that forcible removal policies were racist, and caused emotional, physical and cultural harm to the Stolen Generations;
- recognition that Aboriginal children should not, as a matter of general policy, be separated from their families;
- the distinct identity of the Stolen Generations should be recognised and they should have a say in shaping reparations;
- Aboriginal people affected by removal policies should be given information to facilitate their access to the Tribunal and other options for redress; and
- reparation measures for the effects of forcible removals should be guided by the Van Boven principles (as required by Recommendation 3, discussed further below).

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50 BTM Report, above note 1, Chapter 14.

51 Human Rights and Equal Opportunities Commission, *Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, Sixth Social Justice Report* (1998) 18.

PIAC's Compensation Bill was developed with the consultation and collaboration of Aboriginal and Torres Strait Islander communities across NSW. Involvement of Aboriginal and Torres Strait Islander people accords with a human rights based approach to policy development. The *United Nations Declaration on the Rights of Indigenous Peoples*[52] (**the Declaration**) protects the right to self-determination[53] and the right of Indigenous people to 'participate in decision-making in matters which would affect their rights'.[54] The Declaration also imposes on signatory states an obligation to 'consult and cooperate in good faith' with Indigenous people in order to obtain their consent 'before adopting and implementing legislative or administrative measures that may affect them'.[55]

6.2 Establishing a Stolen Generations fund

It is axiomatic that the work of the Tribunal will only fulfil the recommendations of the BTH report if it is adequately funded, and if the payments it makes are perceived to be fair. To that end, clause 14 of the Compensation Bill provides that a Stolen Generations Fund be established, to be administered by a Trustee appointed by the Attorney General. Funds are to be appropriated from Parliament, together with any contributions from church organisations or other relevant organisations involved in administering forcible removal policies. This would provide ring-fenced funding, ensuring the longevity of the Tribunal's work and that there are sufficient funds to adequately compensate claimants who are able to prove relevant injuries.

A number of submissions to the National Inquiry advocated for a national compensation fund to be established.[56] The BTH Report recommended that the major church organisations which accommodated removed children 'should be encouraged to contribute to this fund should they so choose'.[57]

Similarly the Royal Commission into Institutional Responses to Child Sexual Abuse has recently recommended that a trust fund be established to fund to receive funding for counselling and psychological care paid under the redress scheme, with contributions made by institutions with the federal government a funder of last resort.[58]

6.3 What can be awarded

Clause 9 of PIAC's Compensation Bill provides that the Tribunal may award one or more identified forms of reparations, including:

- resources for Stolen Generations groups to provide culture and history centres, or healing centres, including funding for land or premises;
- community education programs about the history of forcible removals;
- community genealogy projects for Aboriginal and Torres Strait Islander communities to help identify members of the Stolen Generations and their dependents;

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52 *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the UN General Assembly in the 107th plenary meeting, 13 September 2007, available at http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf. Australia became a signatory in 2009.

53 Article 3 of the Declaration.

54 Article 18 of the Declaration.

55 Article 19 of the Declaration.

56 BTH report, above note 1, Chapter 14, Recommendation 14.

57 BTH report, above note 1, Chapter 14, Recommendation 14.

58 Royal Commission, above note 19, at page 26.

- monetary payments for individuals to meet current needs such as funding to travel to see family;
- access to appropriate counselling services;
- access to appropriate health services;
- access to language and culture training;
- memorials that appropriately reflect the views of members of the Stolen Generations; and
- monetary payment.

Clause 9(3) provides that monetary compensation may be awarded to those individuals who can prove they have suffered a particular:
- type of harm, such as sexual or physical assault or labour exploitation; or
- psychological or physical injury directly caused by the fact of their removal.

That reparation should be available in a number of formats is central to the recommendations made by the BTH report, and reflects the principles established by Professor van Boven referred to in Recommendation 3. Professor van Boven's *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*[59] provide for a right to reparation consisting of:
- *Restitution:* re-establishment, to the extent possible, of the situation for the victim that existed prior to the violation of human rights.
- *Compensation:* for any economically assessable damage resulting from violations of human rights such as physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; and costs required for legal or expert assistance, medicine and medical services, and psychological and social services.
- *Rehabilitation:* including legal, medical, psychological and other care and services to restore the dignity and reputation of victims.
- *Satisfaction and guarantees of non-repetition:* including cessation and prevention of continuing violations, public disclosure of the truth, apologies, commemoration and bringing those responsible to account.[60]

In addition to the incorporation of the van Boven principles as the basis for determining categories of reparations, PIAC's *Restoring Identity* report (Appendix B) refers to a number of key principles underlying the establishment of a reparations tribunal, articulated by participants at the Moving Forward consultation meetings and in written submissions. These include:

- *acknowledgement* that forcible removal policies were racist and caused emotional, physical and cultural harm;
- *self-determination* for Aboriginal and Torres Strait Islander peoples, recognising the distinct identity of the Stolen Generations and their right to shape reparations;
- *information and access* for Aboriginal and Torres Strait Islander people affected by forcible removal policies to facilitate their access to the tribunal or other redress options; and
- *prevention* of contemporary policies which separate Aboriginal and Torres Strait Islander children from their families.

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59 Adopted and proclaimed by United Nations General Assembly resolution 60/147 of 16 December 2005.

60 BTH report, above note 1, at 649-650.

6.4 Eligibility criteria

Clause 10 of the Compensation Bill sets out that to be eligible to make a claim for reparation, a claimant must be:

- a person who was, as a child, removed from their family under legislation that applied specifically to Aboriginal or Torres Strait Islander people; or
- an Aboriginal or Torres Strait Islander person who was, as a child, removed from their family prior to 31 December 1975, where that removal was carried out, directed or condoned by an Australian government or an agent of an Australian government.

Eligible claimants should also include a living descendant, relative or family member of a person who would have satisfied the above criteria. Following PIAC's experience of the AFTRS, and the experience of the Stolen Generations Assessor in Tasmania, it is clear that identifying an applicant to be of Aboriginal or Torres Strait Islander can be a difficult and sensitive issue.[61] Accordingly, identifying relevant family members and descendants who may have been affected by the removal and eligible for reparations measures should be set out in any guidelines for the Tribunal on the basis of close consultation with Aboriginal and Torres Strait Islander communities.

Clause 10 also provides that the Tribunal should be satisfied the claimant suffered or was harmed as a consequence, in whole or in part by the removal of that person.

6.5 Procedure & assessment of claims

Clause 11 of the Compensation Bill sets out the procedure to make a claim. The proposed deadline for the making of claims is ten years, with the possibility of extension. In PIAC's experience, one of the greatest limitations of the success of the AFTRS was the short timeframe for the making of claims. The tight timeframe did not allow for communities to become even aware of the opportunity to make a claim, let alone receive sufficient independent legal advice in order to make a submission. PIAC notes that the recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse is that the redress scheme should have no closing date.[62]

Clause 12 of the Compensation Bill provides that a Tribunal must determine a claim within 12 months of receiving it. PIAC believes it is important that decisions are made swiftly, where it is reasonable to do so, and that this is ensured by the imposition of statutory limitations.

Clause 15 provides that Tribunal determinations should be eligible for review on the merits by the NSW Civil and Administrative Tribunal (**NCAT**). PIAC believes it is vital for procedural fairness, as well as community confidence in the Tribunal, that its determinations be both accessible and reviewable. Assessments of the ATFRS and determinations of the Minister were not reviewable in the (then) Administrative Decisions Tribunal. PIAC considers that this inability to access review was a heavy counterweight to the advantages of the ATFRS as an administrative scheme.

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61 The Tasmanian Stolen Generations Assessor, for example, observed that the issue of Aboriginality was a 'very difficult and sensitive issue in the assessment process': Department of Premier and Cabinet, Parliament of Tasmania, *Report of the Stolen Generations Assessor* (2008), at page 15.

62 See above, note 19, Recommendation 48, at page 39.

In addition to claims for monetary payments, clause 18 provides that the Tribunal shall provide a forum and process for truth and reconciliation, enabling claimants to tell their story, have their experience acknowledged and be offered an apology by the Tribunal or other relevant body.

PIAC also recommends that any guidelines or regulations setting out what should be accepted as evidence by the Tribunal be less stringent than those applied in the context of civil litigation. In PIAC's experience of the AFTRS, a great limitation of the scheme was the refusal to rely solely on oral and circumstantial evidence, even though it was acknowledged that the lack of documentary evidence was due to negligent record-keeping on behalf of state government bodies.[63] This was in contrast to the approach taken by the Tasmanian Stolen Generations Compensation Assessor, who relied on corroborating evidence from eye witnesses to determine claims where records were lost, destroyed or had never been created.[64] The Australian Law Reform Commission has also established that rules of evidence have generally posed a barrier to Aboriginal and Torres Strait Islanders in the context of civil litigation. This is predominantly due to Aboriginal and Torres Strait Islander people relying principally on oral traditions rather than written documentation as evidence of their claims, which is more easily challenged under the hearsay and opinion rules.[65]

Further, it will be important that emphasis is placed on the Tribunal itself conducting preliminary investigations, rather than imposing the burden on applicants to establish their claim. One of the key difficulties for claimants in the AFTRS was the paucity of documentary evidence due to failures of government record-keepers to maintain appropriate records of wages withheld on trust. The AFTRS Guidelines gave the Panel the authority to investigate and direct the administrative support unit for the scheme to research records and information.[66] The Guidelines also enabled the Minister to direct the AFTRS panel to further investigate and consider claims. In PIAC's experience with the scheme, neither of these provisions was relied upon. PIAC's initial submissions to the scheme argued that without independent preliminary research, many claimants would be found to be ineligible or, if eligible, their claims would not be properly considered resulting in an inadequate repayment process. This proposition was borne out in practice by the experiences of the claimants and lawyers involved in the Stolen Wages Referral Scheme.[67]

The procedures adopted by the Tribunal will also be key to its success. PIAC's experience of the AFTRS is that in addition to a lower evidentiary standard, the informality of the process of the oral hearings was important for clients. There were clients who attended the Stolen Wages redress panel process who found it to be a positive experience. At a hearing of the Senate Committee on Legal and Constitutional Affairs inquiry into Indigenous Stolen Wages, Mrs Valerie Linow said:

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63 Stolen Wages Referral Scheme, *Settling Accounts: the effectiveness of the Aboriginal Trust Fund Repayment Scheme in addressing stolen wages in NSW, Submission to the Hon John Watkins MP, Minister responsible for AFTRS*, Public Interest Advocacy Centre, 11 June 2008.

64 Answer to the question put by Natasha Case to the Tasmanian Stolen Generations Compensation Assessor, the Hon Ray Groom, at the National Sorry Day Committee Annual General Meeting and Conference in Canberra on 7 October 2007.

65 See Chapter 19, 'Aboriginal and Torres Strait Islander Traditional Laws and Customs' in Australian Law Reform commission, *Uniform Evidence Law* (ALRC Report 102), 8 February 2006, available at http://www.alrc.gov.au/publications/report-102.

66 Para's 8.1(b), (c) and (d) of the AFTRS Guidelines.

67 Banks, R *Stolen Wages: Settling the debt*, Public Interest Advocacy Centre, 31 December 2008, at page 22. Available at http://www.piac.asn.au/publication/2011/06/stolen-wages-settling-debt.

> Going to the panel takes a load off you. If you went to court, it would be more traumatic. I thought the panel were out 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 very easy for me – because, at my age, I am too old for this.[68]

It is also vital that the Tribunal assessors conduct hearings outside of metropolitan areas to ensure accessibility for applicants and whole communities.

Finally, PIAC would recommend that all decisions of the Tribunal be made public. In PIAC's experience with the AFTRS, the minimal public awareness of the scheme due to its failure to publish and promote its own findings, determinations and outcomes undermined its effectiveness. Ensuring that the decision-making process is as transparent as possible will reassure claimants and the public that the process is just and fair. Privacy considerations will of course impact on how details are made public and to what extent individual circumstances should be disclosed. However, as much as is possible, there should be transparency regarding how a decision is made to award a particular monetary payment and/or other forms of redress. Under the AFTRS, while recommendations were not published, it appeared that a system of precedents was established. It is of course preferable that like claims be treated alike and the procedure by which this occurs should be made clear.[69]

In addition, based on PIAC's experience with the AFTRS scheme, it is vital that any decision made in relation to an individual or group claim be accompanied by clear and specific reasons for each individual decision.

6.6 Monetary payments

PIAC supports the recommendation of the Royal Commission into Institutional Responses to Childhood Sexual Abuse that a sliding scale of fair monetary payments be established to assess claims.[70] The Royal Commission has recommended a sliding scale of compensation with a maximum of $200 000 and an average payment of $65 000 for successful claimants. The matrix for assessing monetary payments under the scheme will take into account the severity of the abuse, its impact on the survivor and whether there are aggravating additional elements. Aggravating elements may include whether the applicant was in state care, the presence of another form of abuse, whether the applicant was in a 'closed' institution or without the support of family at the time of the abuse and whether the applicant was particularly vulnerable to abuse due to disability.[71]

In the approach taken to claimants eligible for payment, PIAC suggests that the payment be clearly characterised as a monetary payment in recognition of the abuse suffered. It should be clear to applicants that the payments awarded by the Tribunal differ from the compensatory

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68 Senate Committee on Legal and Constitutional Affairs, *Transcript of Proceedings*, 27 October 2006, available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:committees%2Fcommsen%2F9819%2F0003.

69 *Settling accounts,* above note 64, at page 14.

70 Royal Commission into Institutional Responses to Childhood Sexual Abuse, above note 19, at page 244.

71 Royal Commission, above note 19, at page 21-22.

damages recoverable in successful litigation (which are generally likely to be a greater sum, but more difficult to obtain).

PIAC appreciates that any reparation scheme established to compensate members of the Stolen Generations and their members must be affordable and that the payment scheme will reflect that. However, in the interests of achieving justice, there must be a perception of fairness in the monetary amounts awarded. Further, any concern of financing a tribunal must be weighed with the huge on-going costs to society associated with the legacy of intergenerational harm caused by the forcible removals policy.

6.7 Interaction with other redress and compensation processes

The establishment of a Tribunal to compensate individuals for the fact of their removal will have to take into account the single-issue redress schemes that have been, or may in future be, established. Monetary payments under the Stolen Wages scheme, for example, should be relevant to an assessment of a claim under any reparations tribunal set up to compensate members of the Stolen Generations. Simultaneously, it will have to be acknowledged that for many Aboriginal and Torres Strait Islander people there is no distinction between the original fact of removal and experiences suffered once removed. This is clear from statements made by the AFTRS claimants. PIAC's client, , for example, stated:

> We were all slave labour. No-one told us about wages or that we were supposed to get paid. The welfare put us out there and all we had to do was be little black slaves. I worked long hours from dawn to dusk. We worked seven days a week. There was a lot of work to do for a child. We didn't have that much experience really. Like milking the crows and chopping wood, we had no experience in that. We had no choices. We couldn't complain. We were there to obey. Matron would tell us that: 'You're out there to do work and that's it and do a good job. No complaining.'
>
> We always had to be out working, slave labour. All we know was that we were out to obey and to follow their rules. We were too frightened to say anything. If we didn't do jobs properly we had to keep doing them again until they were right. We were segregated. The only people I could speak to were the cows in the paddock. We were taken advantage of. Little black kids going to work was cheap labour for them and that's all we were.
>
> I ran away from one employer where I was raped. I didn't know who told the police about the abuse. All I remember is the police arriving and they told me to pack up my clothes and go back to the station to meet the matron. When I got back to Cootamundra matron told me 'Don't tell anyone what has happened and tomorrow I shall take you down town and buy you a new dress'. They should have been protecting us but they didn't. Matron's response was to find me other work. One week later she put me out working with someone else. The only option was to run away, but even this was hard because we were so isolated on the properties and didn't even know which way to head. After this I found it difficult to stay long with any employer.[72]

Accordingly, cl 9(7) of PIAC's Compensation Bill provides that the Tribunal may take into account the nature and extent of any reparations received by the claimant from another compensation fund, other State or Territory legislation and any damages received by the claimant at common

[72] Included in PIAC's submission to the Senate Inquiry – find reference. Settling the Debt, page 27.

law or otherwise. PIAC believes it is appropriate that a sum received from another redress scheme, notably the AFTRS, or from civil litigation, be taken into account by the Tribunal in determining any monetary award or other relevant order, such as funding provided for counselling.

PIAC also believes it should be made clear that participation in any tribunal scheme will not preclude resorting to civil litigation if the survivor so desires. While PIAC believes that the majority of claimants will prefer the tribunal process over and above protracted litigation, there are situations where litigation is appropriate. This may be the case, for example, where a claimant believes that the payment available under the redress scheme is inadequate to compensate them for the damage that they have suffered. Claimants should be made aware of the different options available to them and the implications of those options. For example,

- while a lower standard of proof may be adopted in the Tribunal, which may increase the chances of a successful application, the monetary compensation payable is far less than common law damages;
- a claim in the Tribunal may lead to other forms of reparation, such as an apology or access to counselling, as opposed to as successful common law claim, which does not necessarily include anything other than monetary damages; and
- the difference in meaning and significance behind *ex gratia* payments granted by an administrative or statutory body, and court-ordered damages.

6.8 Informing potential claimants of the scheme

As was the case with the AFTRS, the success of any reparations tribunal will depend in part on how comprehensively its function and role are publicised and promoted. In PIAC's experience working on the AFTRS claims, eligible Aboriginal and Torres Strait Islander people will only make a claim if they are aware of the process and then only if they think it will be worthwhile to do so. This is evidenced by the Queensland experience, where many potential claimants chose not to make claims to the Indigenous Wages and Savings Reparations Scheme because of their dissatisfaction with the process and the terms of the settlement offered.[73]

During the AFTRS process, PIAC made its own efforts to raise awareness about the scheme by staging community forums and meetings throughout NSW, as a result of which more than 150 claims were registered. During these meetings, PIAC was frequently told by potential claimants that they had never heard of the scheme. PIAC also funded the production of posters and flyers promoting the scheme and warning of the deadline to register claims.[74]

If a Tribunal is established, it is vital that a specific communications strategy is developed and adequately funded. While community sector organisations will be vital to promote the scheme and promote its operation in relevant communities, for the success and credibility of any reparations scheme there should be appropriate funding in place for them to do so.

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[73] Due to dissatisfaction with the initial process, the Queensland Government has recently committed to re-opening the redress scheme. See Queensland Government, *About the stolen wages reparations scheme*, 10 September 2015, available at http://www.qld.gov.au/atsi/having-your-say/stolen-wages-about/index.html.

[74] See *Settling Accounts,* above note 64, at page 15.

6.9 Legal support and assistance for claimants

Independent legal advice and information should be provided at all stages for potential complainants.

The experience of the AFTRS shows that whether or not an applicant was legally represented, or received legal assistance, made a difference to the outcome of the process. Data provided by the scheme administrators showed that legal representation made a difference to an applicant determining whether to challenge an interim assessment of the amount the scheme calculated to be owed to them. Every time an interim assessment was reviewed, the average final payment increased significantly.[75] PIAC also found that in addition to legal advice, the pro bono lawyers that PIAC facilitated access to provided practical and emotional support to claimants. Without the support of their lawyers, PIAC believes that some claimants would not have pursued their claims.[76]

Almost certainly the most cost-effective, and possibly also the most appropriate, option for providing legal assistance in relation to a reparation scheme would be to fund a model that catalyses and supports the provision of pro bono legal assistance to individuals seeking to access the scheme. This would involve government providing funding to a body – such as PIAC, a public interest law clearing house or another community legal centre – to be the overarching co-ordinator of legal assistance and representation to survivor applicants. PIAC has experience in doing just this via the ATFRS.

Under this model, legal assistance would be provided by commercial lawyers acting pro bono. The coordinating centre would manage, train, supervise and support commercial lawyers to provide pro bono legal assistance in navigating the proposed scheme. The coordinating centre could also provide direct and more comprehensive legal assistance for less straightforward claims. Under this model, there would be some assurance of the quality and depth of service that will be required is accessible to every survivor applicant.

6.10 Review of the Tribunal's operation

Clause 21 of the Compensation Bill requires the publication of annual reports, and for the Tribunal's operations to be reviewed three years from the date it commences operation.

PIAC believes it is important that reparation and compensation schemes are publically accountable, particularly where the existence of the scheme is the result of unjust policies implemented by past governments. PIAC's observations during the period of the operation of the ATFRS was that many claimants were dissatisfied with the lack of information regarding the progress being made and the scheme's on-going achievements and outcomes. Basic information, such as the number of claims that had been assessed, the number that were successful, the number of unsuccessful claims and the amount paid to claimants, was not readily available during the course of the scheme's operation.[77] Accordingly, PIAC submits that

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75 See *Settling accounts*, above note 64, at page 17.

76 See *Settling accounts*, above note 64, at page 17.

77 Some information was consequently made available following a question on notice in parliament. See Mawuli, V *A fairer system*: *submission to the Senate Legal and Constitutional Affairs Committee Inquiry into a review of Government compensation payments,* 9 June 2010, at page 4. Available at http://www.piac.asn.au/sites/default/files/publications/extras/10.06.09-PIAC-Government_Compensation_Payments_sub.pdf.

information should be made periodically available throughout the course of the operation of the Tribunal as well as in the context of a comprehensive review that will be able to inform the future operation of the scheme.

Further, the review must closely consult claimants and potential claimants. The 2008 review of the AFTRS failed to involve scheme participants, whether Aboriginal people who had made claims under the scheme or legal service providers assisting claimants. This was a subsequent source of frustration, and meant that those most directly affected by changes to the scheme following the review were not consulted regarding consequent changes to its operation. This went against the fundamental principle of self-determination, by denying Aboriginal people a role in the decision-making process about how monies should be paid out, and perpetuated the cycle of injustice that started with Aboriginal people being denied the right to manage their own money by past governments.

7. Avoiding repetition: contemporary policies and practices

In assessing the NSW Government response to the BTH recommendation for reparations, it is crucial that contemporary policies relating to the separation of Aboriginal children from their families and communities are also examined. Assessing current laws and policies regarding the placement and care of Aboriginal children formed the fourth term of reference for the National Inquiry.[78] Finding that levels of removal of Aboriginal and Torres Strait Islander children from their families and communities remained unacceptably high, the BTH report recommended that 'guarantees against repetition' be included as an element of reparations.[79] The report stated:

> Appropriate measures must be implemented to ensure that Indigenous families and communities in Australia never again suffer the forcible removal of their children simply because of their race.[80]

The *Moving Forward* consultations undertaken by PIAC also highlighted this significant feature of reparations: that *effective* redress of historical injustice must address not only the actual harm of the past but also the contemporary effects of past wrongs. Many respondents argued that whole communities experience the continuing manifestations of past harm – socially, culturally and economically – and that reparations provide the opportunity for those affected to design and implement community or collective measures that address their distinct on-going needs and a desire to heal.

In recent years, on-going issues have become apparent in relation to the disproportionate removal of Aboriginal and Torres Strait Islander children under the auspices of child protection and the over-representation of Aboriginal and Torres Strait Islander young people in the criminal justice system. While perhaps not 'stolen' in the sense that members of the Stolen Generations were deliberately removed under a national policy of forcible removals and assimilation, these issues demonstrate the continued phenomenon of Aboriginal and Torres Strait Islander children

78 See Terms of Reference for the National Inquiry, available at https://www.humanrights.gov.au/publications/bringing-them-home-preliminary.
79 Recommendation 3, BTH report, Chapter 14.
80 BTH report, above note 1, Chapter 14.

losing their connection to family and communities. As noted by the BTH report, 'The facts of contemporary separation establish a need for fundamental change in Australian law and practice'.[81] This is particularly the case in NSW in the context of child protection policy and in criminal justice.

7.1 Child protection

Past policies of forcible removal have had a direct impact on subsequent generations of Aboriginal and Torres Strait Islander children. The BTH report recognised that descendants of members of the Stolen Generations had lost cultural and familial connections, and often grew up with parents lacking adequate parenting skills. Similarly, intergenerational grieving, caring for traumatised parents suffering from mental illness or substance abuse and loss of family connections were among the impacts of the forcible removal policy identified during PIAC's *Moving Forward* meetings.

The intergenerational trauma and entrenched disadvantage caused by the forcible removals policies provide a unique context in which current child protection policy must operate. Undoubtedly, there is a need to prioritise the best interests of the child principle, but there is an acute need need to reconcile this principle with the principle of self-determination. There is a disturbing trend of continued disproportionality of the removal of Aboriginal and Torres Strait Islander children compared with that of non-Aboriginal children. Since the BTH report was published, the rate of Aboriginal and Torres Strait Islander children in foster, kinship and residential care has approached one in ten, 11 times higher than non-Aboriginal children. This figure has steadily increased over the past decade, during which time the rates of non-Aboriginal children being placed in out-of-home care has stabilised.[82] In the past decade, the over-representation of Aboriginal and Torres Strait Islander children across NSW increased by 140%, compared with 50% of non-Aboriginal children.[83]

The Aboriginal and Torres Strait Islander Child Placement Principle

The Aboriginal and Torres Strait Islander Child Placement Principle (**the Placement Principle**) was developed in recognition of the need to approach child protection with the aim of securing and protecting the connection of Aboriginal and Torres Strait Islander children with their land, communities and culture.[84] In NSW, the Placement Principle is set out in s 13 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Section 13 provides that where an Aboriginal or Torres Strait Islander child needs to be placed in statutory out-of-home care, the preference is for them to be placed with a member of their family, or extended kinship group. If a child is placed with a family which is not Aboriginal or Torres Strait Islander, 'arrangements must be made' to ensure the 'opportunity for continuing contact' with the child's 'family, community and culture'. The Placement Principle, however, is subject to the general principle governing the Act that 'in any action or decision concerning a particular child or young person, the safety, welfare and well-being of the child or young person are paramount'.[85]

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81 BTH report, above note 1, at Chapter 20.

82 Australian Institute of Health and Welfare (2014) *Child Protection Australia 2012-13 Child Welfare Series*, cited in Arney, F et al (2014) *Enhancing the implementation of the Aboriginal and Torres Strait Islander Child Placement Principle: Policy and practice considerations* (Australian Institute of Family Studies: Commonwealth of Australia), available at https://aifs.gov.au/cfca/publications/enhancing-implementation-aboriginal-and-torres-strait-islander-child.

83 See Arney, F et al, above note 63, at page 8.

84 See Arney, F et al, above note 63.

85 Section 9 *Children and Young Persons (Care and Protection) Act 1998* (NSW).

Recent research and analysis have identified significant issues with how the Placement Principle is being complied with, implemented and monitored in practice.[86] Arney et al have identified that the gap between the intent and application of the Placement Principle, across all Australian jurisdictions, is due to a number of barriers, such as the 'inconsistent involvement of, and support for, Indigenous people and organisations in child protection decision-making' and shortage of Indigenous kinship and carers.[87] There is also a narrow understanding of how the Placement Principle should be applied in practice. Arney et al noted:

> While its inclusion in legislation is an essential step toward improving the outcomes for Aboriginal and Torres Strait Islander children, the Principle, in and of itself, particularly when interpreted narrowly as a hierarchy of placement options for Aboriginal children, will be of limited value unless the appropriate monitoring and strategies are in place to support its implementation and assess the outcomes for children.[88]

The Placement Principle, for example, has been characterised as having far greater implications beyond the decision of where to place an Aboriginal child, such as requiring steps to prevent removal and ensuring the participation of Aboriginal and Torres Strait Islander children, parents and family members regarding decisions made in relation to intervention, placement and care.[89] Recommendations for strengthening the application of the Placement Principle include better funding for its operation, training in its use, understanding its place in cultural recognition, and inclusion and strengthening its focus in legislation and policy.[90]

Approaches in comparative jurisdictions

The BTH report identified that the fundamental difference between Australian approaches to child protection and removal and the approaches of comparative jurisdictions with a similar history of colonisation was the level of self-determination afforded to Indigenous peoples when establishing systems of child protection and care.[91] In other jurisdictions, control over decisions in relation to Indigenous communities and, specifically, the welfare of their children, lies solely within Indigenous structures or in partnership with government authorities. The *Indian Child Welfare Act 1978* in the United States, for example, 'gives exclusive jurisdiction to tribal courts in child welfare proceedings about Indian children', allowing for the participation of Indian elders in certain decision-making processes.[92]

There are also differences in comparative jurisdictions in relation to the assessment of the best interests of an Indigenous child. The application of the Placement Principle in NSW legislation, as identified above, is subsidiary to other principles in the Act. This has the effect that consideration of the need to preserve culture is subordinate to the best interests of the child principle. This is to be contrasted with the approach in other jurisdictions, where the need to preserve cultural

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86 See Arney F et al, above note 63, at page 5.
87 See Arney F et al, above note 63, at page 7.
88 Citing Valentine, B and Gray, M (2006) 'International perspectives on foster care: Keeping them home, Aboriginal out-of-home care in Australia', above, note 82, at page 18.
89 Tilbury, C et al (2013) *Aboriginal and Torres Strait Islander Child Placement Principle: Aims and core elements*. Melbourne: Secretariat of National Aboriginal and Islander Child Care (SNAICC), cited in Arney, et al, above note 63 at page 5.
90 See Arney et al, above note 63, at page 18.
91 BTH report, above note 1, Chapter 26.
92 BTH report, above note 1, Chapter 26.

connections for Indigenous children is a mandatory consideration in determining the best interests of the child.

In a number of Canadian provinces, for example, child welfare legislation mandates consideration of the preservation of Aboriginal cultural identity in determining what is in the best interests of a child. Section 2 of the *Child, Youth and Family Enhancement Act 2000* (Alberta), for example, states where intervention is required or being considered, a court or authority making decisions must consider the following matter where the child is an Aboriginal child:

> the uniqueness of aboriginal culture, heritage, spirituality and traditions [which] should be respected and consideration should be given to the importance of preserving the child's cultural identity.

Similarly in British Columbia, if the child is an Aboriginal child, 'the importance of preserving the child's cultural identity must be considered in determining the child's best interests'.[93]

In New Zealand, a huge number of changes were made following the release of the 'Green Paper for Vulnerable Children' in 2011, which culminated in the *Vulnerable Children Act 2014* (NZ) (**VCA**). The purpose of the VCA is to support the Government's setting of priorities for improving the well-being of vulnerable children and to ensure children's agencies work together to that end.[94] Under s 7(1) of the VCA, the Prime Minister may set down priorities for improving the well-being of vulnerable children, following consultation with the Police, and ministries of health, education, justice and social development. This plan seeks to promote the best interests of vulnerable children 'having regard to the whole of their lives' and by taking measures across a range of areas including:

- improving their cultural and emotional well-being and participation in cultural activities;
- strengthening their connection to their families, iwi, hapū and whānau or other culturally recognised family group; and
- increasing their participation in decision making about them, and their contribution to society.[95]

While detailed comparison of different jurisdictions is beyond the scope of this submission, PIAC recommends that these jurisdictions be reviewed when considering contemporary issues. This is particularly so given the different outcomes for Aboriginal people in different countries. For example, while Indigenous residents in Canada and New Zealand also have high rates of contact with the criminal justice system, theses rates 'are nowhere near as high as Australia'.[96]

The need for review and change

PIAC recognises that a significant finding of the Special Commission of Inquiry into Child Protection Services in NSW was that Aboriginal and Torres Strait Islander children are unacceptably over-represented in NSW's child protection system. A number of recommendations were made to address this issue in the Final Report, published in 2008.[97] PIAC also recognises

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93 Section 4, *Child, Family and Community Service Act 1996* (British Columbia).
94 Sections 4(a) and 4(b) VCA.
95 Section 6 VCA.
96 Weatherburn, D (2014) *Arresting Incarceration, Pathways out of Indigenous Imprisonment*, at page 2.
97 The Hon James Wood AO QC, *Report of the Special Commission of Inquiry into Child Protection Services in New South Wales*, November 2008. See Chapter 18, Volume 2, available at

that the NSW Government has responded to the publication of the 2008 report with the *Keeping Them Safe* strategy, which specifically considers the need to support Aboriginal families in the context of child protection and act to reduce over-representation of Aboriginal and Torres Strait Islander families in the child protection system.[98]

It should be noted, however, that the specific problem of over-representation of Aboriginal people in NSW's child protection system forms just one chapter of the report and was not a specific consideration in the terms of reference. What PIAC does not believe has been considered is how the best interests of the child principle can be implemented in conjunction with the principle of self-determination. This specific need is established as a formative principle of the UN Declaration on the Rights of Indigenous Peoples, which recognises in its preamble

> the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child.

The BTH report recommended radical shifts in the approach to child protection and child removals, incorporating both the principle of self-determination and the best interest of the child principle defined in international human rights law.[99] If the goal of Recommendation 3 to 'guarantee against repetition' is to be met, there must be action to address over-representation of Aboriginal and Torres Strait Islander children in care, a trend that is increasing rather than reversing. The importance of doing so is significant given the poor outcomes for Aboriginal children placed in care, particularly with regard to the high rate of movement of these children directly into the criminal justice system. PIAC accordingly recommends that the approach to the protection of Aboriginal and Torres Strait Islander children in NSW be specifically reviewed.

7.2 Over-representation in the criminal justice system

The BTH report concluded that

> issues affecting Indigenous young people in the juvenile justice system have been identified and demonstrated time and time again. It is not surprising that Indigenous organisations and commentators draw attention to the historical continuity in the removal of Indigenous children and young people when the key issues in relation to juvenile justice have already been identified for some time yet the problem of over-representation appears to be deepening.[100]

The BTH report set out clear statistics that showed that Aboriginal and Torres Strait Islander young people are far more likely to be in contact with police, placed in police custody and imprisoned when compared to non-Aboriginal Australians. In the intervening period these rates have not shifted, indeed they are getting worse. In his 2014 annual report, the Aboriginal and Torres Strait Islander Social Justice Commissioner stated the overrepresentation of Aboriginal

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98 http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0011/33797/Volume_2_-_Special_Commission_of_Inquiry_into_Child_Protection_Services_in_New_South_Wales.pdf.

99 See NSW Government, *Keeping Them Safe, A Shared Approach to Child Welfare*, available at http://www.keepthemsafe.nsw.gov.au/v1/supporting_aboriginal_children_and_families.

100 BTH report, above note 1, Chapter 26.

BTH report, above note 1, see Chapter 24.

and Torres Strait Islander Australians in the criminal justice system is 'one of the most urgent human rights issues facing Australia'.[101]

There is no simple answer to reducing the highly disproportionate rates of Aboriginal imprisonment. On the basis of PIAC's legal casework experience in NSW, however, there are a number of areas where PIAC believes reform would assist in beginning to address this national crisis.

Bail in NSW

PIAC's legal casework has in recent years focused on the impact and role of bail laws in the unlawful and unnecessary detention of young people and, in particular, Aboriginal and Torres Strait Islander juveniles. The operation of bail laws and the manner in which bail conditions are policed have created a situation where being held in police detention or on remand in a Corrective Services facility is a common outcome and few steps are taken to avoid it. This damaging trend is problematic for a number of reasons, not least of which is the criminogenic effect of imprisonment and negative interactions with police officers.

The operation of bail laws is particularly significant as it is likely to be one of the first interactions a young person has with the criminal justice system. In addition, the evidence shows that once a young person has come into contact with the criminal justice system, the chances of exiting that system are few.[102] At these preliminary stages, there is already a bias emerging: Aboriginal young people are far more likely to be held in custodial remand than their non-Aboriginal counterparts – in 2011, this was to a factor of 20.[103]

It is essential that bail laws do not have any unnecessarily negative impact on Aboriginal young people, and are not punitive or used as a substitute for effective housing, child protection arrangements or to address other social problems. In PIAC's experience, which is reflected in in depth research across all Australian jurisdictions, the operation of bail laws and policing of bail conditions has had a detrimental impact on our young Aboriginal clients and, in particular, has provided a direct path into the criminal justice system.

Difficulty complying with bail conditions

In PIAC's experience, bail conditions imposed by a court or police officer are often extremely difficult for alleged offenders to satisfy. This is a particular problem for young Aboriginal people. Typical bail conditions often require compliance in areas where Aboriginal people are already struggling, such as requiring stable accommodation or attendance at education or employment. In a study of bail conditions imposed on young people across all Australian jurisdictions, the Australian Institute of Criminology found that bail conditions were unduly onerous, difficult for young people to adhere to and often appear 'arbitrary and unrelated to the young person's offending'.[104]

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101 Aboriginal and Torres Strait Islander Social Justice Commissioner *Social Justice and Native Title Report 2014,* Australian Human Rights Commission, 20 October 2014, available at https://www.humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/social-justice-and-nati-0.

102 Australian Institute of Criminology, *Bail and remand for young people in Australia: A national research project*, November 2013, at page 63. Available at http://www.aic.gov.au/publications/current%20series/rpp/121-140/rpp125.html.

103 Australian Institute of Criminology, above note 102, at page 17.

104 Australian Institute of Criminology, above note 102, at page 76.

Stringent bail conditions and overzealous policing of those conditions (discussed further below) has arguably led to an increase in the number of Aboriginal people being incarcerated. The Senate Legal and Constitutional Affairs Committee Inquiry into Justice Reinvestment concluded that more stringent bail conditions have been a driver of increased incarceration rates.[105] Similarly the NSW Law Reform Commission found that strict bail orders with numerous conditions that are difficult to comply with may contribute to higher numbers of youth breaches of bail and therefore more youths in custodial remand.[106] At the same time, research has shown that there is a very low risk that a child or young person will not turn up to their court date. In 2006-07, less than 2% of children and young people failed to appear at court or had an arrest warrant issued.[107]

Policing of bail conditions

PIAC believes that changes in policing practices in recent years have contributed to the increasing contact Aboriginal and Torres Strait Islander people are having with the criminal justice system.

In 2006, the former Labor Government released a *NSW State Plan* that aimed to reduce re-offending by 10 per cent by 2016 through 'proactive policing of compliance with bail conditions' and 'extended community monitoring of those at high risk of re-offending, through more random home visits and electronic monitoring'.[108] In its submission to the NSW Law Reform Commission's Bail Inquiry, the NSW Police Force submitted that it had increased bail compliance checks by approximately 400% between January 2007 and September 2010.[109] The Australian Institute of Criminology, conducting an in depth review of bail, young people and remand,[110] concluded that one reason for this increase is the existence of Key Performance Indicators for the NSW Police Force.[111] While the language of proactive policing has been removed from the current NSW State Plan, *NSW 2021*, enquiries to PIAC in relation to the policing of bail conditions have continued unabated.

Many of PIAC's clients have sought legal advice after being detained for 'technical breaches' of bail, a term which refers to the circumstances where a person is arrested for breach of a bail condition, which in itself is not a new offence, and does not harm the young person, another person or the community. Examples of technical breaches include being five minutes late for curfew and being with a different family member other than the person specified in the bail condition. PIAC's clients are frequently reporting a level of policing of their bail conditions out of step with the severity of the alleged offence, such as incessant checking of curfews throughout the night several nights per week. Excessive monitoring of bail conditions was also reported to

105 Senate Legal and Constitutional Affairs References Committee, *Value of a justice reinvestment approach to criminal justice in Australia*, 20 June 2013, at para 2.29 available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2010-13/justicereinvestment/report/index.

106 NSW Law Reform Commission *Bail, Report 133,* 8 April 2012, available at http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r133.pdf.

107 Noetic Solutions Pty Ltd, *A Strategic Review of the New South Wales Juvenile Justice System, Report for the Minister for Juvenile Justice,* April 2010, at page 64, available at http://www.juvenile.justice.nsw.gov.au/Documents/Juvenile%20Justice%20Review%20Report%20FINAL.pdf.

108 NSW Premier's Department, *State Plan: A New Direction for NSW* (Sydney: Crown Copyright, 2006).

109 Australian Institute of Criminology, above note102, at page 80.

110 Australian Institute of Criminology, above note 102 at page 16.

111 Australian Institute of Criminology, above note 102 at page 81.

the Australian Institute of Criminology's (**AIC**) national research on young people and bail. As a result of this research the AIC found an Australia-wide practice of 'overzealous policing of young people's bail compliance and in some cases, a 'zero tolerance' approach to bail breaches'.[112]

Unlawful arrests and detention due to administrative errors

Through its Children in Detention Advocacy Project (CIDnAP), PIAC has identified a large number of young people being arrested not even for 'technical breaches' of bail, but for breach of bail conditions that are out of date or have been removed. This was supported by research undertaken by the Youth Justice Coalition, which found that a number of young people were being arrested for breach of bail conditions in circumstances where there were no cases pending or bail conditions; that is, children were being arrested and detained where their matter had been finalised or the conditions changed.[113] In 2011, PIAC launched a legal class action representing a number of young people who were allegedly unlawfully detained on the basis of incorrect or out of date bail conditions remaining on the NSW Police Force's 'COPS' database.[114]

The case of Jenny,[115] a young Aboriginal girl arrested for breach of a bail condition that no longer existed, illustrates the negative consequences that can flow from a seemingly innocuous mistake. Jenny had been on bail on conditions that included being with her mother at all times. Jenny was then sentenced to a youth justice conference that finalised her matter and removed all bail conditions. One afternoon, approximately two weeks later, Jenny was in the city with her friends when she was arrested for not being with her mother. She informed them that her bail conditions were no longer in force, but the police officers did not believe her – their computer system showed that her conditions still applied. Her mother rang the police station, offering to fax over the order that showed the bail conditions were no longer applicable, but was told that if she had been wrongly arrested it was the court's fault for not updating the system. Her mother tried calling the juvenile detention centre where Jenny had been taken, and was told that she would have to wait until morning to sort it out. When the young girl appeared before the magistrate early the next morning, after spending the night in a juvenile detention centre, the prosecutor told the magistrate that the computer system had not been updated, and that the girl was not subject to any bail conditions. Jenny was therefore released without further penalty.

This case study highlights that deficiencies in systems such as computer records, compounded by an inflexible approach to breaches of bail by police, can unnecessarily increase the contact of juveniles with the criminal justice system. If Jenny had been given a warning or a caution, or been brought to court by a summons or a court attendance notice, the mistaken situation could have been resolved without her spending an unnecessary and possibly unlawful night in custody. PIAC has been seeking the eradication of these errors and this approach to bail through its class action.

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112 Australian Institute of Criminology, above note 103 at page 81.

113 Wong K, Bailey B and Kenny D *Bail Me Out: NSW Young Offenders and Bail*, Youth Justice Coalition, 15 September 2009, available at http://www.piac.asn.au/publication/2012/02/bail-me-out-research-report.

114 For information on the class action see PIAC's website, at http://www.piac.asn.au/project/cidnap-unlawful-detention-young-people.

115 Names have been changed to protect the privacy of the individuals.

Consideration of the particular needs of Aboriginal and Torres Strait Islander young people

As with adults, a primary purpose of bail is to ensure a young person's attendance at court. However, particularly when considering Aboriginal and Torres Strait Islander young people, bail laws should also promote rehabilitation and reintegration into society.

PIAC believes that bail legislation across the country should be amended to recognise the disadvantages facing Aboriginal and Torres Strait Islander young people in bail determinations. PIAC recommends that, before refusing bail to an Aboriginal or Torres Strait Islander young person, the court should consider the social disadvantages that impact on Aboriginal and Torres Strait Islander people generally and on the individual in question specifically. These might include issues such as dislocation from family and culture, educational and employment disadvantages and substance abuse.

A good model for this approach is the Gladue (Aboriginal Persons) Court in Toronto, Canada, which was established in response to the overrepresentation of Canadian Aboriginal people in the criminal justice system.[116] The Gladue principles require a court to take into account at bail hearings and sentencing proceedings specific considerations in relation to Aboriginal offenders. These considerations include, among others, discrimination, institutional or personal abuse, dislocation from culture or family and substance abuse. The court is also able to request a bail report addressing those factors if the information is not readily available at the bail hearing in order to consider alternative options to remand.

The *Bail Act 2013* (NSW) requires a court to consider a range of matters when making an assessment for bail. One of these matters is

> any special vulnerability or needs the accused person has including because of youth, being an Aboriginal or Torres Strait Islander, or having a cognitive or mental health impairment.[117]

Beyond this reference, however, there is no guidance given to the court. PIAC believes a list of relevant factors should be included in bail legislation or regulations that would direct a court's attention to the specific needs of Aboriginal people who are the subject of bail proceedings. This would accord with recognition in other areas of the criminal law of the relevance of Aboriginal disadvantage; specifically, this includes the recent guidance provided by the High Court in relation to taking into account the historic experiences of an Aboriginal offender when being sentenced for a criminal offence.[118]

Policing practices

In the BTH report, the conclusion was clear:

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116 Judge of the Ontario Court of Justice, Knazan, B *Sentencing Aboriginal Offenders in a Large City – The Toronto Gladue (Aboriginal Persons) Court,* National Judicial Institute Aboriginal Law Seminar, Calgary, January 2003.

117 Section 18(1)(k) *Bail Act 2013* (NSW).

118 *Bugmy v The Queen* [2013] HCA 37.

> the data demonstrate that over-representation of Indigenous young people in police custody is a significant problem and that there are differential patterns of policing Indigenous children and young people compared to non-Indigenous children and young people.[119]

PIAC believes that if the disproportionate representation of Aboriginal and Torres Strait Islander people in the criminal justice system is to be addressed, there should be a focus on the initial interaction between Aboriginal and Torres Strait Islander people and the police. Based on PIAC's casework, current policing practices in NSW elevate the chances of arrest and detention of Aboriginal and Torres Strait Islander people, and perpetuate negative relationships with police officers.

The experience PIAC has gained through its casework is backed up by a number of external studies that have deduced an adverse exercise of police discretion on the basis of a perception of race, particularly in relation to Aboriginal and Torres Strait Islander people. A 2006 study of the successful use of stop and search powers, for example, in areas of high Aboriginal and Torres Strait Islander populations, showed that there is a wide disparity in the application of these powers. Given the highest rate of unsuccessful searches took place in geographical areas with large Aboriginal and Torres Strait Islander populations, the authors concluded the use of these powers in the geographical areas of the study were based on racial profiling.[120] Similarly, a 1999 review by the NSW Ombudsman noted a vast disparity in the exercise of move-on powers when comparing the exercise of those powers against Aboriginal and non-Aboriginal people.[121]

As noted above in relation to checking bail conditions, PIAC's concern is that the move over the past decade to 'proactive policing' by the NSW Police Force has disproportionately impacted on PIAC's vulnerable clients, including Aboriginal and Torres Strait Islander people and particularly young Aboriginal and Torres Strait Islander people. The formalisation of 'proactive policing' in the former Labor Government's 2006 *NSW State Plan*,[122] has been followed by legislative reform which incorporates the principle, not only in bail law but also by legislation rushed through in 2013 by the NSW Parliament that provided for the power of arrest without warrant.[123] While disrupting criminal activity is a laudable aim and important for community safety, the concern was always:

> Formalising the goals of 'proactive policing' in arrest law may exacerbate the overpolicing and incarceration of Indigenous people and marginalised groups'.[124]

In late 2014, the head of the NSW Bureau of Crime Statistics and Research concluded that the significant rise in the NSW prison population, despite overall crime going down, could be attributed to 'Much more aggressive policing activity'.[125]

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119 BTH report, above note 1, see Chapter 24.

120 Cunneen, C (Professor of Justice and Social Inclusion, The Cairns Institute, James Cook University) (2012) *Opinion on Racial Profiling on Federal Court of Australia Proceeding No VID 969 of 2010* (11 October 2012), filed in the Federal Court of Australia on 15 October 2012 in the case of *Daniel Haile-Michael & Ors v Nick Konstantinidis & Ors*, at para 20. available at http://www.policeaccountability.org.au/issues-and-cases/racial-profiling/race-discrimination-case-documents/.

121 Cited in Cunneen, C, above note 121 at para 24.

122 NSW Premier's Department, *State Plan: A New Direction for NSW* (Sydney: Crown Copyright, 2006).

123 Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* was amended by the *Law Enforcement (Powers and Responsibilities) Amendment (Arrest Without Warrant) Act 2013.*

124 Sentas, V and McMahon, R (2014) 'Changes to Police Powers of Arrest in New South Wales' *Current Issues in Criminal Justice*, Volume 25, Number 3, March 2014, at page 786.

In PIAC's experience, this shift to a proactive policing model has had a largely detrimental impact on Aboriginal and Torres Strait Islander people, unnecessarily drawing them into the criminal justice system and leading to largely irreversible and adverse consequences for the individual, his or her family and indeed whole communities. It has also continued to cement the precarious relationship between Aboriginal young people and adults with the police officers in their communities. Aboriginal Australians report a high level of discrimination across a range of settings, with one of the highest occurrences being when interacting with police, security people, lawyers or in a court of law.[126] The very perception of discrimination has an impact on Aboriginal and Torres Strait Islander people's well being; research has shown that just a perception can lead to changes in job seeking behaviour or dropping out of the work force. Discrimination can also be linked to negative health outcomes.[127]

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125 Hall, L (2014) "'Aggressive policing' creating court delays, crime statistics boss says' *Sydney Morning Herald Online,* 11 June, 2014, available at http://www.smh.com.au/nsw/aggressive-policing-creating-court-delays-crime-statistics-boss-says-20140611-zs3vs.html.

126 Biddle, N "Entrenched Disadvantage in Indigenous Communities" in Centre for Economic Development of Australia *Addressing entrenched disadvantage in Australia*, April 2015, at page 73. available at http://adminpanel.ceda.com.au/FOLDERS/Service/Files/Documents/26005~CEDAAddressingentrencheddisadvantageinAustraliaApril2015.pdf.

127 Biddle, N, above note 127 at page 73.

Appendix A: PIAC's Stolen Generations Compensation Bill

Draft Stolen Generations Reparations Tribunal Bill

A Bill for an Act to provide for the establishment of a Tribunal to decide and make recommendations on claims for Stolen Generations reparations and other matters

A Bill for an Act to provide for the establishment of a Tribunal to decide and make recommendations on claims for Stolen Generations reparations and other matters

The Parliament of Australia enacts:

1. Short title

This Act may be cited as the *Stolen Generations Tribunal Act 2008*.

2. Commencement

This Act commences on the day on which it receives the Royal Assent.

3. Interpretation

In this Act, unless the contrary intention appears:
Aboriginal or Torres Strait Islander means anybody who identifies as an Aboriginal or Torres Strait Islander descendant as defined in the *Aboriginal and Torres Strait Islander Act 2005*.
Eligibility Criteria means the criteria that determine whether a claimant for reparations is eligible for reparations as set out in section 10.
Indigenous means Aboriginal or Torres Strait Islander.
Stolen Generations means persons eligible for reparations under this Act.
Stolen Generations Fund means the Fund established by section 14.
Tribunal means the Stolen Generations Reparations Tribunal established by this Act.
Van Boven Principles means the *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* (UN Doc E/CN.4/Sub.2/1996/17, 24 May 1996) drafted in 1996 by Professor Theo van Boven.

4. Stolen Generations Reparations Tribunal and establishing Principles

(1) A tribunal, to be known as the Stolen Generations Reparations Tribunal, is established by this Act.

(2) The Tribunal is established in recognition of the Principles.

(3) The Principles are:

(a) Acknowledgement that forcible removal policies were racist and caused emotional, physical and cultural harm to the Stolen Generations.

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

(c) The distinct identity of the Stolen Generations should be recognised and they should have a say in shaping reparations.

(d) Indigenous people affected by removal policies should be given information to facilitate their access to the Tribunal and other options for redress.

(e) Reparations measures for the effects of forcible removals should be guided by the Van Boven Principles.

5. Composition of the Tribunal

(1) The Tribunal shall consist of six members, at least half of whom must be Aboriginal or Torres Strait Islanders.

(2) The Attorney General must by writing determine a code of practice within 15 days of the commencement of this Act, for selecting persons to be nominated by the Attorney General for appointment as members of the Tribunal, that sets out general principles on which the selections are to be made, including but not limited to:

(a) merit; and

(b) independent scrutiny of appointments; and

(c) probity; and

(d) openness and transparency.

(3) After determining a code of practice under subsection (1), the Attorney General must publish the code in the *NSW Government Gazette*.

(4) A code of practice determined under subsection (1) is a legislative instrument for the purposes of the *Subordinate Legislation Act 1989* (NSW).

(5) Schedule 1 has effect in relation to the Tribunal.

6. Functions of the Tribunal

The Tribunal has the following functions:

(a) to decide whether a claimant is eligible for reparations;

(b) to decide on appropriate reparations to be granted in response to a claim;

(c) to promote a process of truth and reconciliation;

(d) to consider proposed legislation;

(e) to consider prejudicial policies and practices; and

(f) such other functions as may be prescribed.

7. Powers of the Tribunal

(1) The Tribunal has power to do all things necessary or convenient to be done to perform their functions and, in particular, has power:

(a) to obtain information from departments and agencies; and

(b) to obtain further information from the claimant, if unable to decide from the information obtained under paragraph (a) whether a claimant is eligible for reparations.

(2) The Tribunal may exercise their powers notwithstanding any other legislation relating to the confidentiality or privacy of information.

8. Entitlement to reparations

(1) The Tribunal shall award reparations on a claim under this Act if the claimant satisfies one or more of the Eligibility Criteria.

(2) Monetary reparations are payable from the Stolen Generations Fund.

9. Reparations

(1) The Tribunal may award reparations in the form of:

(a) resources for stolen generations groups to provide culture and history centres, or healing centres, including funding for land or premises;

(b) community education programs about the history of forcible removals;

(c) community genealogy projects for Indigenous communities to help identify membership of the Stolen Generations and their dependants;

(d) monetary payments for individuals to meet current needs such as funding to travel to see family;

(e) access to appropriate counselling services;

(f) access to appropriate health services;

(g) access to language and culture training;

(h) memorials that appropriately reflect the views of members of the Stolen Generations; and

(i) monetary compensation.

(2) The Tribunal may award one or more of the forms of reparations set out in subsection (1) in response to a claim.

(3) The Tribunal may award reparations in the form set out in subsection (1)(i) to people who can prove

(a) that they suffered particular types of harm, such as sexual or physical assault or labour exploitation; or

(b) that they suffered or continue to suffer from physical or psychological injury caused by the fact of their removal.

(4) The Tribunal may vary the forms of reparations set out in subsection (1) as it sees fit.

(5) The Tribunal shall have regard to the Van Boven Principles in varying the forms of reparations set out in subsection (1).

(6) The Tribunal shall where practicable award reparations that maximise group rather than individual outcomes.

(7) In awarding reparations, the Tribunal must take into account the nature and extent of any reparations received by the claimant under State or Territory legislation and any damages or compensation received by the claimant at common law or otherwise.

10. Eligibility criteria for reparations

(1) To be eligible for reparations under this subsection, a claimant must be:

(a) a person who was, as a child, removed from their family under legislation that applied specifically to Aboriginal or Torres Strait Islander people; or

(b) an Aboriginal or Torres Strait Islander person who was, as a child, removed from their family prior to 31 December 1975, where that removal was carried out, directed or condoned by an Australian government or an agent of an Australian government.

(3) To be eligible for reparations under this subsection, a claimant must be:

(a) an Aboriginal or Torres Strait Islander person; and

(b) a living descendant of a deceased person who would have satisfied the criteria in subsection (1).

(4) To be eligible for reparations under this subsection, a claimant must be:

(c) an Aboriginal or Torres Strait Islander person;

(d) a relative, family member or descendant of a person who satisfies or would have satisfied the criteria in subsection (1):

who the Tribunal is satisfied suffered or was harmed as a consequence, in whole or in part, of the removal of that person.

(5) To be eligible for reparations under this subsection, a claimant must be a community that suffered detriment as a result of circumstances that gave rise to eligibility of any member of that community for reparations under subsection (1), (3) or (4).

(6) The Tribunal shall recognise statements by organisations such as Link Ups and Aboriginal and Islander Child Care Agencies for the purpose of determining eligibility under this section.

11. Claims for reparations

(1) A claim for reparations must be made to the Tribunal in such manner as it prescribes and shall include a certificate of Indigenous identity and a statement about the circumstances and impact of the removal.

(2) A claim must be made within 10 years after the commencement of this Act.

(3) The Minister may, for any proper reason, extend the time for making an application under s 11(2), taking into account:

(a) the reason for the delay;

(b) the merits of the application;

(c) fairness as between the person and other persons in a like position; and

(d) any other factor the Minister considers to be relevant.

(4) A claimant for reparations may, with the consent of the Tribunal, amend a claim.

(5) A claim for reparations may be made by a group of persons.

(6) A claim for reparations may be made on behalf of a person under a legal disability by a guardian of that person.

(7) For the purposes of determining eligibility, the person under the legal disability is to be regarded as the claimant.

12. Time for completion of assessments

The Tribunal must decide a claim within 12 months after receiving it.

13. Tribunal to decide claims

If the Tribunal is satisfied that reparations should be awarded on a claim, the Tribunal must:

(a) notify the Trustee of the Stolen Generations Fund of the amount to be disbursed to cover the cost of the award; or

(b) recommend the reparation measure for action by the relevant government, church or non-government body.

14. Establishment of Stolen Generations Fund

(1) An account to be known as the Stolen Generations Fund is established:

(a) for the establishment and work of the Tribunal; and

(b) to disburse funds for reparations awarded to claimants eligible under this Act.

(2) Payments from the Stolen Generations Fund are to be met from funds appropriated by the Parliament, together with any contributions from state or territory governments, church organisations involved in administering forcible removal policies, and any other contributors.

(3) The Stolen Generations Fund will be administered by a Trustee to be appointed by the Attorney General.

15. Tribunal decision is reviewable

All decisions made by the Tribunal are eligible for merits review by the NSW Civil and Administrative Tribunal. Review may be sought by the relevant claimant or by any government, church or non-government body that is the subject of a recommendation of the kind referred to in section 13(b).

16. Jurisdiction of the Tribunal to consider prejudicial policies and practices

(1) Where any Aboriginal or Torres Strait Islander claims that he or she, or any group of Aboriginal or Torres Strait Islanders of which he or she is a member, is or is likely to be prejudicially affected –

(a) by any ordinance or any Act (whether or not still in force), passed at any time on or after 31 December 1975; or

(b) by any regulation, order, proclamation, notice or other statutory instrument made, issued, or given at any time on or after 31 December 1975 under any ordinance or Act referred to in paragraph (a) of this subsection; or

(c) by any policy or practice (whether or not still in force) adopted by or on behalf of the Commonwealth, [the State Governments], any Government Agency or [Church Organisation], or by any policy or practice proposed to be adopted by or on behalf of the Commonwealth, [the State Governments], any Government Agency or [Church Organisation]; or

(d) by any act done or omitted at any time on or after 31 December 1975, or proposed to be done or omitted, by or on behalf of the Commonwealth, [the State Governments], any Government Agency or [Church Organisation],

and that the ordinance or Act, or the regulation, order, proclamation, notice or other statutory instrument, or the policy or practice, or the act or omission, was or is inconsistent with the Principles, he or she may submit that claim to the Tribunal under this section.

(2) The Tribunal must inquire into every claim submitted under subsection (1).

(3) If the Tribunal finds that any claim submitted to it under subsection(1) is well-founded it may, if it thinks fit, having regard to all the circumstances of the case, recommend to the relevant body that action be taken to compensate for or remove the prejudice or to prevent other persons from being similarly affected in the future.

(4) A recommendation under subsection (3) may be in general terms or may indicate in specific terms the action which, in the opinion of the Tribunal, the relevant body should take.

(5) The Tribunal shall cause a sealed copy of its findings and recommendations (if any) with regard to any claim to be served on –

(a) the claimant;

(b) such relevant body as in the opinion of the Tribunal has an interest in the claim; and

(c) such other persons as the Tribunal thinks fit.

17. Jurisdiction of the Tribunal to consider proposed legislation

(1) The Tribunal shall examine any proposed legislation referred to it under subsection (2) and shall report whether, in its opinion, the provisions of the proposed legislation or any of them would be contrary to the Principles.

(2) Proposed legislation may be referred to the Tribunal, in the case of a Bill before the Parliament, by the relevant Minister or by a resolution of either house.

18. Truth and reconciliation

(1) The Tribunal shall provide a forum and process for truth and reconciliation under which Indigenous peoples affected by forcible removal policies may tell their story, have their experience acknowledged and be offered an apology by the Tribunal or others.

(2) The Tribunal shall determine and publish appropriate procedures to facilitate the matters referred to in subsection (1).

19. Protection from liability

The Tribunal does not incur any personal liability for an act done or omitted to be done by the Tribunal in good faith in the performance or exercise, or purported performance or exercise, of any of their functions or powers under this Act.

20. Confidentiality

(1) The Tribunal must not divulge the information obtained under this Act otherwise than as provided by this section.

(2) The Tribunal may divulge the information obtained under this Act in so far as it is necessary to do so to carry out their functions under this Act.

21. Annual reports & operational review

(1) The Tribunal is to publish annual reports on the performance of their functions.

(2) The Tribunal is to cause copies of any reports prepared in accordance with subsection (1) to be made widely available to the public.

(3) A review of the Tribunal's operation is to commence three years from the commencement date of this Act.

(4) The purpose of the review is to assess the Tribunal's operation against the principles defined in section 4.

(5) The review must:

(a) involve consultation with claimants, potential claimants, recipients of monetary compensation and whole communities;

(b) be published in full no later than 12 months from the date the review commenced.

22. Death of applicant

(1) A claim for reparations does not lapse because the claimant dies before the claim is decided.

(2) If a claimant for reparations dies before the claim is decided, monetary compensation, if payable on the claim, is to be paid to the estate of the deceased.

23. Regulations

The Governor-General may make regulations for the purposes of this Act.

Schedule 1

Provisions in relation to the Stolen Generations Reparations Tribunal

[To comprise details concerning remuneration and conditions of appointment; staffing; sittings, etc.
Rules of evidence not to apply.
Tribunal to have investigative powers.

Appendix B: *Restoring Identity* report (2002)

restoring identity

final report

2002

restoring identity

Final report of the

Moving forward consultation project

Amanda Cornwall

Public Interest Advocacy Centre

Cover design
Cover design by Gadfly Media.
Photograph: "Coonana Kid" by Alastair McNaughton.

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Public Interest Advocacy Centre Ltd
ABN 77 002 773 524
Level 1, 46 York St, Sydney
NSW 2000
AUSTRALIA
Tel 02 9299 7833
Fax 02 9299 7855
piac@piac.asn.au
www.piac.asn.au

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Overview

This report documents the outcomes of the *Moving forward* consultation project, which included a consultation process conducted during 2001 and research carried out in late 2001 and 2002. It is divided into three parts.

Part 1 provides information on forcible removal policies and the project. Chapter 1 outlines the methodology used for the consultation project. Chapter 2 provides background information about forcible removal policies and the meaning of reparations. Chapter 3 introduces PIAC's proposal for a reparations tribunal to provide redress for the harm caused by forcible removal policies.

Part 2 discusses Indigenous peoples' views about reparations and how the situation in Australia compares to international approaches. Chapter 4 presents Indigenous views on reparations in the wider context of Indigenous aspirations for self determination and the reconciliation debate. It explains the importance of identity for the stolen generations and how government programs have failed. Chapter 5 reviews government and church programs for rehabilitation and restitution, identifying successes and shortfalls. Chapter 6 reviews reparations schemes in Canada, South Africa and New Zealand, offering insights into the fundamental aspects of reparations in practice.

Part 3 explains the current options for redress for forcible removal policies and presents PIAC's reparations tribunal proposal as amended in light of feedback from the *Moving forward* consultations. Chapter 7 discusses the legal claims by members of the stolen generations in courts and tribunals, and compensation schemes for institutional child abuse and exploitation of Indigenous labour. Chapter 8 details the role and functions of the proposed reparations tribunal, who can apply for reparations and how the proposal might be implemented.

Executive summary

Reparations for the stolen generations

The Public Interest Advocacy Centre (PIAC) developed a proposal for a stolen generations reparations tribunal to provide full reparations for forcible removal of Indigenous children. The proposal was developed to address the failure of governments and churches to provide reparations as recommended by the *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families*.

The tribunal proposal gained widespread support during the Senate Inquiry into the Stolen Generations in 2000, which reviewed government and church responses to the *National Inquiry*. In 2001 PIAC sought the views of Indigenous peoples about the proposal through a national consultation project, called *Moving forward: achieving reparations*.

Moving forward project

The *Moving forward* project was carried out with the advice of a reference group with representatives of the Aboriginal and Torres Strait Islander Commission (ATSIC), the National Sorry Day Committee, the Human Rights and Equal Opportunity Commission (HREOC) and stolen generations groups in the Northern Territory. The Myer Foundation, Rio Tinto Aboriginal Foundation and The Reichstein Foundation provided funding for the project.

The project held group and individual interviews with over 150 people at 10 focus group meetings across the country between February and May 2001. It also held meetings with over 20 Indigenous organisations, including stolen generations groups, Indigenous health services and legal services. Submissions were received from over 30 people and organisations during the project.

The discussions were based on an issues paper that canvassed aspects of the proposed tribunal:

- what reparations means to Indigenous peoples
- the functions of the tribunal
- who should be entitled to reparations from the tribunal
- the issue of compensation and
- how the tribunal should be structured.

In August 2001 a national conference, *Moving forward: achieving reparations for the stolen generations* was organised by PIAC, ATSIC and HREOC. An *Interim report* detailing the outcomes of the meetings and submissions was prepared for the conference. Recommendations from the conference also informed the consultation project.

The *Interim Report* was forwarded to state, territory and federal governments for comment in August 2001. Some state and territory governments indicated interest in the tribunal proposal and gave examples of how they are progressing aspects of the proposal. The Federal Government has made it clear that it is opposed to PIAC's proposal for a reparations tribunal.

Background

Australia's Indigenous child separation policies are part of a racist past in which the state controlled almost every aspect of Indigenous peoples' lives. It is a history in which Indigenous parents were presumed unfit to care for their children by nature of their race. The policies caused destruction of family, culture and dignity and, in many cases, caused deep emotional and psychological harm.

An estimated 10 per cent of Indigenous children - mainly those with some non-Aboriginal ancestry - were removed from their families and communities under government policies between 1910 and 1970. About 20,000 to 25,000 people are thought to have been removed under the policies during that period.

The HREOC conducted the *National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families* during 1995 and 1996. It investigated past law and policies that resulted in the removal of Indigenous children by compulsion, duress and undue influence.

The report of the National Inquiry, *Bringing them home*, concluded that the policies were in breach of the international prohibition on racial discrimination and the level of systematic discrimination amounted to a 'gross violation of human rights'. HREOC recommended a package of reparations based on international human rights principles consisting of:

- **acknowledgment and apology** by federal and state parliaments, and by state and territory police forces and churches
- **guarantees against repetition** through community education and legislation for national Indigenous Child Placement Principles, and incorporation of the UN Genocide Convention into Australian law
- **measures of restitution** through language and culture centres, family tracing and reunion services and protection of records
- **measures of rehabilitation** by way of counselling services and providing opportunities for Indigenous communities to assume responsibility for the welfare of their children
- **monetary compensation** to people directly affected by forcible removals

The HREOC also reviewed contemporary policies for Indigenous child separation from their families. It found pervading paternalism towards Indigenous peoples in child welfare services and in the juvenile system. HREOC acknowledged that major social and economic disadvantage among Indigenous peoples is a significant contributing factor. It recommended major reforms in these sectors and a comprehensive Indigenous social justice package.

Government and church responses

In the five years since the *Bringing them home* report only limited progress has been made in implementing the recommendations.

All state and territory governments and all of the churches involved in administering forcible removal policies have offered acknowledgment and apologies, which have been widely accepted. The Federal Government claims that the magnitude and effect of the policies has been exaggerated and has offered only a statement of regret for past wrongs against Indigenous peoples generally.

Funding for specialised counselling programs have been administered as part of mainstream mental health programs and have largely failed to reach the stolen generations.

Federal Government funding for community-based family reunion services, called Link Up, took many years to implement. Although there was a national network of Link Up services by 2002, there are few with integrated counselling services.

Government and church undertakings to co-ordinate access to family records through 'one-stop shops' have not eventuated in some states. Few governments have acted on promises to train Indigenous archivists, historians and genealogists.

Little attention has been paid to restoring culture and language, acknowledging personal experience and providing redress. State and federal government funding for museums and libraries to conduct oral history programs do not provide the therapeutic benefits of public hearings and associated healing programs.

Indigenous children continue to be separated from their families at a much higher rate than children in the general population, primarily on grounds of 'neglect'. Indigenous young people continue to be over represented in the juvenile justice system.

Indigenous priorities

During the *Moving forward* meetings strong themes emerged from discussions about the meaning of reparations for Indigenous peoples.

- Acknowledge the full history of government treatment of Indigenous peoples as a first step towards reconciliation.
- Acknowledge the distinct identity of the stolen generations within the Indigenous community and consult with them about design and delivery of reparations programs.
- Affirm identity and experience of removals through 'telling story' in an appropriate forum, with an official acknowledgment and apology.
- Reduce the number of Indigenous children who are separated from their families through programs that empower Indigenous communities and families and overcome social and economic disadvantage.
- Establish memorials and community education programs in response to proposals developed by the stolen generations and their families.
- Allocate funds and premises for stolen generation support groups to provide culture and healing centres, to support removed people in the community in which they now live.
- Ensure appropriate access to family and personal records and training of Indigenous archivists, historians and genealogists.
- Provide travel subsidies for removed people to visit family.

International approaches

The right to reparations for gross violations of human rights has been recognised in many countries around the world. The experiences in Canada, New Zealand and South Africa are particularly pertinent. These examples reflect a growing international recognition of the role of reparations in the process of reconciliation. In those countries governments have acknowledged the harm caused and have recognised victims' rights to reparations. Features of the schemes are processes to hear the experiences of survivors, rehabilitation and restitution programs and limited monetary compensation.

About the tribunal

The tribunal offers an alternative to legal claims by the stolen generations and addresses the failure of government and church programs to provide full and just reparations as recommended by *Bringing them home*.

The tribunal would be based on governments and churches acknowledging the nature and magnitude of forcible removal policies and the harm caused. It would acknowledge people's

stories of removal and seek to restore culture and identity. It would also have a role in recommending measures to prevent the high rate of Indigenous child separation that still occurs today.

The functions of the tribunal would be:
- to provide a forum for Indigenous peoples affected by forcible removal policies to tell their story, have their experience acknowledged and be offered an apology
- to provide reparations measures in response to applications through reparations packages
- to make recommendations about government and church practices on Indigenous child separation to heal the past and prevent recurrence.

The reparations packages would be designed to help people heal and move on with their lives. There would be an emphasis on measures to support groups and communities.

Indigenous peoples made it clear during the consultation meetings that they want a flexible tribunal model so that local needs are accommodated. They believe it is important that the tribunal is able to influence state and territory government programs affecting them and their children as well as Federal Government schemes. Similar redress programs in Canada and New Zealand provide for local and regional diversity to reflect local needs and customs.

Why a tribunal?

Government responses to *Bringing them home* have failed to address the modest aspirations of the stolen generations. The reparations tribunal would ensure government and church responses to past racism are in line with international human rights principles.

Members of the stolen generations have made legal claims against state and federal governments in an effort to seek redress, at great personal cost. The cases have not been able to establish that governments owe a duty of care or a fiduciary duty to children removed under the policies. The courts have made it clear that they are reluctant to find governments liable for individual acts which occurred so long ago. Some judges have stated that the issues raised by these cases would be better resolved in the political arena.

The cases illustrate the limitations of litigation. They tend to focus on technical legal issues and fail to acknowledge the racism and broader consequences of the policies. Litigation is not available to many of the stolen generations because of lack of documentary evidence and the statutory bar on bringing legal claims more than three years after the damage occurred. The adversarial nature of litigation means that members of the stolen generations, who have already suffered emotional and psychological harm, are subject to further trauma.

Compensation

Many of the children removed under forcible removal policies were the victims of sexual and physical assault, racial discrimination and labour exploitation. *Bringing them home* recommended that compensation be paid to people who can prove these types of wrongs.

To many of the stolen generations and their families monetary compensation is important as symbolic recognition of harm. Others find it objectionable that life-changing trauma and grief should be quantified in monetary terms. Members of the stolen generations at the national *Moving forward* conference said that compensation is not a priority and should not dominate public debate.

The governments of Canada and Ireland have used the restorative justice approach to resolve claims by children who have been victims of sexual assault in government-run institutions. This approach recognises that redress includes financial and other compensation for survivors and offers them an opportunity to establish a permanent record of personal experiences and an apology.

The proposed reparations tribunal would provide financial compensation for members of the stolen generations who can prove a legal wrong, such as sexual assault, false imprisonment or labour exploitation.

What next?

The tribunal proposal was originally designed to operate on a national basis with leadership from the Federal Government. It was supported by the Australian Labor Party and Australian Democrats members of the Senate Inquiry into the Stolen Generations in 2000. However, the Federal Government has made it clear that it does not support a reparations tribunal.

PIAC envisages that the tribunal could be implemented by state, territory and federal governments in partnership with churches and Indigenous organisations. Different initiatives could be taken in each state to reflect the views and needs of local Indigenous communities.

Government programs in Victoria, Western Australia and Queensland already reflect key recommendations from the *Moving forward* project. State and territory governments and the Australian Council of Churches have indicated interest in the project.

The *Moving forward* project reference group will continue to meet to work for implementation of the tribunal proposal and to restore the identity of the stolen generations.

Recommendations

Implementation of government programs

1.1 The Ministerial Council on Aboriginal and Torres Strait Islander Affairs provide annual public reports on the progress of state and federal government programs that seek to address past Indigenous forcible removal policies and prevent the current high rate of Indigenous child separation.

1.2 All government agencies responsible for programs to provide reparations engage with members of the stolen generations in the design and implementation of the programs.

Family tracing and reunion

2.1 State, territory and federal governments provide additional resources to the national network of Link Up services to provide outreach services and integrated counselling services.

2.2 State and territory governments that have not already done so, work with the churches to provide Indigenous peoples with a 'first stop shop' to provide co-ordinated access to their personal and family histories.

Family records and genealogy

3.1 State, territory and federal governments implement their promises to provide training for Indigenous archivists, genealogists and historians and to promote employment of Indigenous peoples in these positions.

3.2 State, territory and federal governments work with Indigenous community organisations to develop community genealogies to identify the people affected by forcible removals and their descendants.

Contemporary removal

4. Governments address over-representation of Indigenous children and young people in the child welfare and juvenile justice systems through programs that promote Indigenous self governance and social justice.

Tribunal principles

5. State, territory and federal governments, in co-operation with the churches, establish a tribunal to make full and just reparations for forcible removal policies based on the following principles:

- **acknowledgement** of the racist nature of forcible removal policies and the harm caused
- **self-determination** of Indigenous peoples, including the stolen generations
- **access to redress** for Indigenous peoples affected by forcible removal policies
- **prevention** of the causes of contemporary separation of Indigenous children from their families in the present and future.

Functions of the tribunal

6. The tribunal have the following functions:
- provide a forum for Indigenous peoples affected by forcible removal policies to tell their story, have their experience acknowledged and be offered an apology
- provide reparations measures in response to applications through appropriate reparations packages
- make recommendations about government and church activities that affect contemporary Indigenous child separation and measures that might be taken to heal the past.

Types of reparations

7. The tribunal provide appropriate reparations measures in response to applications to assist Indigenous people to overcome the harm caused by forcible removal policies, with an emphasis on group resolution of claims.

Individual compensation

8. The tribunal provide individual monetary compensation to Indigenous peoples affected by forcible removal policies who can prove that they suffered types of damage recognised under current Australian law, such as sexual and physical assault or labour exploitation.

Who can apply

9. The tribunal provide reparations to Indigenous peoples who were removed from their families under forcible removal policies, family members who suffered as a result of the removals and their descendants who suffered harm.

Procedures

10.1 The tribunal conduct hearings primarily to hear people's stories and document their experiences, with fact-finding for the purpose of verifying claims conducted through a separate, non-adversarial process.

10.2 The tribunal be accessible and accountable, widely publicising its procedures and the reparations measures available.

10.3 The tribunal protect personal information of applicants, unless applicants consent to its publication or other use.

Structure and membership

11. The tribunal be a partnership of governments, churches and Indigenous peoples, including the stolen generations, with the following features:
- members are appointed by the partners according to set criteria for relevant skills and expertise
- maximum funding for reparations be made available and the cost of administering the tribunal be minimised as far as possible
- local level presence in the community
- structures to influence state and federal government activities.

Implementation

12. State, territory and federal governments and the churches develop and implement a process to establish a reparations tribunal in close consultation with ATSIC and stolen generations groups.

PART 1 - INTRODUCTION

Chapter 1 – About the project

Background

Australia's Indigenous child separation policies are part of a racist past in which the state controlled almost every aspect of Indigenous peoples' lives. It is a history in which parents were presumed unfit by the nature of their race, not their ability to care for their children. The results were destruction of family, culture and dignity, which often caused deep psychological and spiritual harm.[1]

The *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (the National Inquiry) contributed significantly to Australia's understanding of these policies. The report of the National Inquiry, *Bringing them home*[2], prompted unprecedented public sympathy and gestures of apology, including official apologies from all state and territory governments. Yet five years since *Bringing them home* was tabled in the Federal Parliament only limited progress has been made in implementing the reparations measures that were recommended.[3] The Federal Government has denied the magnitude and effect of the policies, refusing to apologise for events of the past. Members of the stolen generations have made legal claims against the NSW and Federal Governments in an effort to seek redress, so far without success.[4]

To provide an alternative to litigation and to achieve full and just reparations for the stolen generations the Public Interest Advocacy Centre (PIAC) devised a proposal for a reparations tribunal. PIAC sought the views of Indigenous peoples about the tribunal proposal during 2001 through a national consultation project called *Moving forward – achieving reparations* (the *Moving forward* project). The proposal was strongly supported by Indigenous peoples with some refinements.

The aspirations of the stolen generations indicated during the *Moving forward* project are modest. They want a full acknowledgement of history and an apology from the Federal Government, recognition of the distinct identity of the stolen generations and some control over programs that are intended to meet their needs. The challenge for the project partners is to see the proposal implemented by state, territory and federal governments and the churches.

Project management

The project was conducted in partnership with key stolen generations groups and Indigenous and human rights bodies, through a project reference group. Members of the reference group are:

- Audrey Kinnear, Co-chairperson, National Sorry Day Committee
- Brian Butler, Social Justice Commissioner, Aboriginal and Torres Strait Islander Commission
- Elizabeth Evatt, Chairperson, Public Interest Advocacy Centre
- Harold Furber, Northern Territory stolen generations corporations
- Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission.

The reference group met on five occasions during 2001 and reviewed the final report during 2002. It has agreed to continue meeting after completion of the *Moving forward* final report to advance the implementation of the recommendations.

PIAC managed the project, with Amanda Cornwall as project manager and Sarah Mitchell as administrative officer.

The Myer Foundation, the Rio Tinto Aboriginal Foundation and The Reichstein Foundation provided funding for the project.

Terminology

The term 'stolen generations' refers to the Indigenous peoples' who were removed from their families as children under policies favouring separation of children of 'mixed' ancestry. The historian, Peter Read, coined the term in his work in the early 1980s on the separation policies in NSW.[5] It has since gained currency in public debate and is therefore used in this report. However, the term is problematic as it has a tendency to blur the wide variety of circumstances and policies under which the separations occurred.

The difficulties with the term were highlighted in a story about Lowitja O'Donoghue in the *Herald Sun* newspaper on 28 February 2001. Ms O'Donoghue had been separated from her Aboriginal mother at the age of two when she and her four siblings were taken to Colebrook Home, a mission for 'half caste' children. Her father, an Irish station worker, had sent the children to the home. Ms O'Donoghue's mother had no say in the matter and suffered unbearable grief for the rest of her life. The story was presented in the *Herald Sun* as an admission by Ms O'Donoghue that she was not 'stolen' as previously claimed. Many members of the stolen generations felt betrayed by the story and were hurt by the ensuing negative publicity.

The term 'forcible removal policies' is used to refer to the range of past policies, laws and practices that resulted in the separation of Indigenous children from their families by 'compulsion, duress or undue influence'. The Human Rights and Equal Opportunity Commission (HREOC) referred to the policies collectively as 'forcible removal policies' during the National Inquiry.[6]

In defining 'forcible removal policies' HREOC took into account the circumstances at the relevant time (it focussed on 1910 to 1970). It recognised that while many removals were made in accordance with laws and policies, in some cases there had been illegal use of force and use of threats, moral pressure or infliction of hardship. HREOC acknowledged that a common practice was to remove children in the absence of their parents. The uneven power relationships between government officials and Indigenous families at the relevant time were also acknowledged. 'Forcible removals' were contrasted with removals that were truly voluntary on the part of parents who relinquished their children, or where the child was orphaned and there was no Indigenous carer to step in.[7]

The term 'Indigenous peoples' is used to describe Aboriginal and Torres Strait Islander people in Australia, to reflect the distinct cultural groups. It is also used to describe the Indigenous peoples in other countries.

Methodology

The *Moving forward* project sought the views of Indigenous peoples about PIAC's proposal for a reparations tribunal to address the harm of forcible removal policies. The discussions necessarily also canvassed views on reparations and government and church responses to *Bringing them home*.

The project used qualitative and quantitative information. The quantitative material was drawn from parliamentary and government inquiries in Australia and overseas, published research in legal and social policy journals and relevant laws and decisions of courts and tribunals.

The qualitative research was drawn from 10 focus group meetings with Indigenous peoples conducted across Australia, from oral and written submissions and from meetings with key Indigenous organisations. The focus group meetings, called *Moving forward* meetings, took place between March and May 2001 and were attended by over 150 Indigenous people. Nearly 50 submissions from Indigenous organisations helped to inform the project. The views expressed at a national conference held in August 2001 also contributed to the recommendations in this report. All stolen generations groups in Australia were consulted during the project.

An issues paper, entitled *Moving forward – achieving reparations*, set the parameters for the consultation process. It was launched in March 2001 at the second national Stolen Generations conference, *Healing the Pain*. The issues paper provided information about the tribunal proposal and posed questions about its core aspects:

- key functions of the tribunal
- who could apply for reparations
- tribunal processes
- mechanisms for compensation.

Moving forward meetings

The *Moving forward* meetings heard responses to the tribunal proposal and provided an opportunity for Indigenous peoples to discuss their own priorities for reparations. Most meetings were planned for three to four hours duration, but some meetings continued all day at the request of local organisers. Each meeting was attended by about 15 people, usually with a balance of men and women, and a mixture of older people and younger people. The participants were predominantly people who identified as members of the stolen generations. They usually included some people working for Aboriginal community controlled health services, Link Ups, the Aboriginal and Torres Strait Islander Commission (ATSIC) and relevant state government agencies. A profile of the meetings is set out in Appendix 1.

The meeting locations were selected on the basis that there was an active local stolen generations group in a particular area or an Indigenous member of the National Sorry Day Committee with appropriate skills to conduct the meetings. These people and organisations were engaged as project consultants to organise and facilitate the meetings. Counsellors or support people were provided at each meeting and space was set aside for people who needed a break from discussions or time alone. The location of the meetings and the host organisations are set out in Table 1.

Table 1 - Program of *Moving forward* meetings

Location	Venue and host	Facilitators
Sydney	Host: ATSIC, Sydney Venue: University of Technology Sydney	Lola Edwards, National Sorry Day Committee (NSW) & Barry Duroux Link Up NSW
Nambour	Venue: Nambour Community Centre	Judi Wickes, National Sorry Day Committee
Bathurst	Host and venue: Bathurst Aboriginal Land Council	Lola Edwards and Carol Kendall, National Sorry Day Committee (NSW)
Perth	Venue: Aborigines Advancement Council	Rosalie Fraser, National Sorry Day Committee
Broome	Host: Kimberley Stolen Generations Corporation and ATSIC Regional Council Venue: ATSIC office	Mark Bin Bakar, Kimberley Stolen Generations Corporation
Darwin	Host: Northern Territory Stolen Generations Corporation	Jane Vadiveloo and Toni Ah-Sam
Alice Springs	Host: Central Australian Stolen Generations and their Families Corporation	Jane Vadiveloo
Adelaide	Host: Link Up and ATSIC Venue: Nunkuwarrin Yunti	Richard Young, for Link Up (SA)
Melbourne	Host: ATSIC Regional Councils Venue: Victorian Aboriginal Health Service	Marjorie Thorp, PIAC stolen generations group (assisted by Melissa Brickell, National Sorry Day Committee)
Hobart	Venue: Hobart Aboriginal Church	Debra Chandler, National Sorry Day Committee

Before approaching any community representatives about hosting a focus group meeting PIAC notified local ATSIC elected officials and invited them to participate in the meeting if they wished. All elected officers of ATSIC were notified about the project in January 2001.

A highlight of the of the *Moving forward* meeting in Alice Springs was a visit by the United Nations Special Rapporteur on contemporary forms of racism, Professor Maurice Glele-Ahanhanzo. Participants at the meeting had a rare opportunity to tell their personal stories of removal and discuss their disappointment with the Federal Government's response to *Bringing them home* directly to the UN's visiting team.[8]

Notes of the discussions at each meeting were made by the project manager and local volunteers. To protect the privacy of individuals, who were often relating very sensitive personal information, detailed records were not kept of the meetings. A profile of the main themes of the discussions at the meetings is set out in Appendix 2. More specific discussions on particular topics are referred to throughout this report.

Submissions and other meetings

The project received 33 written and oral submissions addressing the tribunal proposal and suggesting ideas for appropriate reparations. Submissions were received from the following organisations:

- ATSIC, NSW state advisory committee
- Central Australian Aboriginal Legal Aid Service, Alice Springs
- Garden Point Association, Darwin
- Graham Home, Mt Margaret Mission, Kalgoorlie, Western Australia
- Jarrah – Stolen Generations, NSW
- Kobeelya Centre, Edith Cowan University, Katanning Annexe, Western Australia
- Muramali program, Winangali
- National Aboriginal and Torres Strait Islander Catholic Council
- National Aboriginal Community Controlled Health Organisations
- National Council of Churches in Australia
- Sacred Site Within Healing Centre, South Australia
- Social Health Program, Wucchopperen Aboriginal Health Service, Queensland
- Meeting of South Australian stolen generations counsellors

Submissions to the Senate Inquiry into the Stolen Generations from Indigenous organisations were also used as part of the project's research. They included submissions from:

- Aboriginal Legal Service of Western Australia (WA)
- Binaal Billa Regional ATSIC Council (NSW)
- Crocker Island Association (NT)
- Jarrah – Stolen Generations
- Karu Aboriginal Child Care Agency (NT)
- National Sorry Day Committee (ACT)
- Northern Territory Stolen Generation Aboriginal Corporation and Central Australian Stolen Generations and their Families Corporation (NT)
- Residents of Cootamundra Girls Home (NSW)
- Resource Unit for Indigenous Health, Education and Research, Department of Psychiatry, University of Melbourne (Vic)
- Retta Dixon Home Aboriginal Corporation (NT)
- Victorian Aboriginal Child Care Agency Co-operative (Vic)
- Victorian Aboriginal Legal Service (Vic)
- Yamatjibarna Baba Maaja Aboriginal Corporation (NT)
- Yilli Rreung Regional Council (NT)
- Yirra Bandoo Aboriginal Corporation (NT)

The project officer met with people from Indigenous organisations such as Link Ups, Aboriginal health and legal services, and elected officers of ATSIC between March and June 2001:

- Aboriginal Legal Rights Movement, Adelaide
- Aboriginal Legal Service Western Australia, Perth
- ATSIC Commissioner for Brisbane and senior staff, Brisbane
- ATSIC Commissioner for Hobart and senior staff, Hobart
- ATSIC policy staff in Canberra, Sydney and Melbourne
- Binaal Billa Regional ATSIC Council Chairperson
- Central Australian Aboriginal Legal Service, Alice Springs
- Health and Well Being program, National Aboriginal Controlled Community Health Organisations and the Aboriginal Health and Medical Research Council, Canberra and Sydney

- Kimberley Stolen Generations Corporation
- Link Up at Derbarl Yerrigan Health Service, Perth
- Link Up at Nunkuwarrin Yunti, Adelaide
- Link Up, Queensland, Brisbane
- Link Up, New South Wales
- Muramali Program, Winangali
- National Council of Churches in Australia, Sydney
- Northern Aboriginal Legal Service, Darwin
- Queensland Aboriginal and Islander Legal Services Secretariat and National Aboriginal and Islander Legal Services Secretariat, Brisbane
- Victorian Aboriginal Legal Service, Melbourne

The main themes in the submissions are set out in Appendix 2.

Interim report and conference

An *Interim report* summarising responses to the issues paper and proposing draft recommendations was prepared for a national *Moving forward* conference in Sydney in August 2001. The national conference was held at the University of New South Wales in Sydney. It was organised by HREOC, ATSIC and PIAC. Over 250 people attended the conference including members of the stolen generations, government officers, academics, students and general community.

Speakers at the conference included members of the stolen generations; international speakers from Canada, USA, New Zealand and South Africa; representatives from the major political parties; the National Council of Churches; Reconciliation Australia; ATSIC; the National Sorry Day Committee; HREOC and PIAC.[9] Workshops at the conference allowed for discussion of the tribunal proposal set out in the *Interim report*. The conference recommendations are set out in Appendix 3.

The *Interim report* was also presented at the Stolen Generations Healing Summit coinciding with the Yeperenye Dreaming Festival in Alice Springs in September 2001. The Summit was organised by the Central Australian Stolen Generations and their Families Corporation.

Federal, state and territory governments, the Federal Australian Labor Party and the Australian Democrats were invited to respond to the *Issues paper* and the *Interim report*.

About PIAC

PIAC is a Sydney-based community legal and policy centre. It provides legal advice and representation, public policy programs and advocacy training to promote the rights of disadvantaged people. It uses test case litigation and policy reforms to address unjust or unsafe laws and practices. PIAC's work with Indigenous peoples affected by forcible removal policies is part of its commitment to human rights and reconciliation.

In 1996 PIAC and the Public Interest Law Clearing House in New South Wales (PILCH) co-ordinated legal advice and assistance to Indigenous peoples making submissions to the National Inquiry. After the release of the *Bringing them home* report in 1997 PIAC and PILCH assessed over 50 claims by members of the stolen generations. In 1998-99 PIAC provided legal representation for some members of the stolen generations who took legal action against the NSW Government in the NSW Supreme Court (the claims have since been

withdrawn). PIAC has also represented members of the stolen generations making claims in the NSW Victims Compensation Tribunal for crimes against them while state wards.

PIAC was guided in its policy work on stolen generations issues by a reference group established in 1999. Reference group members included people from the National Sorry Day Committee, ATSIC, Link Up NSW, the Council on Aboriginal Reconciliation, Indigenous people who worked on the National Inquiry, academics and a representative of the NSW Legal Aid Commission.

Notes

1 Haebich, Anna, 2001, Between knowing and not knowing, public knowledge of the Stolen Generations, paper presented to the second National Stolen Generations conference, Healing the Pain, March 2001, at p 1.
2 Human Rights and Equal Opportunity Commission, 1997, *Bringing them home*, report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Commonwealth of Australia.
3 Senate Legal and Constitutional References Committee, 2000, *Healing: a legacy of generations*, report of the Inquiry into the Stolen Generations.
4 Clarke, Jennifer, 2001, *Cubillo v Commonwealth, Case Note*, Melbourne University Law Review, 25/1 (2001) 218 at p 221.
5 Read, Peter, 1982, *The Stolen Generations: The Removal of Aboriginal Children in NSW 1883 to 1969*, (NSW Ministry of Aboriginal Affairs, Occasional paper no. 1).
6 *Bringing them home,* Terms of Reference, at p 5.
7 *Bringing them home,* at p 5.
8 The report of the UN mission during 2001 is discussed in chapter 4 below.
9 Human Rights and Equal Opportunity Commission, 2001, *Moving forward: achieving reparations for the stolen generations*, conference papers, available at www.humanrights.gov.au/movingforward/speeches.html

Chapter 2 - Defining reparations

Removal practices

Forcible removal policies were part of a package of racist laws and policies that left Indigenous peoples, particularly Indigenous women, with little control over their lives.[1] The laws included prohibitions on mixed race relationships or a requirement for official permission for mixed race marriages. Legal guardianship of Aboriginal children was often placed with the state, rather than with Aboriginal mothers. Unpaid or underpaid Aboriginal labour and official appropriation of wages were sanctioned. Aboriginal people were required to have permits to leave reserves and visit towns and special controls were imposed on the supply and consumption of drugs and alcohol.[2]

This occurred in the context of violent conflicts over land, food and water. Children were removed from their families for reasons of education and to be exploited for their labour. At different periods of time and in different parts of Australia a variety of policies applied. Segregation and 'protection', which involved moving Indigenous peoples to reserved lands under the management of government or missionaries, were adopted in the 19th century. The exception to this protectionist trend was Tasmania, where most Indigenous families had been removed to Cape Barren Island by the turn of the 19th century. Until the late 1960s Tasmanian Governments insisted that Tasmania did not have an Aboriginal population.[3]

By the mid 19th century the decline of the Indigenous population had been so great that its very survival was in doubt. 'Merging' and 'absorption' were then favoured – removing children of mixed race from Indigenous families so that over time they would 'merge' with the non-Indigenous population. Following the first Commonwealth-State Native Welfare Conference in 1937, state governments began adopting policies designed to assimilate Indigenous peoples of mixed descent. Assimilation was an active and intense policy of intervention, in contrast to the more passive process of 'merging'.[4]

From the 1940s and 1950s general child welfare laws, rather than race specific laws, were increasingly used to remove Indigenous children. Under welfare laws the children had to be found to be 'neglected, 'destitute' or 'uncontrollable'. *Bringing them home* states that these terms were applied by courts and welfare officers much more readily to Indigenous children. Also, greater scrutiny of Indigenous peoples' lives by government meant that 'any deviation from the acceptable non-Indigenous 'norm' came to the notice of the authorities immediately.'[5]

Indigenous children could be removed under an explicitly racist law or under a law with apparently general application, but they were subject to the same administration – Aboriginal welfare boards.[6] 'During the 1950s and 1960s greater numbers of Indigenous children were removed from their families to advance the cause of assimilation. As institutions could no longer cope with the numbers of children being removed, welfare practice encouraged placement of those children with non-Indigenous foster families 'where their identity was denied or disparaged'.[7]

The laws and practices were examined by the National Inquiry conducted by HREOC in 1995-96. While this was not the first time these policies had been publicly aired, the racism underlying the policies and the tragic human consequences had never before been provided in such detail.[8]

The Federal Government has argued that the lower number of Indigenous children removed under race specific laws in the 1940s and 1950s in the Northern Territory is evidence that

there were no race-based forcible removal policies at the time. In the *Cubillo* case Justice O'Loughlin concluded from this evidence that there was no 'blanket' policy of removal of 'part-Aboriginal' children in the 1940s and 1950s in the Northern Territory.[9] This analysis takes no account of the increasing numbers of 'part-Aboriginal' children in the care of the state for 'ordinary welfare reasons'. In 1957 in the Northern Territory 'part-Aboriginal' children made up a majority of children in the care of the state.[10]

Churches and religious bodies were heavily involved in the care of separated Indigenous children, and in some early cases missionaries removed children without the consent of parents. They share some responsibility for forcible removals because of their involvement in providing accommodation, education, training and work placements for children.[11]

Despite changes in policies and practices since 1970, Indigenous children continue to be over-represented in the child welfare and juvenile justice systems. The National Inquiry found that pervading paternalism in the welfare system plays a large part in the high proportion of Aboriginal child separations today. Most are removed on the basis of 'neglect' rather than 'abuse'. HREOC also acknowledged underlying social disadvantage as a major obstacle to changing the fortunes of Indigenous children.[12]

How many?

The number and proportion of Aboriginal children removed from their families under the forcible removal policies is not known. The *Bringing them home* report estimated that 'between one in three and one in ten Indigenous children were forcibly removed from their families or communities' from 1910 to 1970.[13] Research since the National Inquiry has found that HREOC misread some of the statistics available to it.

The estimate that one in ten children were removed is now commonly regarded as more sound – still a significant proportion of children from any community.[14] This estimate is partly based on a 1994 survey by the Australian Bureau of Statistics of Indigenous peoples aged 25 years and above.[15] The survey suggests that approximately 17,000 Indigenous children had been removed from their families up to 1994. Of those removals 4,500 occurred after 1970. Commenting on this survey, historian Robert Manne concludes:

> It is not easy to estimate how many Aborigines born after 1900 had died by 1994. Extrapolating from this figure on the basis of Aboriginal life expectancy makes it seem probable that between 20,000 to 25,000 Aboriginal children were separated from their families between 1910 and 1970.[16]

The Federal Government has claimed that *Bringing them home* misled the Australian public and that the stolen generations have exaggerated their plight.[17] It disputes the use of the term 'stolen generations' claiming that the magnitude of the policies had been exaggerated – so there was no 'generation' – and there was no systematic use of force to justify the term 'stolen'.[18] In February 2001 the Prime Minister, Mr Howard, characterised the Lowitja O'Donoghue story as a 'highly significant' fact, implying that it vindicated the Government's denial of the existence of the stolen generations.[19] The Federal Government has also claimed vindication of its claims following the Federal Court decision in the *Cubillo* case. The Federal Court has been at pains to distance itself from the social and political issues, stating that its findings are not a decision about the existence of a stolen generation.[20]

Whatever the estimated numbers, no generalisations can be made about the nature of the removals. There were a diversity of policies and reasons for removals at different times and the Aboriginal populations in each region differed widely. The way the children were treated

once removed also differed from one region to another and at different times.[21] The number of people affected by the policies must also take into account the impact on families when children were forcibly taken from them.

Effects of removals

During the National Inquiry HREOC undertook an extensive program of hearings in every capital city and many regional and smaller towns. It took public evidence from Indigenous people and organisations, government officials, church representatives, non-government agencies and former mission employees. This included evidence from 535 Indigenous people concerning their experiences of removal policies.

The report of the National Inquiry, *Bringing them home,* was tabled in the Federal Parliament in 1997. It presented hundreds of stories of Indigenous people who had given evidence to the Inquiry. Grief and loss are the predominant themes of the report. It emphasises that the 'past is very much with us today, in the continuing devastation of the lives of Indigenous Australians.'[22] It describes the effect of removal from family and culture and in some cases, physical, psychological and sexual abuse. In some cases sexual abuse was pervasive and punishments were severe, leading to deep physical, spiritual and psychological harm.

Bringing them home describes trauma, loneliness and dislocation experienced by those removed and by their families. In many instances the children were brought up in conditions of chronic neglect, with poor levels of education and where Aboriginal languages and cultures were actively suppressed.

Bringing them home identified the effects of the removals on the children of people who had been removed. The lack of experience of home life meant that many of those who had been removed lacked basic parenting skills. The children often grew up caring for traumatised parents with unresolved grief and depression. They had a high risk of suffering mental illness themselves.[23]

The families who were left behind often suffered devastating emotional trauma. They were left to carry responsibility for cultural practices and learning and have had to find ways to welcome those removed back into the community.[24]

Racism and genocide

HREOC found that forcible removal policies and practices were both a breach of the international prohibition on racial discrimination and a breach of the prohibition of genocide. The finding on racial discrimination was based on the view that the practices involved racial discrimination of such magnitude and on such a scale that it amounted to a 'gross violation of human rights'.[25] The finding that the policies were a breach of the prohibition of genocide in international law was on the basis that the practices were 'acts done with intent to destroy a racial group in whole or in part by the forcible transfer of members of one group to another group'.[26]

Historians and the courts have since challenged HREOC's finding on genocide, particularly for the period after World War II. With the benefit of further research historians have concluded that there is a distinction between pre-war 'absorption' policies, based on eugenics, and post-war assimilation policies, based on racism and paternalism. While the former may have been genocidal, the latter is regarded as designed for the benefit of Indigenous peoples, not the destruction of the racial group.[27]

The Australian courts have made a similar distinction. In *Kruger v Commonwealth of Australia* the High Court ruled that the *Northern Territory Aboriginals Ordinance* 1918 was a 'beneficial'

law, authorising 'non-punitive' detention, not a law intended to destroy a race - not genocide.[28] The decision left open the question of whether practices and policies under the law, as distinct from the law itself, amounted to genocide.[29]

In *Cubillo v Commonwealth* Justice O'Loughlin also distinguished between pre-war and post-war policies. Although not ruling out eugenicist thinking in pre-war policies, Justice O'Loughlin found that any such tendencies were overtaken by assimilation policies. He found that a 1939 policy that directed the removal of all illegitimate children of white fathers from their Aboriginal mothers was a beneficial law. These children were removed for separate education, mainly to prepare them for domestic or pastoral work.

Justice O'Loughlin concluded that assimilation, as promoted from the early 20th century, was in the child's best interests. He found no evidence of attempts to 'breed out colour' or to ensure a supply of domestic servants and manual labourers after World War II. He found that destruction of family and cultural associations may have been a consequence of post-war policy but that was not its purpose.[30] Justice O'Loughlin concluded that there was insufficient evidence to support the claim that the Federal Government's post-war removal policy in the Northern Territory was 'blanket' and eugenicist.[31]

The discussions about whether post-war removal policies amounted to genocide do not in any way challenge HREOC's finding that the policies were racial discrimination of such magnitude as to amount to a gross violation of human rights. The removal of ten per cent of Indigenous children, primarily based on race, was both substantial and discriminatory. The cruelty and injustice so often associated with the removals and subsequent care, and the effect on the families left behind, cannot be denied.

The *Moving forward* meetings and submissions to the project made it clear that Indigenous peoples believe that acknowledgement of the inherent racism in forcible removal policies is fundamental to reparations and reconciliation. Some people expressed the view that the practices, if not the formal policies, had a genocidal intent.

Defining reparations

To address the harm of forcible removals HREOC developed a package of remedial measures called 'reparations'. These are based on human rights principles accepted by the international community to address gross violations of human rights. The principles, generally known as the van Boven principles, recognise the right to redress for victims of gross violations of human rights.[32]

HREOC recommended a package of reparations consisting of:

- **acknowledgment and apology** by state, territory and federal parliaments, and by state and territory police forces and churches
- **guarantees against repetition** by way of community education, legislation for national Indigenous Child Placement Principles, and incorporation of the UN Genocide Convention into Australian law
- **measures of restitution** through language and culture centres, family tracing and reunion services, and protection of records
- **measures of rehabilitation** involving counselling services and steps towards giving Indigenous communities responsibility for the welfare of their children
- **monetary compensation** to people directly affected by forcible removals.[33]

HREOC made over 50 recommendations for action by governments, churches and the community. The first recommendation was for further recording of testimony by Indigenous people who had experienced forcible removals.[34]

A large number of recommendations dealt with management of family records held by governments and churches and processes to make them accessible to people who were affected by forcible removal policies. HREOC recommended the indexing and archiving of records, joint records taskforces to co-ordinate interstate and church records and minimum access standards. It favoured a 'first stop shop' for all records held by government and church agencies so that Indigenous applicants would not need to apply to each separately held collection. HREOC recommended training and employment of Indigenous peoples as archivists, historians and genealogists.[35] It also recommended enhancement of family reunion and tracing services nationally.[36]

HREOC recommended a one-off lump sum payment of compensation to all those who were removed. It also recommended compensation for people affected by the policies who could prove types of harm recognised under Australian law, such as labour exploitation, physical and sexual abuse, loss of culture and loss of land rights.[37]

HREOC found that significantly higher rates of Indigenous children continue to be separated from their families today. It reviewed child welfare practices and juvenile justice laws as they affect Indigenous young people. It concluded that this is the result of a number of factors, including pervading paternalism and indirect racism in child welfare services. To address the problem, HREOC recommended a complete overhaul of child welfare services. It acknowledged that the welfare of Indigenous children is inextricably linked to the well-being of the Indigenous community and its ability to control its destiny.[38]

A social justice package for Indigenous families and children was recommended, to be developed by governments in partnership with ATSIC and other Indigenous groups.[39] At the heart of these recommendations was the need for Indigenous peoples to have self-determination in the areas of child welfare and juvenile justice.

Responses to *Bringing them home*

The *Bringing them home* report had a profound effect on the general public, unlike any inquiry in recent Australian history. Its findings were accepted without question, at least in the short-term. Within days of the report being tabled in Federal Parliament in May 1997, the Leader of the Opposition, Mr Kim Beazley, read extracts and wept openly in the House of Representatives.[40]

The general public embraced HREOC's recommendations for apology and acknowledgement. In 1998 over half a million people responded by signing 'Sorry Books' and thousands took part in ceremonies on National Sorry Day, 26 May 1998. A 'Journey of Healing' was commenced in 1999 and hundreds of events have taken place across the country since then.[41] According to former Prime Minister, Malcolm Fraser, the Journey of Healing 'offers practical ways in which everyone can help to shape a better future for us all'. In 2001 the Journey of Healing focused on the families and communities left behind when children were removed, with many healing ceremonies for communities in rural areas. In 2002 the focus is on two themes – making known the effect of removal on rural and remote regions and helping to build understanding of the effect of removal on the children of those removed.[42]

The Federal Government refused to make an apology. It said '… we do not believe that our generation should be asked to accept responsibility of earlier generations, sanctioned by the law of the times…'.[43] HREOC and ATSIC believe responsibility for the policies is continuous through the institution of government.[44] The Prime Minister's claims that a formal apology would have legal implications[45] has been challenged by legal commentators and dismissed as irrelevant by the Federal Court.[46]

The Federal Government's formal response to *Bringing them home* in 1997 was a package of $63 million for 'practical assistance' measures. It included:

- training of Indigenous counsellors
- new counsellor positions
- parenting support programs
- family reunion services to extend the network of Link Up services nationally
- language and culture programs (from existing ATSIC funds)
- copying and preserving files held by the Australian Archives
- an oral history project by the National Library of Australia.

All state and territory parliaments formally acknowledged and apologised for past forcible removal policies. Apology and acknowledgement ceremonies by state governments and the ACT Government between 1997 and 1999 incorporated speeches by representatives of the stolen generations who were invited to address state parliaments. Their speeches and those of political leaders in reply were heartfelt and moving.[47]

The Prime Minister's position is in contrast to the approach taken by the Houses of the NSW Parliament in June 1997, at a time when the NSW Government was the subject of legal claims by members of the stolen generations.[48] The motion passed by both Houses read as follows:

> This House on behalf of the people of New South Wales -
> - Apologises unreservedly to the Aboriginal people of Australia for the systematic separation of generations of Aboriginal children from their parents, families and communities;
> - Acknowledges and regrets Parliament's role in enacting laws and endorsing policies of successive governments whereby profound grief and loss have been inflicted upon Aboriginal Australians… [49]

The Northern Territory Parliament conducted a ceremony of acknowledgement and apology on 24 October 2001 at it's first sitting following the election of the Australian Labor Party to government.

State and territory government responses focus on similar measures, but the level and type of programs vary. The main initiatives are:

- indexing and archiving of records
- programs for access to records
- oral history programs
- funding for family reunion and family tracing services
- school education and cultural awareness training for professionals working with Indigenous families
- adoption of the Indigenous Child Placement Principle in child welfare and adoption policies and guidelines.[50]

The churches were responsible for providing accommodation, education and work placements for children and have continuing responsibility for records of children who were in their care. The role of the churches in the child separation policies has been acknowledged and apologies have been offered. All the major denominational churches in Australia at national, state and local level have offered apologies in diverse ways. Measures taken by the churches include improving access to records and providing land and premises used as former homes. Some churches have offered to contribute to a national compensation fund if it were to be established by the Federal Government.[51]

Notes

1 Haebich, Anna, 2000, *Broken Circles, fragmenting Indigenous families,* Fremantle Arts Centre Press, documents the destruction of Aboriginal families through the forced removal of children from 1800 to 2000.
2 Haebich, as above, ch 5 and 6; Clarke, already cited, at pp 223-224; *Bringing them home*, pp 25 - 150.
3 *Bringing them home*, pp 25 - 150, esp at p 29.
4 as above, pp 25 – 150, esp at p 27–33.
5 as above, pp 25 – 150, esp at p 33 - 35.
6 as above, 25 - 150; Clarke, already cited, pp 245 – 246 discusses the administration of the laws in the Northern Territory in more detail.
7 *Bringing them home*, pp 25 - 150, esp at p 34.
8 Previous inquiries and public debates are referred to in *Bringing them home*, already cited; also see Anna Haebich, 'Between knowing and not knowing, public knowledge of the Stolen Generations', already cited.
9 Clarke, already cited pp 253 - 255, citing *Cubillo v Commonwealth* (2000) 174 ALR 97, at 203.
10 as above, at pp 221-222, referring to Barbara Cummings, *Take this child ... from Khalin Compound to Retta Dixon Children's Home* (1990) at 113.
11 *Bringing them home,* pp 1 - 24.
12 as above, pp 423-459, 489 and pp 539 - 540.
13 as above, pp 25 - 150.
14 Manne, Robert, 2001, *In Denial: the stolen generations and the right*, UNSW Press, pp 24 - 28.
15 Australian Bureau of Statistics, *National Aboriginal and Torres Strait Islander Survey 1994: Detailed Findings,* ABS catalogue no. 4190.0 at page 7; *Bringing them home,* pp 36 - 37.
16 Manne, already cited, p 27.
17 Submission of the Federal Government to the Senate Inquiry into the Stolen Generations, submission no. 36, Senator Herron, Minister for Aboriginal and Torres Strait Islander Affairs.
18 as above.
19 Manne, already cited, p 2 - 3.
20 *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97 at 115; *Cubillo v Commonwealth of Australia* and *Gunner v Commonwealth of Australia* (2001) 183 ALR 249 at 254.
21 Manne, already cited, p 27 - 28; *Bringing them home*, pp 36 - 37 and ch 10 and 11.
22 *Bringing them home,* p 3.
23 as above, pp 222 - 232.
24 as above, pp 212 - 221; *Healing: a legacy of generations,* pp 83 - 91; discussed at the *Moving forward* meetings and meetings of the *Moving forward* project manager with ATSIC officials in Hobart, Melbourne and Sydney.
25 as above, pp 268 - 269.
26 as above, pp 266 - 277; on genocide specifically pp 270 - 275; Aboriginal and Torres Strait Islander Social Justice Commissioner – HREOC, April 2000, submission 93A, Senate Inquiry into the Stolen Generations, pp 40 - 53.
27 Manne, already cited, pp 366 – 41; Tatz, Colin, 1999, *Genocide in Australia*, Australian Institute of Aboriginal and Torres Strait Islanders Studies Research Section Occasional Paper.
28 *Kruger v Commonwealth* (1997) 190 CLR 1, Dawson J at 70, Toohey J at 88, Gaudron J at 107, McHugh at 144 and Gummow at 158; discussed in Jennifer Clarke, as above, at 219 and 222.
29 Storey, Matthew, 1997, *Kruger v Commonwealth: Does genocide require malice?,* University of NSW Law Journal, 4/3 1997; *Kruger v Commonwealth* (1997) 190 CLR 1 (also discussed in ch 7 below).
30 Clarke, already cited, pp 254 - 255; *Cubillo v Commonwealth* (2000) 174 ALR 97.
31 Clarke, as above, pp 226.

32 *Bringing them home*, pp 277 - 283 (esp p 280) and Appendix 8, which sets out the draft van Boven principles; the principles have been reviewed since 1997, but the underlying standards have not changed.
33 The components of reparations are discussed in *Bringing them home*, pp 282.
34 *Bringing them home*, recommendation 1, p 22.
35 as above, recommendations 21 - 28 and 38 - 39.
36 as above, recommendation 30.
37 as above, recommendations 14 - 20, pp 302 - 313.
38 as above, pp 458 - 459.
39 as above, pp 489 - 541 (conclusions discussed p 540); ch 25 and recommendation 42, p 558.
40 Manne, already cited, pp 5 and 28.
41 www.journeyofhealing.com
42 www.journeyofhealing.com
43 Federal Government's response to *Bringing them home*, Minister for Aboriginal and Torres Strait Islander Affairs, Senator Herron, 1997, cited in Aboriginal and Torres Strait Islander Commissioner, *Social Justice Annual Report 1998*, HREOC, 1999, p 63.
44 HREOC submission to Senate Inquiry quoted in *Healing: a legacy of generations*, p 112; ATSIC quoted in transcript of evidence to Senate Inquiry, p 11, cited in *Healing: a legacy of generations*, p 112 - 113.
45 Transcripts of various media interviews cited in *Healing: a legacy of generations* at 113.
46 *Cubillo v Commonwealth* (2000) 174 ALR 97, 134-6 and 573 respectively; discussed in Clarke, already cited, pp 250 and 282. Justice O'Loughlin said it is inappropriate for the courts to refer to statements made in the Parliament in reaching a decision on liability. On the other hand, the lack of an acknowledgement and apology from the Government was a factor expressly taken into account when assessing damages.
47 The apology processes and extracts of statements are set out in *Healing: a legacy of generations*, ch 4; full statements can be found at www.journeyofhealing.com
48 *Williams v The Minister, the Aboriginal Land Rights Act 1983* [1999] NSWSC 843 (26 August 1999); on appeal *Williams v The Minister, the Aboriginal Land Rights Act 1983* [2000] NSWCA 255 (12 September 2000).
49 *Healing: a legacy of generations*, pp 129-130; the motion was passed on 18 June 1997.
50 as above, pp 51, 61, ch 3, 6 and 7.
51 as above, pp 4, 138 - 140, and 166. Also see *Continuing the journey*, report of the National Council of Churches Australia National Forum, July 2001.

Chapter 3 – PIAC's tribunal proposal

The original proposal

PIAC proposed a reparations tribunal in response to its experience of providing legal advice and assistance to the stolen generations during the National Inquiry. It identified that most of the stolen generations would face major obstacles to successful litigation. They lack adequate evidence as documents have been lost or destroyed and witnesses' memories are unreliable after such a long period of time. Statutory limitation periods would bar most claims – limitations prevent claims after a set period of time had elapsed since the event that caused the harm (usually three years). The adversarial nature of court proceedings would also be potentially harmful because of the psychological and emotional harm applicants have already suffered. Having to relive past experiences under cross-examination would be traumatic and potentially harmful.[1]

In developing an initial proposal for NSW, PIAC consulted with people from Link Up (NSW), the State Reconciliation Council, the NSW Attorney General's Aboriginal Justice Advisory Council, ATSIC, HREOC, Aboriginal legal services and Aboriginal medical services. The proposal met with widespread support and by mid -1999 PIAC had revised its proposal, recommending a national tribunal.

The aim of the proposal was to provide a preferable alternative to litigation and to comprehensively address inadequacies in government and church responses to *Bringing them home*. It would offer a forum for Indigenous peoples to have their stories heard and provide reparations packages to suit people's needs. The tribunal would also have a role in monitoring and making recommendations about government and church policies and Indigenous child welfare programs.

The tribunal was designed with reference to the reparations measures adopted in Canada, South Africa and New Zealand (discussed in chapter 6) and aspects of the recommendations for reparations in *Bringing them home*.

The proposal envisaged that the tribunal would be a partnership between governments, churches, Indigenous organisations and the stolen generations community, but independent of all of them. Tribunal members would be a mix of Indigenous and non-Indigenous people with appropriate cultural awareness and experience in adjudication. They would be appointed by the project partners on the basis that they had appropriate skills and expertise.

The tribunal proposal was based on the premise that governments should stop defending legal claims by the stolen generations and agree to provide full reparations, including compensation. The Leader of the Federal Australian Labor Party, Mr Kim Beazley, supported this position in 1999. He called on the Federal Government to stop defending the legal claims and to 'provide justice and restitution to members of the stolen generations'.[2]

PIAC proposed that the tribunal be created as a national co-operative scheme with funding from state and federal governments and the churches involved in administering forcible removals policies. It favoured a tribunal created by statutes passed by federal and state governments. PIAC argued that a legislative basis for the tribunal would have a number of advantages:

- it would be an expression of the will of parliaments, as the people's representatives
- it would provide a more secure basis for the tribunal's operations

- it could provide the tribunal with appropriate powers to carry out its role effectively and
- it could provide that people who had been awarded compensation by the tribunal were not able to make further claims through the courts.

The proposal did not require any admission of legal liability by governments and churches. An acknowledgement of the nature of forcible removal policies and the harm done would provide the basis for providing reparations. The tribunal would only need to consider whether a person is entitled to reparations, including compensation. This would simply require proof of Indigenous identity and facts about the circumstances of removal and events following the removal.

There are many schemes that provide for people to receive monetary compensation where they have suffered a loss, regardless of whether someone has admitted fault or been found liable. Statutory compensation schemes for victims of crime, motor vehicle accidents and workplace injuries are the better known schemes. There are also smaller scale schemes established under out-of-court settlements where a group of people have made a claim, such as in class actions. Typically the defendant agrees to pay compensation, but does not admit to legal liability and a fund is established to distribute the compensation to the class of people affected by the claim.

PIAC proposed a wide range of functions for the tribunal:
- collect information about forcible removals and provide a central repository and point of access for family records
- hear from Indigenous (and possibly non-Indigenous) people with direct experience of forcible removal policies and their effects
- respond to applications for reparations from people directly affected by forcible removals, providing a range of reparations measures, including compensation in some circumstances
- devise programs of its own, such as memorials or community development programs
- make recommendations about current government practices and programs.[3]

PIAC recommended that the tribunal would require these functions to achieve the range of reparations measures that might be identified by applicants.

Support for the tribunal

The *Moving forward* project found Indigenous peoples, including the stolen generations, strongly support the reparations tribunal proposal, with some refinements. The all-encompassing functions were not favoured. Instead there was support for a tribunal with a focus on hearings, programs to provide restitution of culture and identity, and prevention of recurrence. People emphasised the desire for group needs to be met rather than just providing for individuals. People also wanted the tribunal to have a flexible structure so that their diverse needs are accommodated. The responses are detailed in chapters 4, 5 and 8.

PIAC's proposal for a national reparations tribunal was detailed in a submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generations in 2000.[4] The National Sorry Day Committee presented a similar proposal for a Healing Commission. The Australian Democrats and Australian Labor Party members of the Senate Committee supported the tribunal proposal. They recommended a reparations tribunal to address the need for an effective process of reparation, including the provision of monetary compensation. PIAC's model was endorsed as a 'general template' for such a tribunal.[5]

In May 2001 the Federal Australian Labor Party made a commitment to actively seek an alternative to litigation. It undertook to convene a conference of state and federal governments, the churches and the stolen generations to 'examine alternative methods for dealing with the effects of forcible removal policies.' Federal Labor seeks a model that avoids the costs and pain of the courts without apportioning blame or guilt.[6] The NSW Labor Government, however, has defended legal claims by members of the stolen generations.

The Australian Democrats have actively advocated for a reparations tribunal to provide full and just reparations, including monetary compensation.[7] In a minority report to the Senate Committee, Senator Aden Ridgeway presented a detailed proposal and arguments favouring a tribunal and justifying payment of compensation.[8]

The Federal Government rejected the proposed tribunal on a number of grounds. Firstly, it did not support payment of monetary compensation to individuals. Secondly, it believed the tribunal 'with the comprehensive jurisdiction and extensive powers suggested would not guarantee a less stressful consideration of matters or be less expensive than court proceedings'.[9] In its submission to the Senate Committee the Federal Government dismissed claims for payment of compensation to the stolen generations. It claimed that compensation would cost $3.9 billion - four times the annual budget for ATSIC. This estimate is based on payment of $100,000 in compensation to nearly 40,000 people.[10]

In August 2001 the Minister for Immigration and Multicultural Affairs, Mr Ruddock, presented a series of obstacles to the tribunal proposal at the *Moving forward* conference. These included the cost of finding documentary evidence, the administrative costs of a tribunal, the estimated $3.9 billion cost of compensation and difficulties in deciding how much each state government and church would be required to pay. The comments assume that the tribunal would require every applicant for reparations to prove details of their removal and the harm that followed. It ignores the starting point for PIAC's model - an acceptance by government and churches of the nature of forcible removal policies and the harm caused. The Federal Government's response is in contrast to schemes established by the Canadian, South African and New Zealand Governments, discussed in chapter 6.

State government responses to the tribunal proposal have varied. Most indicated interest in the proposal after receiving the *Interim report* in August 2001. State government officials attending the *Moving forward* conference took away the strong message that the success of reparations programs depends on active engagement with the stolen generations. The Governments of Queensland, Victoria and Western Australia offer models for many aspects of successful reparations (discussed in chapters 4 and 5).

The Senate Committee recommended that individual monetary compensation be paid through a reparations tribunal, using PIAC's model as a template.[11] However, no Australian government has agreed to pay compensation. The Federal Government has said that individual monetary compensation is not appropriate. On the other hand it claims that compensation has effectively been provided through the 'practical assistance' package. State governments have refused to pay compensation on the basis that it is not appropriate or that it is a matter for the Federal Government.[12] A number of the major denominational churches have indicated a preparedness to contribute to a national compensation fund if the Federal Government were to establish one, as recommended in *Bringing them home*.[13]

The reparations tribunal proposal is supported by ATSIC, Australians for Native Title and Reconciliation, the Australian Council for Social Services, the National Sorry Day Committee

and HREOC.[14] The National Council of Churches in Australia has indicated that reconciliation requires a church response to the proposed tribunal. It supports an effective alternative to litigation.[15] Reconciliation Australia also supports an alternative to litigation that will advance the journey of healing for those people directly affected.[16] Both organisations will consider the final PIAC tribunal proposal in light of feedback from their constituencies.

Notes

1 The limitations of litigation are detailed in PIAC's submission to the Senate Inquiry into the Stolen Generations, chapter 4, available at www.piac.asn.au and reproduced in Australian Indigenous Law Reporter (2000) 5(4) at 107.
2 Mr Kim Beazley MP, House of Representatives, *Hansard,* 26 August 1999 page 9209; *Healing: a legacy of generations*, p 117.
3 PIAC, 2000, Submission to Senate Inquiry into the Stolen Generations; PIAC, March 2001, *Moving forward: achieving reparations*, Issues paper.
4 PIAC submission, already cited.
5 *Healing: a legacy of generations*, recommendations 7 and 8.
6 Labor's policy was released on 26 May 2001; detailed by Mr Bob McMullan, Shadow Minister for Aboriginal Affairs and Torres Strait Islander Affairs, Reconciliation and the Arts, address to *Moving forward* conference, HREOC, 2001, conference papers, already cited.
7 Senator Aden Ridgeway, address to the *Moving forward* conference, already cited.
8 *Healing: a legacy of generations*, already cited, Minority Report by the Australian Democrats.
9 Federal Government Response to the report of the Senate Inquiry into the Stolen Generations, June 2001, *Hansard,* Senate, Senator Ian Campbell, 27 June 2001.
10 Senator Herron, Minister for Aboriginal Affairs and Torres Strait Islander Affairs, 2000, Federal Government submission to the Senate Inquiry into the Stolen Generations, submission 36.
11 *Healing: a legacy of generations*, recommendation 7.
12 *Healing: a legacy of generations*, pp 229 - 237 and Senator Campbell, Federal Government Response to the report of the Senate Inquiry into the Stolen Generation, already cited.
13 *Healing: a legacy of generations*, pp 259 - 260; *Bringing them home*, recommendations 14 - 20.
14 See for example, ACOSS submission to the Senate Inquiry into the Stolen Generations 2000, submission 55 and 55A; ACOSS, Pre-Budget submission 2002; ATSIC Social Justice Commissioner, Brian Butler and Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC, William Jonas addresses to the *Moving forward* conference, *Moving forward* conference papers, already cited.
15 The Rev David Gill, Secretary General, National Council of Churches of Australia, *Moving forward* conference papers, already cited.
16 Ms Shelley Reys, co-chair, Reconciliation Australia, *Moving forward* conference papers, already cited.

PART 2 – UNFINISHED BUSINESS

Governments and churches responded to *Bringing them home* with programs that focussed on areas of undisputed priority – access to personal and family records, family tracing and reunion and support for the emotional wellbeing of people affected by forcible removal policies. The following chapters discuss how implementation of some of these programs has been hampered by governments being unprepared to listen to the stolen generations views about how to meet their needs.

The failure of governments to meet the needs of the stolen generations has come to be known as part of the 'unfinished business' of reconciliation, a reference to the work of the Council on Aboriginal Reconciliation during the 1990s.[1] Chapter 4 discusses Indigenous self governance and the importance of recognising the discrete identity and needs of the stolen generations. Chapter 5 reviews difficulties encountered with government programs providing counselling services, family reunion services and access to family records where that identity is not acknowledged. It also sets out the areas where governments and churches have failed to address the *Bringing them home* recommendations.

Chapter 6 reviews reparations programs in Canada, South Africa and New Zealand, providing useful lessons and comparisons for Australia.

Chapter 4 – Acknowledging history and people

Acknowledging history

The Federal Government's refusal to acknowledge the nature and extent of forcible removal policies and to offer an apology remains a major cause of disappointment for Indigenous peoples and supporters of reconciliation.

A Motion of Reconciliation moved by the Prime Minister in the House of Representatives in August 1999 did not mention forcible removal policies. The motion acknowledged in part that the 'mistreatment of many Indigenous Australians … represents the most blemished chapter in our international history'. It expressed 'deep and sincere regret' that Indigenous Australians suffered injustices under the past generations…'.[2]

While most people accept that an apology at this stage is unlikely to be credible, the ongoing denial of the scope and effects of the policies is a significant barrier to reconciliation. Acknowledging history is the starting point for reconciliation of a racist past. Dumisa Ntsebeza, a former Commissioner with the South African Truth and Reconciliation Commission, told the *Moving forward*: *achieving reparations* conference, that a racist past is 'like toxic waste'. 'It cannot simply be buried and forgotten. It will resurface when least expected', warned Mr Ntsebeza.[3]

The Australian Government's approach is in contrast to the approaches of the governments of Canada and New Zealand. The Canadian Government's Statement of Reconciliation in 1998 included a full and frank acknowledgement of past child removal policies, the harmful effects and the communal and individual pain caused. It expressed 'profound regret for past actions of the federal government which have contributed to

these difficult pages in the history of our relationship together'. It specifically referred to the residential school system targeting Aboriginal people. It said the system 'separated many children from their families and communities and prevented them speaking their own languages and from learning about their heritage and cultures.'[4] It specifically acknowledged and apologised for child sexual abuse.

The New Zealand Crown offered an apology in 1995 that included an expression of 'unreserved apology' and 'profound regret' for the loss of lives and devastation of property and social life that resulted from hostilities. It sought to atone for the acknowledged injustices and to 'begin the process of healing and to enter into a new age of co-operation.'[5]

The dissatisfaction of Indigenous peoples with the Federal Government's responses to *Bringing them home* was highlighted in the report of the United Nations Special Rapporteur on contemporary forms of racism, Professor Maurice Glele-Ahanhanzo, on his mission to Australia in 2001. He identified the 'outstanding' question of reconciliation with Indigenous peoples as a challenge that remains for Australia, and the stolen generations is highlighted as one of five areas for attention in his report. He notes that 'for many Aboriginals the defensive attitude adopted by the Federal Government on matters that are very painful to them cast doubt about its real desire to achieve meaningful reconciliation..'.[6] and urges the government to seek 'a humane solution to the question of the 'stolen generation'.[7]

In July 2002 the HREOC Social Justice Commissioner Dr William Jonas expressed serious concerns about the nation's progress in achieving the exercise of Indigenous rights. He suggests Indigenous Affairs seems to have become a series of anniversaries 'operating as an annual reminder of the unfulfilled promises and commitments of governments'. He cites the Royal Commission into Aboriginal Deaths in Custody, the *Mabo* decision, and the *Bringing them home* report. The Commissioner concludes:

> … we face a deplorable situation in which not only has the Federal Government failed to respond adequately or comprehensively to the Council for Aboriginal Reconciliation's recommendations, they have quite deliberately sought to shut down debate and avoid any engagement about them ….[8]

Partnership and self governance

Indigenous peoples in Australia have continually asserted their right to be self-determining and to exercise control over their own lives. There is no 'one size fits all' model for achieving self-determination. It takes many forms ranging from control over decision-making processes and the effective participation of Indigenous peoples in decisions that affect them, to involvement in the design and delivery of services, to recognition and support for Indigenous customary approaches, to the development of community capacity to be self-reliant through broader regional governance and autonomy processes.[9] ATSIC's call for a treaty is a further example that provides a rights-based approach to Indigenous empowerment.[10]

A central aspect of self-determination is an acknowledgement by governments of the legitimacy of Indigenous cultural structures and approaches, and a commitment by them to working in partnership with Indigenous peoples and communities.

Historically, governments have not tended to recognise these factors. The harm caused by state interference in the family life of Indigenous peoples, particularly through the welfare system, has been acknowledged in a number of public inquiries over the past 20 years.[11] The Royal Commission into Aboriginal Deaths in Custody, for example, found that the history of relations with Indigenous peoples in Australia is one of 'deliberate and systematic disempowerment of Aboriginal people starting with dispossession of their land and proceeding to almost every aspect of their life… (with) every turn in the policy of government and the practice of the non-Indigenous community… postulated on the inferiority of Aboriginal people'.[12] While this was often 'guided by the best of motives… Aboriginal peoples were never treated as equals and certainly relations between the two groups were conducted on the basis of inequality and control'.[13]

Since the Royal Commission, governments have made commitments to working in partnership with Indigenous peoples, such as through the 1992 National Commitment to improved outcomes in the delivery of programs and services for Aboriginal peoples and Torres Strait Islanders by the Council of Australian Governments. The National Commitment acknowledged the importance of improving the effectiveness of service delivery through:

- empowerment, self-determination and self-management by Aboriginal peoples and Torres Strait Islanders
- economic independence and equity being achieved in a manner consistent with Aboriginal and Torres Strait Islander social and cultural values, and
- the need to negotiate with and maximise participation by Aboriginal peoples and Torres Strait Islanders in the formulation of policies and programs that affect them.

The 1992 National Commitment was replaced by a Communiqué on reconciliation in November 2000. The 2000 Communiqué has a more limited focus, with the Council of Australian Governments committing itself to 'an approach based on partnerships and shared responsibilities with indigenous communities, program flexibility and coordination between government agencies, with a focus on local communities and outcomes' in addressing Indigenous disadvantage[14].

The 2000 Communiqué is more consistent with the Federal Government's approach to reconciliation. It is framed in terms of 'practical reconciliation' and 'mutual obligation'. It emphasises government programs and services addressing Indigenous disadvantage at the individual level in health, housing, education and employment[15], as well as on notions of individual empowerment and reciprocity. The Federal Government's policy framework for the next three years, announced in March 2002, suggests more of the same.[16]

The HREOC Social Justice Commissioner regards practical reconciliation as an 'impoverished' notion that will not in and of itself lead to meaningful reconciliation between Indigenous and non-Indigenous people. In May 2002 he said:

> It is also simply not enough to suggest, as in the past year, that the rights agenda is over by splintering the focus on Indigenous affairs and shifting attention from one topical issue to another, whether it be violence or substance abuse or petrol sniffing in Indigenous communities. Such an approach … often serves only to manage and even perpetuate enduring cycles of disadvantage, at the expense of resourcing more holistic and far-reaching solutions.[17]

Most states and territories have been slow to enter into partnerships with Indigenous peoples, despite the 1992 National Commitment. It is only in the past five years that they have begun to enter into partnership agreements with ATSIC on behalf of Indigenous peoples on issues such as housing and infrastructure, health and law and justice.

Justice agreements, for example, have been reached in Victoria, Western Australia and Queensland and form the core of those government's approaches to addressing Indigenous over-representation in custody. New South Wales, despite having adopted the rhetoric of partnership[18], has been slow to implement such commitments in practice. The NSW government has only recently requested the NSW Aboriginal Justice Advisory Committee to prepare a draft justice agreement and entered into a communiqué with ATSIC in April 2002.

The view that Indigenous peoples must have control of their lives was reflected during the *Moving forward* project. The *Moving forward* meetings clearly supported Indigenous communities taking greater responsibility for the care of their children and young people to protect them from substance abuse and family violence. The project was told repeatedly how members of the stolen generations and their families support each other through support networks and shared experience.[19] The project also heard concerns about the lack of involvement of stolen generations groups in decisions concerning program delivery aimed at addressing their needs (see Appendix 1).

Information and co-ordination

Many government reparations programs have failed because of a lack of political will and a failure to engage with the stolen generations, the people who are meant to be the beneficiaries. Throughout the *Moving forward* project people sought information about government and church programs. People had heard of promised funding and programs, but few knew if they had eventuated or where to find them. The prevailing view was that most government programs have failed to reach the stolen generations or to achieve their goals.

The Senate Constitutional References Committee Inquiry into the Stolen Generations came to similar conclusions. The Committee's report, *Healing: a legacy of generations*, found that the Federal Government's 1997 'practical assistance' package had not effectively targeted the stolen generations.[20] It concluded that funding allocated for separated people had been misdirected and that an audit of the allocation of funding against the target population would be beneficial. The Committee recommended an independent evaluation of the progress of all government initiatives to implement *Bringing them home*.[21] The Federal Government's programs and the Committee's comments on them are summarised in Table 2 on page 24.

The 2001-2002 Federal budget allocated a further $53.9 million over four years to continue support for Link Up, counselling services and counselling support and parenting support programs. The National Library oral history project and the National Archives work were regarded as complete in 2001. The $9 million originally allocated from ATSIC funds for language and culture programs has not been extended.[30]

Table 2 - Federal government programs 1997 - 2001

Program	Amount	Comments by Senator
Health, including counselling: Enhance Health and Well Being programs by expanding the network of Indigenous Regional Training Centres (for Indigenous counsellors) and 59 additional specialist Indigenous counsellors.[22] Administered by Department of Health and Aged Care, OATSIH	$33 million ($17 million training, $16 million counsellors)	Critical of the process used by the Office of Aboriginal and Torres Strait Islander Health (OATSIH) for selection of the location of counselling services and lack of monitoring of who uses the services. It concluded the manner of allocation was an inappropriate use of the funding.[23]
Parenting and family support: Administered by Family and Community Services $5.9 million	Only $580,000 spent by late 2000, leaving $5.3 million unspent.[24]	The program did not target stolen generations. There was a strong likelihood of the funding being inappropriately allocated to mainstream Indigenous programs.
Family tracing and reunions: Enhance existing Link Up programs and establish a national network of Link Ups.[25] Administered by ATSIC	$11.25 million	Delays in funding for services outside NSW and Queensland, but new services in WA, SA and NT by 2000. Need for additional component to Link Up services to assist people going home, provide in-house counselling services and outreach services.
Culture and language programs: Administered by ATSIC	$9 million	Focus on language, not culture. Failed to meet the diverse and complex needs of separated people ($5.5 million allocated by 1999).[26]
Oral History project: Administered by the National Library	$1.6 million	Failed to satisfy the intent of Bringing them home recommendation for Indigenous agencies to be funded to record, preserve and administer access to testimonies of Indigenous people affected by forcible removal policies. Testimony collected from all types of witnesses, when the need for Indigenous perspectives of history had been emphasised by HREOC and the unnecessary brevity of the project.[27]
Indexing and copying material: held by the National Archive	$2 million[28]	The National Archives is responsible for a National Records Taskforce, implementing the recommendations for access and for training of Indigenous archivists.[29] Not clear what has been completed.

State and territory governments have primary responsibility for programs in key areas such as access to records, funding for family reunions, oral history projects and policies affecting current Indigenous child separation. Detailed information about state and territory responses was not available to the Senate Inquiry.[31]

Poor monitoring and co-ordination of state, territory and federal government responses has been a fundamental problem with implementation of programs. HREOC recommended that the implementation of responses to *Bringing them home* be coordinated through the Council of Australian Governments (COAG). It recommended a process for the auditing of implementation by federal, state and territory governments with annual progress reports.[32] Instead, the Federal Government gave the responsibility for monitoring implementation to the Ministerial Council for Aboriginal and Torres Strait Islander Affairs (MCATSIA).

Submissions to the Senate Inquiry said that MCATSIA lacked the necessary level of administrative responsibility to co-ordinate activities across governments. Some said the failure to use COAG indicated a refusal to give priority to Indigenous issues. The Committee did not accept that this was the case. It concluded that the problem did not lie with MCATSIA, but arose from the Federal Government's failure to give clear guidance on the task and a lack of interest by state and territory governments in the mechanics of monitoring and co-ordination.[33] The Committee noted that the working groups of MCATSIA did not meet regularly and that there was very little information available in Council reports.[34]

The *Moving forward* project reference group concluded that MCATSIA should provide direction for co-ordinating programs to address the impacts of Indigenous child removal and prevent it recurring. It supports an audit by MCATSIA of the funds allocated for stolen generations programs against the target population, as proposed by the Senate Committee. It also supports MCATSIA producing an annual report made publicly available detailing relevant benchmarks and programs to address them in each jurisdiction.

A discrete identity

Recognition of the stolen generations as a discrete part of the Indigenous community with its own history, experiences and traditions was emphasised in the *Moving forward* meetings. The distinctiveness of the stolen generations community was also a strong theme in submissions to the Senate Inquiry from stolen generations groups. The Senate Committee report says an emphasis on the effect of forcible removals on all Indigenous people fails to identify the specific needs of the stolen generations.[35]

The individual circumstances of separation and the different effects on individuals were emphasised repeatedly throughout the *Moving forward* project. Different situations in each state and territory, different policies and practices at different times and different individual experiences result in different needs. People frequently told the project that they want to be heard in their own right and they resent others claiming to speak on their behalf.[36]

The varying circumstances in which children were separated or removed and the different experiences in institutional care, foster care or with adoptive families are significant. Stolen generations groups make explicit distinctions between people who were removed permanently, assimilated, segregated, institutionalised or fostered and adopted.[37] The different impacts on people's lives mean they have different needs in terms of reparations. Some people who were institutionalised lost all connection to family and culture, while others remained in touch with family or had regular visits from family. Those who grew up

in institutions were denied the affection of family life and family connection, received a generally poor standard of education (trained to be domestic servants and stockmen) and suffered harsh physical conditions. Those who were fostered or adopted did not escape physical and sexual abuse and often grew up suffering shame and rejection within the adoptive family.[38]

Some commentators have said that *Bringing them home* failed to give sufficient recognition to the diversity of experiences of those who were removed. The Senate Inquiry into the Stolen Generations, for example, took the view that it over emphasised the impacts of the removals across the whole Indigenous community. This was regarded as part of the reason that governments have failed to properly target the stolen generations in the delivery of reparations programs and services. The Senate Committee regarded loss of identity, culture and contact with community as the most crucial loss of all.[39]

Since *Bringing them home* there has been a growing acknowledgement of the impacts on descendants of those who were removed. This was reflected in submissions to the *Moving forward* project and in discussions at *Moving forward* meetings. The impacts described include intergenerational grieving, growing up caring for traumatised parents - some suffering from mental illness or substance abuse - and loss of family connections.[40]

The *Moving forward* project reference group believe ATSIC and state departments of Indigenous affairs need to actively inform members of the stolen generations about programs designed to meet their needs.

Recommendation 1

1.1 The Ministerial Council on Aboriginal and Torres Strait Islander Affairs provide annual public reports on the progress of state and federal government programs that seek to address past Indigenous forcible removal policies and prevent the current high rate of Indigenous child separation.

1.2 All government agencies responsible for programs to provide reparations engage with members of the stolen generations in the design and implementation of the programs.

Telling story

The need for Indigenous peoples to have their experience of the removal process heard and officially acknowledged continues to be an important priority. It was raised at all of the *Moving forward* meetings, in many submissions and at the *Moving forward* conference. Many people have not had the chance to tell their story and that of their family. The submission from the former residents of Graham Home - Mt Margaret Mission in Western Australia said:

> For many of our members the [*Moving forward*] issues paper has brought their past to the fore, … some have revisited their past for the first time … many felt intimidated to tell their story in the open for fear of their disloyalty to that era. However, on the whole the members felt that it was time to let go of the hurt and sadness.

Bringing them home identified the benefits of the hearings conducted by the National Inquiry and recommended that hearings continue for the purpose of restoring the balance to historical perspective. It recommended funding for 'appropriate Indigenous agencies' to

record, preserve and administer access to testimonies of Indigenous peoples affected by forcible removal policies who wish to record their history.[41] It also recommended that Indigenous culture, language and history centres serve as repositories of personal information that individuals may place in their care. Private collections of records held by churches and other non-government agencies could be transferred to the centres.[42]

Instead of funding Indigenous agencies, state and federal governments funded libraries and museums to conduct oral history projects on Indigenous family separation.[43] The Victorian Government, for example, funded the Koori Oral History Program at the Museum of Victoria. New South Wales and Western Australia have taken a similar approach. At the time of the Senate Inquiry, only Queensland and the Australian Capital Territory had programs that provide funding to Indigenous organisations for these activities.[44]

The Federal Government provided funding for an oral history project, carried out by the National Library. The Senate Committee found that the project did not satisfy the intent of the *Bringing them home* recommendation. It was most concerned that the project collected testimonies of non-Indigenous people. It said the objective of the recommendation was to provide the specific views and histories of Indigenous peoples. The government's claims of desiring a 'well rounded' view were therefore inappropriate. The brevity of the project, over just two years, was also criticised.[45]

The participants in the *Moving forward* project made it clear that oral history projects do not meet their needs. They want to tell their story for the official record to have their experience acknowledged, with an official explanation and apology. Providing an interview to an historian is an entirely different process. The desire for an appropriate process to tell their story was one of the major reasons they support the reparations tribunal proposal.

The Senate Committee recognised the limitations of oral history as a measure for healing through 'telling story'. Interviews are carried out for the purpose of collecting raw data that will later be assessed for relevance and research value. The information is shaped by the interview because the objective is to discuss a particular subject.[46] In contrast, a person telling their story is able to define the scope and nature of what is said.

Submissions to the Senate Committee criticised the lack of funding for telling of the past other than through oral history interviews. The submissions also commented on the lack of funds for preservation of memories and for the provision of safe-keeping places for memorabilia, photos, testimony and records.[47] The Central Australian Stolen Generations and their Families Corporation is one of only a few groups that provide a repository for records, testimony and other memorabilia of their members.

Community Forums conducted by the Victorian Koorie Records Taskforce in 2001 and 2002 provide a more appropriate forum for people to tell their stories. The aim of the Forums was to consult with Koorie communities, to inform people about how to access their records, but also to give people a chance to share stories about their experiences in finding their family history. Over 250 participated in the Forums, which were well received by local communities. The Taskforce was established in 2001 by the Victorian Government primarily to facilitate access to family records, but the forums met a much wider need in the community.[48]

Notes

1 The CAR identified the issue in a number of its reports including *Australian declaration towards reconciliation*, 11 May 2000, *Roadmap for reconciliation* 2000 and its final report *Australia's challenge*, tabled in Federal Parliament on 7 December 2000. Also see Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2001*, , report no. 3 HREOC, 2002.
2 Mr John Howard, House of Representatives, *Hansard*, 26 August 1999.
3 Dumisa Ntsebeza, HREOC, 2001, *Moving forward* conference papers, already cited.
4 *Healing: a legacy of generations*, chapter 4 (Canada discussed pp 119 – 123); Canadian Government, *Statement of Reconciliation* at www.inac.gc.ca/gs/rec_e.html
5 Waikato Raupatu Claims Settlement Act 1995 (New Zealand); *Healing a legacy of generations*, pp 122 - 123.
6 *Report to the 58th session of the Commission on Human Rights*, March 2002, available at www.humanrights.gov.au/social_justice/index.html
7 as above, recommendation 9.
8 Speech delivered by Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner at the Sydney and Adelaide launches of the *Social Justice Report 2001* and the *Native Title Report 2001*, 17 July 2002, available at www.humanrights.gov.au/speeches/social_justice/sydney_launch.html
9 For a discussion of processes currently under way see papers from the Indigenous Governance conference hosted by Reconciliation Australia in April 2002: www.reconciliation.org.au; *Social Justice Report 2001,* already cited, ch 3.
10 ATSIC, 2001, *Treaty – get it right*, available at www.atsic.gov.au; Geoff Clark, ATSIC Chairperson, *Setting the Agenda*, paper presented to ATSIC national policy conference March 26, 2002. Rights based approach advocated by the Aboriginal and Torres Strait Islander Social Justice Commissioner in *Social Justice Report 2000,* HREOC, report no.2/2001 and *Social Justice Report 2001*, already cited.
11 Report of the Royal Commission into Aboriginal Deaths in Custody, 1992*; Bringing them home*; Haebich, *Broken Circles*, already cited.
12 Report of the Royal Commission into Aboriginal Deaths in Custody, 1992, pp9 - 10.
13 as above, p10.
14 http://www.pm.gov.au/news/media_releases/2000/media_release531.htm
15 John Howard, 'Practical Reconciliation' in *Essays on Australian reconciliation*, ed. Michelle Grattan, 2000.
16 The Hon Philip Ruddock, Minister for Immigration and Multicultural and Indigenous Affairs, *Changing direction* address to the ATSIC national policy conference, 26 March 2002, available at www.atsic.gov.au
17 Speech delivered by Dr William Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner at the launch of the *Social Justice Report 2001*, already cited.
18 Bob Carr, Partnership the key to relations between black and white, *Sydney Morning Herald*, 20 February 2001.
19 *Moving forward* meetings in Sydney, Perth, Broome, Alice Springs and Darwin. Also emphasised in meetings of the *Moving forward* project manager with the Aboriginal Health and Medical Research Council and Link Ups between March and May 2001 (listed in Appendix 3).
20 *Healing: a legacy of generations*, already cited.
21 as above, p 74, recommendation 1.
22 as above, p 45, from the submission by OATSIH.
23 as above, p 48 - 49.
24 as above, p 49 - 50.
25 as above, p 53 - 56.
26 as above, p 86 - 87.
27 as above, p 81 - 82.
28 Minister for Aboriginal and Torres Strait Islander Affairs, 2000 Submission to the Senate Inquiry into the Stolen Generations, submission 36, p 663 and Appendix 2.
29 *Healing: a legacy of generations*, p 91.
30 Budget 2001 Fact Sheet, ATSIC May 2001; details provided in a facsimile from the office of the Federal Minister for Aboriginal Affairs, February 2002 to the *Moving forward* project.
31 Most state and territory governments either did not make submissions to the Inquiry or the submissions provided no new or useful information. Only the ACT Government provided a submission that included a government response to *Bringing them home* and the most current ACT Implementation report. See *Healing: a legacy of generations*, at 2 - 3.
32 *Bringing them home*, recommendation 2, at 23.
33 *Healing: a legacy of generations*, pp 146 - 147.
34 *Healing: a legacy of generations*, pp 150 - 151.
35 *Healing: a legacy of generations*, pp 24 - 25 (quotes Mr Matthew Story for Yirra Bandoo Aboriginal

Corporation, Transcript of evidence to the Senate Committee).

36 *Moving forward* meetings in Sydney, Darwin, Alice Springs, Broome, Perth (see Appendices 1 and 2).

37 *Healing: a legacy of generations*, pp 18 - 22.

38 *Healing: a legacy of generations*, pp 22 - 23; Discussed in the *Moving forward* meetings in Perth, Broome, Darwin, Adelaide and Alice Springs (see Appendices 1 and 2). The stolen generations organisations in the Kimberley and the Northern Territory distinguish people who were adopted and fostered and those who were institutionalised in the categories of membership of the associations.

39 *Healing: a legacy of generations*, p 21.

40 Discussed in *Bringing them home*, pp 222 – 232; written submissions from Cental Australian Aboriginal Legal Service, The Sacred Site Within Healing project and *Moving forward* meetings in Bathurst, Darwin, Alice Springs.

41 *Bringing them home*, recommendation 1 and pp 21 - 22.

42 *Bringing them home*, recommendations 29b and 39.

43 as above, pp 77 - 78.

44 as above, pp 81 - 82.

45 as above, pp 81 - 82.

46 *Healing: a legacy of generations*, p 82.

47 as above, p 78.

48 Victorian Koorie Records Taskforce, 2001, Victorian Regional Forums: Bringing them home, *Finding your story community forums summary report*, pp 2 - 5.

Chapter 5 – Rehabilitation and restitution

Government and church responses to *Bringing them home* have focussed on rehabilitation and restitution. The priority given to health and well-being, assistance with tracing family records and family reunion reflect the priorities of the stolen generations. These programs meet people's most fundamental desire - to know about their family and their own identity. Although these programs have been effective in general, specific problems have arisen in some areas. Programs to provide restitution of culture and history and to address contemporary separation of Indigenous children from their families have been far less successful.

Health and well-being

The Federal Government's 'practical assistance package' included $33 million to expand training for Indigenous counsellors and to fund 59 new specialist Indigenous counsellor positions.[1] According to the Senate Committee, funding for the counselling services had been misdirected to mainstream Indigenous health programs as part of Indigenous mental health services. The agency responsible for the program was the Office of Aboriginal and Torres Strait Islander Health (OATSIH) within the Department of Family and Community Services. The process used to select the geographic location of the new counselling positions was heavily criticised by the Senate Committee. It described the process as 'difficult to follow' and flawed on a number of grounds.

The Committee found that OATSIH had no clear definition or understanding of the target audience or their geographic location. Even worse, OATSIH could not provide data on people who use the services and if they 'deem themselves members of the stolen generation'. The Committee concluded that the process used by OATSIH does not 'seem to be an appropriate use of government funding.'[2]

While the training program appears to have been well received, the *Moving forward* project heard criticisms of the new counsellor positions. Many people said the counselling services are generally not available at times of greatest need - when seeking records and during family reunions. A frequent comment from the *Moving forward* meetings was that people have to be prepared to identify as having mental illness to be able to access counselling.

The need for culturally appropriate counselling and support services for members of the stolen generations, their families and communities was the issue most frequently raised during the Community Forums conducted by the Victorian Koorie Records Taskforce in 2001.[3]

The Indigenous counsellor training programs funded under the 'practical assistance package' have been more successful. An example is The Muramali Program, a training program for Aboriginal health practitioners. It provides guidance on how to deal with the specific type of trauma experienced by people who were forcibly removed.[4] Lorraine Peeters from Muramali describes their program as follows:

> Survivors of [forcible] removal policies, now known as 'the stolen generations', have existed in an environment of sustained assault on identity and culture, and enduring grief, loss and disempowerment. As survivors of removal policies struggle to heal from these past wrongs, we offer a pathway to recovery, which unites mind, body and spirit.[5]

Another community-based counselling program is The Sacred Site Within Healing Centre, a counselling and grief management training program for Indigenous peoples.[6]

A commonly held view at the *Moving forward* meetings was that some of the funding for new counselling services would have been better placed with stolen generations groups to complement their activities.[7]

Family reunion

A national network of Link Up services has been in existence since 1997, primarily through funding provided by the 'practical assistance' package. ATSIC is responsible for administering the program, which is delivered by local, community-controlled organisations. They provide information and support, assistance with tracing records and arranging reunions.[8] Link Ups also play an important role in certification of descent and research.[9] The first Link Up was established in NSW in 1980, followed by Queensland Link Up ten years later.

One of the shortcomings of Link Up services discussed by the Senate Inquiry is a lack of in-house counselling services.[10] Link Ups and stolen generations groups told the project they believe that at least half of the new Indigenous counsellor positions should be relocated to Link Ups.[11] The only counsellor positions co-located with Link Up services are in Perth and Broome, where the Link Up service is located at an Aboriginal community-controlled health service. The Senate Committee supported the need for Link Ups to have integrated counselling services.[12]

Another shortcoming of Link Up services is the very limited number of offices, with only one in most states. The Senate Inquiry supported state and territory governments providing funds to facilitate expansion of the services. Progress has been made to improve the extent and quality of Link Ups since then, with development of best practice guidelines, staff training and accreditation by ATSIC. New Link Up offices opened in Broome, Tennant Creek and Cairns during 2001 and 2002.[13]

The need for financial assistance for people to travel to meet with family was frequently expressed during the project. Children separated from their families were often taken to a place some distance away. Family reunion and regular visits to family are impossibly expensive for most Link Up clients, who are on very low incomes. Link Up is able to provide limited financial subsidies as part of its role in supporting family reunion, but it far from meets the needs of the stolen generations community.[14]

Family records

Seeking out personal and family records is of utmost importance to people who have been separated from their family and community. It was raised at all the *Moving forward* meetings and in many submissions to the project.

Access to records

The need for co-ordination of government and church records and for support for people going through the process was frequently raised in the *Moving forward* meetings and meetings with Link Up staff. Many people find that the information recorded in official records helps confirm what happened to them, including brutality and racism. Others expressed the distress they had experienced because records had been lost or destroyed, or only partially maintained. Sometimes the records do not have the answers that people are looking for and sometimes they contain more than people want to know.

Bringing them home made over 20 recommendations about preserving records, co-ordinating access to records and providing support for people during the process. It included a recommendation for a 'first stop shop' for all government and church records in each state and territory, facilitated by Joint Records Taskforces.[15]

Implementation of these recommendations has progressed well in some states and territories but not in others. The most advanced program for access to records is in Queensland, where the Community and Personal Histories Section of the Department of Families, Youth and Community Care was established in 1992. The program was established in light of recommendations of the Royal Commission into Aboriginal Deaths in Custody. It provides access to historical state records about Aboriginal and Torres Strait Islander peoples and in doing so assists many people to piece together family histories and genealogy.[16] The usual fees for access to records are waived for people applying for their family records through Link Ups.[17]

A centralised service is also provided in Western Australia. The Family Information Records Bureau of the Department of Community Development (WA) provides family history information from records held in its own archives and assists with access to records held by other departments and organisations.[18]

In contrast, in New South Wales, where the majority of Indigenous peoples live, applications for government records still need to be made to at least two separate departments – Archives and Aboriginal Affairs. Processes for managing the privacy of individuals named in the records were found wanting in 2001. However, NSW appears to be the only state that has reciprocal arrangements with other states.[19]

The Northern Territory has recently introduced Freedom of Information legislation, which will facilitate improved record keeping and provide a right of access to personal records. The Senate Committee described the arrangements in South Australia in 2000 as grossly under-resourced.[20]

The search for records is often the first step in tracing family and therefore identity. The *Moving forward* meetings discussed the distress that occurs as part of this experience. *Bringing them home* recommended that agencies providing access to personal records should have counsellors available. The Senate Committee found that few agencies responsible for providing personal and family records had counsellors available.[21] At best, agencies offer information on where to find counselling services but even that information is not always available.[22]

Governments and churches in all states and territories, with the support of the Federal Government, need to provide effective personal and family history programs with the following features:

- adequate resources for joint records taskforces to co-ordinate records
- a first stop shop for applicants to obtain their records and assistance with compiling family histories
- an appropriate privacy protocol to protect individual identity, and allow people to trace family
- records provided free of charge or for minimal cost[23]
- counselling services available at the time of making applications.

Recommendation 2

2.1 State, territory and federal governments provide additional resources to the national network of Link Up services to provide outreach services and integrated counselling services.

2.2 State and territory governments that have not already done so, work with the churches to provide Indigenous peoples with a 'first stop shop' to provide co-ordinated access to their personal and family histories.

Indigenous genealogists

An important aspect of managing family records is to ensure that Indigenous peoples are among the genealogists, historians and archivists looking after and interpreting the records. Many *Moving forward* meetings raised the need for Indigenous genealogists and historians as a priority. Genealogy is becoming increasingly important for all Indigenous peoples because of native title claims. It is also important as governments will not hand over custody of records unless appropriate professionals are available to care for them.

Bringing them home recommended training programs for Indigenous archivists, historians and genealogists. Most state and territory governments have a long way to go to implement this recommendation, even though they claim to support it. Queensland is the most advanced, with more than half the archivists and historical researchers being Indigenous. In 1998 in Victoria there were no Indigenous researchers or archivists, although funds had been pledged to train two Koori archivists.[24] In 1997 as part of the Federal Government's funding package the National Archives was given responsibility for progressing training of Indigenous archivists.[25] It is not clear what programs resulted.

The *Moving forward* project reference group believes state and territory governments that have not already done so should establish a 'one stop shop' to co-ordinate access to personal and family records and to assist with compiling family histories. Governments should act on promises to train and employ Indigenous peoples as archivists, historians and genealogists.

Indigenous community education

The *Moving forward* meetings identified Indigenous community education as a significant need that has not been met by government and church programs. Of particular importance is the need to inform Indigenous peoples about their family connections and genealogy. The *Moving forward* meetings and the national conference heard of many people who have taken the initiative to construct their own community genealogies.

Bringing them home recognised this need. It recommended Indigenous community education on the history and effects of forcible removal and the development of community genealogies to establish membership of people affected by forcible removal.[26]

Recommendation 3

3.1 State, territory and federal governments implement their promises to provide training for Indigenous archivists, genealogists and historians and to promote employment of Indigenous peoples in these positions.

3.2 State, territory and federal governments work with Indigenous community organisations to develop community genealogies to identify the people affected by forcible removals and their descendants.

Land, culture and history

An essential element of reparations is to restore people to the position they would have been in but for the harm done to them. For Indigenous peoples who were removed from family and community this includes restoring culture, language, land, history and association with community.

Access to land is a vexed issue for people who were removed. Some have been able to return and take up their place in the community. Many are not able to return, while others who return are not fully accepted into traditional society. These people are not able to claim native title or take on their full role in the cultural knowledge and customs of the clan or tribal group. The Indigenous Land Fund, established to provide for Indigenous peoples who cannot establish native title, has a potential role to benefit the stolen generations. The *Moving forward* project was told about applications by stolen generations groups to the Indigenous Land Fund that have not been successful.[27]

Churches have considered returning land and buildings used to house forcibly removed children or other mission land to Aborigines. The *Moving forward* meeting in Broome discussed obstacles encountered when such a proposal was offered more than five years ago.[28]

Access to training programs on Aboriginal language and culture was important for many people in the *Moving forward* meetings and in submissions to the Senate Committee.

ATSIC conducted a number of language programs as part of the Federal Government's 'practical assistance package'. However, the Senate Committee found that a large proportion of the programs did not meet the complex and varied needs of the stolen generations. One comment was that there was too much emphasis on preserving language rather than on making knowledge of language and culture accessible to the community.[29]

Bringing them home supported an expansion of funding for language, culture and history centres to ensure national coverage at regional level. Its recommendation was intended to provide for the needs of people who were forcibly removed and to alleviate the pressure on the people left behind (who have responsibility to carry on cultural knowledge).[30] The funding for these programs was not renewed in 2001.

People who return home to the community from which they were removed have different needs from those who do not. A language and culture program and title to land may not be as useful to those who cannot return home. For them it is more appropriate to be provided with support in the place to which they were removed and now live.[31] Submissions to the *Moving forward* project and to the Senate Inquiry advocated providing land or premises to the stolen generations so that they have a place of their own where they can support each other. Support for resource centres and healing centres is strongest in Western Australia, the Northern Territory and New South Wales, where there are organised stolen generations support groups.[32]

The *Moving forward* conference supported the efforts by stolen generations groups to have disused former homes converted into memorials.[33] The project heard many stories that highlighted the importance of devising proposals for memorials in close consultation with the stolen generations, and only after a consensus had been reached. The Federal Government's announcement of a national memorial for the stolen generations in 2001 was offensive to many of the stolen generations. The Journey of Healing expressed the views of many who were deeply insulted when their representations about the memorial were ignored.[34]

Bringing them home recommended proposals for commemorating individuals, families and communities affected by forcible removal at the local and regional levels be developed by ATSIC.[35]

Community education

Bringing them home recommended school education programs and professional training for people working with Indigenous communities to prevent repetition of forcible removal policies. The Senate Committee found that most state and territory governments have implemented these recommendations in a variety of ways.[36] The *Moving forward* meetings supported broad-based community education to enhance community understanding of past wrongs and to prevent repetition. Most people believed government efforts at community education had been inadequate. These views may partly reflect that Indigenous peoples have not been made aware of government initiatives in this area.

Indigenous children today

Rates of separation

Indigenous children continue to be separated from their families at a much higher rate than non-Indigenous children. In 1999-2000 they made up 23 per cent of children in the child protection system.[37] Indigenous children are far more likely to be the subject of a substantiated child protection investigation – where a court has found that there are issues of physical abuse, sexual abuse, emotional abuse or neglect.[38] Investigations for Indigenous children are more often for reasons of neglect than abuse compared with the general population.[39] Indigenous children were six times more likely to be living in out-of-home care (provided for children in need of care or protection) than other children were in June 2000.[40]

The high rate of Indigenous child separation from their families was raised at all the *Moving forward* meetings. It was widely acknowledged that children are bearing the brunt of high rates of family violence and substance abuse in the Indigenous community. At the *Moving forward* meeting in Melbourne the chairperson of the meeting, Marjorie Thorpe, distributed newspaper articles about a Victorian Government inquiry into substance abuse among Aboriginal young people. In the articles the Victorian Aboriginal Child Care Agency had identified 'chroming' (paint sniffing) as one of the most serious parenting issues Indigenous people face because of economic and social marginalisation.[41] The group discussed the need for Indigenous communities to acknowledge the problems faced by their communities and to take responsibility for improving the care of their children.

This view is reflected in comments by Indigenous women during public debates about family and sexual violence in Indigenous communities during 2001. For example, Rose Solomon, former manager of Bairnsdale Koori Women's Shelter and Family Violence Service wrote:

> Indigenous people have to be leaders on these issues, not other people. Indigenous women and communities have to be supported to come up with their own solutions. Denying or silencing women victims is re-abusing them and there can be no way forward and no healing if the problems are denied.[42]

The Social Justice Report 2001 is critical of the federal government's 'mutual obligation' and 'practical reconciliation' approaches to welfare reform. It discusses models of Indigenous self governance that are more likely to facilitate community based change.[43]

Changing attitudes to welfare

Bringing them home acknowledged that the welfare of Indigenous children is inextricably linked to the wellbeing of the Indigenous community and its ability to control its destiny. However, it concluded that the high rate of Indigenous children in the child welfare system is also the result of paternalism in welfare agencies that continues to influence decisions, despite changes in policy. It found that attempts to provide culturally appropriate welfare services to Indigenous communities have failed to overcome the weight of historical experience associated with 'the welfare'.[44] HREOC proposed a complete overhaul of welfare services to address the problem.

Central to HREOC's recommendations were national standards on the treatment of Indigenous children and young people in care and national legislation to enforce a standard response. Fundamental to the proposed standards is Indigenous self-determination, so that accredited Indigenous organisations are involved in decision-making from the point of notification. The proposal incorporates the Indigenous Child Placement Principle (ICPP), which gives preference to the placement of Indigenous children with other Indigenous peoples when placed outside the family. The standards also require Aboriginal Child Care Agencies to be involved in child placement decisions.[45]

The Senate Committee had 'considerable difficulty' obtaining information on the implementation of recommendations on contemporary Indigenous child welfare practices.[46] At the time of the Senate Inquiry state and territory governments had adopted the ICPP into policy, but most indicated that they would not incorporate it into legislation. In 2002 the Western Australian Government was proposing to adopt the ICPP into new child welfare legislation.

In 2001 the Australian Institute of Health and Welfare expressed the view that the impact of the Principle is reflected in the high proportion of Indigenous children now placed with Indigenous caregivers or with relatives.[47] Aboriginal Child Care Agencies are involved in child placement decisions in most jurisdictions.[48]

The extent to which HREOC's other recommendations on Indigenous child welfare have been adopted is not clear, especially those concerning Indigenous self-determination and social justice.[49] The Social Justice Report 2001 highlights the need for implementation of Indigenous governance and community capacity building as an essential aspect of welfare reform.[50]

Juvenile justice

Bringing them home also reviewed juvenile justice laws and practices as they affect Indigenous young people. It acknowledged previous government inquiries into imprisonment and policing of Indigenous peoples and the failure of programs and policies to address high rates of imprisonment. HREOC concluded these programs had failed because of pervasive tokenism, lack of engagement with Indigenous communities and underlying issues of disadvantage.[51] It recommended law reform measures that would provide self-determination for Indigenous peoples in the juvenile justice area. The recommendations have not been acted on or have been actively rejected.[52]

The distrust and alienation of Indigenous communities towards the criminal justice system is the result of the history of oppression and racism. The tragic consequences for communities in Cape York in Queensland and Swan Valley in Perth attracted national attention in late 2001. Government agencies in those states are under pressure to find ways to build

relationships with Indigenous peoples so that effective law enforcement can be achieved to protect women and children.[53]

Aboriginal Justice Agreements developed in Victoria, Queensland and Western Australia provide an avenue for self-determination in the justice arena. The Victorian Aboriginal Justice Agreement was released in 1999 as a joint initiative of the Department of Justice, the Department of Human Services, ATSIC Regional Council and the Victorian Aboriginal Justice Advisory Committee. It addresses over-representation of Aboriginal people in all levels of the justice system, improves Aboriginal access to justice-related initiatives and promotes greater awareness of civil, political and legal rights among Indigenous peoples. The Agreement incorporates measures to provide for Indigenous participation in policy development at state and local level.[54] An Aboriginal Justice Agreement was also being developed in New South Wales in 2002.

To address the underlying disadvantage that makes Indigenous children more vulnerable to removal, HREOC recommended a social justice package to be developed by governments in partnership with ATSIC and other Indigenous groups.[55] This recommendation has not been implemented.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has proposed a framework for monitoring and evaluating progress in addressing Indigenous disadvantage. It emphasises the processes and mechanisms necessary to engage in a meaningful process of reconciliation. The Commissioner's strategy focussed on improving accountability of governments, participation of Indigenous peoples in policy and service delivery and protection of human rights.[56]

Recommendation 4

Governments address over-representation of Indigenous children and young people in the child welfare and juvenile justice systems through programs that promote Indigenous self governance and social justice.

Notes

1 *Healing: a legacy of generations*, p 45, from the submission by Office of Aboriginal and Torres Strait Islander Health.
2 as above, p 46 - 49.
3 Victorian Koorie Records Taskforce, *Finding your story community forums summary report*, as above at 7.
4 *Indigenous Health Matters* newsletter of OATSIH, vol 4 April 2001. The program is run by Lorraine Peeters and was funded by OATSIH as part of the 'practical assistance' package to provide ten training programs a year.
5 Lorraine Peeters, abstract of presentation at a workshop presented at the *Moving forward* conference, 2001 (not included in published conference papers).
6 Details about Winangali provided in a submission to the *Moving forward* project.
7 *Moving forward* focus group meetings (see Appendix 1); address to the *Moving forward* national conference by John Cox, Kimberley Stolen Generations Corporation (oral presentation only, not included in published papers).
8 *Healing: a legacy of generations*, pp 53 - 54; state and territory funding of Link Ups discussed at pp 60 - 61.
9 The models for Link Ups vary. In NSW and Queensland they are run by independent organisations with a community based management committee. In other states they are run by Aboriginal Child Care Agencies, stolen generations groups or Aboriginal community controlled health services. The models are discussed in *Healing: a legacy of generations,* pp 54 - 60.
10 *Healing: a legacy of generations*, pp 60 - 61.

11 Minutes of*Moving forward* reference group meeting, June 2001, Adelaide, available from PIAC.
12 The service in Perth is discussed in *Healing: a legacy of generations* p 55; the need for counselling services within Link Ups is discussed pp 62 - 64.
13 Personal communication of the author with Link Up offices in NSW and the Northern Territory 2001 and 2002.
14 Meetings of the *Moving forward* project manager with Link Up workers in Perth, Lawson (NSW) and Brisbane in March and May 2001; discussed by ATSIC at www.atsic.gov.au/issues/bringing_them_home/bringhome/linkup.html February 2002.
15 *Bringing them home,* recommendations 21, 22a, 22b, 23(1) – (5), 24, 25(1) – (8), 26, 27, 28, 29a, 29b, 38a, 38b, 38c, 39 (and 40a and 40b on counselling).
16 *Healing a legacy of generations,* pp 89 - 99; *Social Justice Report 1998*, already cited pp 123 - 126; *Report of the Royal Commission into Aboriginal Deaths in Custody* 1992, recommendation 52.
17 Memorandum of Understanding between the Queensland Government and Link Up (Queensland) 2001.
18 Letter to PIAC from the Minister for Community Development, Women's Interests, Seniors and Youth, Disability Services, Culture and the Arts (WA), 17 October 2001.
19 Meeting of PIAC solicitor, Link Up NSW and NSW Archives with the Department of Aboriginal Affairs, March 2001 to resolve a complaint to the Department about a family record inappropriately released.
20 *Healing: a legacy of generations*, p 99.
21 as above, pp 91 - 99.
22 In NSW in 2001 the staff of the Department of Aboriginal Affairs and Archives responsible for Indigenous family records did not know where to refer people to appropriate counselling services; personal communication between PIAC solicitor and Department officials.
23 Personal and family records are provided free of charge or at minimal cost - *Social Justice Report 1998*, already cited, pp 123.
24 *Healing: a legacy of generations,* p 97.
25 as above, p 91, referring to Minister for Aboriginal and Torres Strait Islander Affairs, submission to Senate Inquiry into the Stolen Generations, already cited, p 663.
26 *Bringing them home*, recommendation 11.
27 *Healing: a legacy of generations,* pp 103 - 106 discusses some of the difficulties with the land councils, laws on native title and the Indigenous Land Fund; the difficulties faced by members of the stolen generations in having their place in traditional society and title to land recognised is discussed in Clarke, already cited, pp 283 - 284.
28 Also discussed in *Bringing them home*, pp 418 - 419 and recommendation 41.
29 *Healing: a legacy of generations*, pp 83 - 91. ATSIC's programs were funded from a reallocation of funds from within its budget in 1997, imposed by the government.
30 *Bringing them home,* recommendation 1 and pp 297 - 301. Also see *Healing: a legacy of generations*, pp 83 - 91.
31 *Healing: a legacy of generations*, pp 83 - 91, refers especially to a submission to the Committee from the Kimberley Stolen Generations Committee.
32 *Healing: a legacy of generations*, p 88 and pp 104 -105; submissions to *Moving forward* project from Jarra - Stolen Generations and Garden Point Association; Kimberley Stolen Generations Committee, 2000, submission to the Senate Inquiry into the Stolen Generations.
33 See *Moving forward* conference recommendation 16, set out in Appendix 4.
34 www.journeyofhealing.com.au and discussed in *Healing: a legacy of generations*, pp 140 –142 and recommendation 5.
35 *Bringing them home*, recommendation 7B.
36 *Bringing them home,* recommendations 8 and 9; *Healing: a legacy of generations*, chapter 7.
37 Australian Institute of Health and Welfare, 2001,*Child protection Australia 1999-00*.
38 as above, pp 15 and 19. In Western Australia and South Australia Indigenous children required protection at more than seven times the rate of other children and in Victoria it was 9.6 times the rate of other children.
39 as above, pp 20 - 21.
40 as above, p 43. In NSW the rate of Indigenous children in out-of-home care was over 9 times the rate of other children and in Victoria and the ACT it was over 8 times the rate. The difference was lowest in Tasmania and the Northern Territory. Similar findings are set out in *Healing: a legacy of generations* at page 188 and in *Bringing them home*, chapter 21.
41 Julie Anne Davies, Who cares for Matilda?, *The Age*, 9 May 2001; 'How can we reverse this appalling descent into hell?, The Age, 12 May 2001; and Children painted into grim corner, *The Age*, May 2001.
42 There must be more healing, not more hurt, *Through Our Eyes Bulletin,* 21 June 2001 available at

www.nwjc.org.au/avcwl/lists/public/through-our-eyes/maillist.html.

43 *Social Justice Report 2001*, already cited, ch 2 and 3.

44 *Bringing them home,* p 458.

45 *Bringing them home*, ch 25 and 26 and recommendations 44 - 51.

46 *Healing a legacy of generations,* p 202, and pp 176 - 177; implementation of the national standard discussed pp 186 - 192.

47 Australian Institute of Health and Welfare, 2001, *Child protection Australia 1999-00,* pp 43 and 44. In NSW 80% of Indigenous children were placed with an Indigenous caregiver or relative, in Queensland 71%, in WA 78%, ACT 69%, NT 64% and Tasmania 42%. No figures were available for Victoria.

48 *Healing: a legacy of generations*, already cited, p 196.

49 as above, ch 6.

50 *Social Justice Report 2001*, already cited, ch 2 and 3.

51 *Bringing them home,* pp 489 - 541, esp pp 539 - 540.

52 *Social Justice Report 2000*, already cited, p 64 - 72; *Social Justice Report 2001*, chapter 5.

53 *Fitzgerald Interim Report on Cape York Justice*, 2001, available at www.thepremier.qld.gov.au; *Record of Investigation into the death of Susan Taylor,* State Coroner, Western Australia, October 2001; *Inquiry into Complaints of Family Violence and Child Abuse in Aboriginal Communities in 2001, Interim Report*, April 2002 available at www.premier.wa.gov.au/feature_stories/GordonInquiry_InterimReport.pdf

54 Victorian Aboriginal Justice Agreement, Department of Justice, Victoria, 1999.

55 *Bringing them home,* chapter 25.

56 *Social Justice Report 2000*, already cited, chapter 4.

Chapter 6 - International approaches

The right to reparations for gross violations of human rights has been recognised in many countries around the world. The experiences in Canada, New Zealand and South Africa are particularly pertinent. These examples reflect a growing international recognition of the role of reparations in the process of reconciliation. In those countries governments have acknowledged the harm caused and recognised victims' rights to reparations. Key features of these schemes are processes to hear the experiences of survivors, rehabilitation programs and monetary compensation.[1]

Canada

The Canadian Government had similar programs to Australia's forcible removal policies from the late 1870s to the 1970s. The 'residential schooling program', based on assimilationist child welfare policies, removed Indigenous children from their families and placed them in church-operated residential schools. The schools failed to provide adequate levels of education, children were brought up in conditions of chronic neglect, and became victims of overcrowding and disease. Sexual abuse was pervasive, punishments were severe, and Aboriginal languages and cultures actively suppressed.[2] About 105,000 Indigenous children attended some 80 residential schools across the country before the last ones closed in the 1980s.[3]

From 1991 to 1996 the Royal Commission on Aboriginal Peoples in Canada investigated the relationship between Indigenous peoples, government and society. It recommended a full public inquiry to document the purposes and effects of the policies and propose remedial action. The Commission also recommended a national repository of videos and records about residential schools.[4]

In 1998 the Government of Canada made a Statement of Reconciliation.[5] It provided the starting point for community initiatives and redress programs based on partnership with Aboriginal peoples. A central initiative was the Aboriginal Healing Foundation, established in 1998 with Canadian $350 million to distribute as grants to community-based healing initiatives for the victims of residential schooling. Programs funded by the Foundation address issues such as cycles of physical and sexual abuse, family violence, drug and alcohol abuse and parenting skills.[6]

The Canadian Government has sponsored redress programs in response to legal claims by former residents of the Indian residential schools who suffered sexual or physical abuse. Over 7,200 individuals have made legal claims against the Canadian Government and the churches in Canada and a number of class or representative claims have also been filed. In 1997-98 the Government settled 220 claims, paying more than Canadian $20 million to former victims of residential schools run by the Federal Government where employees had been convicted of sexual abuse. In 1998-99 about Canadian $8 million was paid to 70 alleged victims of sexual abuse. Settlements range from Canadian $20,000 to $200,000.[7]

The redress programs include exploratory dialogues with survivors, Aboriginal leaders and healers, and church representatives, to inform models for resolving legal claims. Pilot alternative dispute resolution schemes have worked with and resourced groups of survivors of child sexual abuse to 'find credible ways to resolve abuse claims, help to bring about healing, provide closure to participants, and begin to build new relationships between Aboriginal peoples and the Government of Canada.'[8]

Common elements of the dispute resolution schemes are:
- compensation for validated claims within the framework of the general law and proven in accordance with the same standard of proof as in the courts (balance of probabilities)
- neutral fact-finders are responsible for assessing the validity of claims, independent of government and claimants
- former students tell their sensitive stories in a supportive environment.[9]

One of the limitations of the schemes is that the churches that shared responsibility for developing and administering the schools have not participated.[10] The Anglican church in Canada has stated that it supports alternative dispute resolution processes where the plaintiff agrees, where the facts of the case have been 'adequately established' and where entitlement has been validated.[11]

There is no forum for former students of Indian residential schools to tell their story and have their experience acknowledged other than in the context of the redress programs for legal claims. The Canadian Healing Foundation has found that many survivors call them to tell their story by telephone because there is nowhere else to go.[12]

The Canadian Government also funds a range of activities to preserve and advance Aboriginal languages and culture through community-based initiatives. Most relevant to the former residents of residential schools is annual funding for cultural education centres established by First Nations and Inuit peoples. These centres are intended to help to increase First Nations' and Inuit people's knowledge and use of their traditional languages and cultural skills.[13]

South Africa

In 1995 a Truth and Reconciliation Commission (TRC) was established in South Africa to help 'transcend the divisions and strife of the past' and build a future based on respect for human rights. The Commission was established by statute with the following objectives:
- create a record of human rights violations committed between 1960 and 1994
- facilitate the granting of amnesty to people who made full disclosure
- restore the human and civil dignity of victims by granting an opportunity to relate their accounts and receive appropriate reparation measures
- make recommendations to prevent future violations of human rights.[14]

The Commission's Committee on Human Rights Violations investigated and conducted hearings into human rights violations over several years. It heard from perpetrators of crimes during the apartheid era and from its victims. People who confessed to crimes associated with apartheid could apply for amnesty from criminal prosecution and indemnity for civil claims.[15]

Where claims of 'gross violations of human rights' were substantiated in the hearings of the Human Rights Committee, victims were referred to a Committee on Reparations and Rehabilitation. Gross violations of human rights were defined in terms of killing, abduction, torture or severe ill-treatment.[16]

The TRC's final report made recommendations on the appropriate policy to provide reparations to the victims of gross violations of human rights. It recommended a reparation policy consisting of:
- urgent interim reparation – assistance for victims and their families in urgent need, providing them with access to appropriate services and facilities
- individual reparation grants – individual monetary grants to victims and their families paid according to various criteria. The Commission made findings of gross violation of

human rights for 22,000 victims, recommending that they receive individual financial grants of between US $2,800 - $3,500 a year over a 6-year period
- symbolic reparation through measures to facilitate communal processes of remembering, such as a national day of remembrance and reconciliation, memorials and museums
- community rehabilitation programs to promote healing and recovery of individuals
- institutional reform to prevent recurrence.[17]

Urgent interim relief payments of about US $330 were granted to about 20,000 people in 1998, but many people are still waiting to be paid. In January 2000 the Mbeki government stated its intention to offer several hundred US dollars (Rand 2,000) in compensation. Victims support groups have protested that the amount is too little and that the TRC compromised victims' rights to making civil claims (by providing amnesties and indemnities).[18]

New Zealand

The Waitangi Tribunal in New Zealand was established in recognition of the large-scale dispossession brought about by colonisation. The function of the tribunal is to investigate claims by Maori that they have been prejudiced by laws, policies or practices of the Crown in breach of the principles of the Treaty of Waitangi 1840. About 1,000 claims were on the tribunal's books in mid-2001. They range from claims about current government policy or proposed initiatives, to historical grievances about confiscation and land transactions. Although it was established in 1975, the tribunal did not become a significant force in New Zealand until the mid 1980s.[19]

The approach to reparations packages has been the subject of public debate for some considerable time in New Zealand. The tribunal can recommend measures such as compensation, changes to government departments and audits of proposed legislation.[20] The Waitangi Treaty has meant that reparations focus on loss of land and resources and wars waged against tribes. Compensation is therefore at the tribal rather than individual level.[21]

The tribunal has very limited powers to make binding decisions. It reports grievances to government and can generally only make recommendations for government action. The only exceptions are the tribunal's power to direct that State Enterprise lands and Crown Forest lands be returned to Maori (in the latter case with monetary compensation, if deemed appropriate).

The tribunal regards a damages approach to reparations as neither possible nor appropriate. This is partly based on the view that, given the nature of Indigenous grievances, monetary compensation alone would not suffice. The Waitangi Tribunal supports packages that restore a lost economic base bearing in mind the extent and nature of the loss and the current needs of the grieving community. Settlements look to the future and how to help communities out of grievance mode. Another important aspect of settlement is restoring tribal autonomy – tino rangatiratanga.

Finally, in the words of Chief Judge Williams:

> …settlements are about face…of standing, of self pride, of that indefinable something by which some people walk tall and others do not. Settlement packages always include a full apology. Face could not be restored without it.[22]

A unique and essential feature of the tribunal is its hearing processes. The tribunal strives to be bilingual and bicultural. Half of its members are Maori and at least one Maori must sit on

each panel. Hearings are held in traditional villages in traditional meeting-houses in front of communities who carry the grievance.

> The importance of providing simple opportunity for tribunal leaders and members to face Crown officials … and accuse them directly of historical and current wrongs must not be underestimated. I have sat in many Waitangi tribunal inquiries … and I have in each case had a powerful sense at the end of a week of hearings that the ability to repeat publicly in front of the tribe and others present … the grievances of the tribe can be enormously empowering.[23]

Hearings are held as much as possible in accordance with Maori custom. The judges are not necessarily in control of hearings. Maori custom always prevails in traditional villages and meeting-houses, so that the judges are the leaders of the local community. The general effect is that the tribes feel they own the tribunal because it reflects their own practices and their own lives.[24]

Notes

1 *Healing: a legacy of generations*, pp 260 - 272; Appendix 11 reviews compensation schemes in Germany, Hungary, Austria, Holland and Japan. Schemes in South Africa, Canada and New Zealand discussed in PIAC submission to the Senate Committee, already cited.
2 *Report of the Royal Commission on Aboriginal Peoples,* 1996, volume 1, chapter 10 available at www.indigenous.bc.ca/rcap.htm
3 *The Government of Canada's Response to the Law Commission of Canada's Report: Restoring dignity*, June 2001.
4 *Report of the Royal Commission on Aboriginal Peoples*, volume 1, already cited.
5 *Canadian Government Statement of Reconciliation*, 1998.
6 *Gathering Strength: Canada's Aboriginal Action Plan,* Government of Canada, 1997, launched in January 1998. Information about the Foundation available at www.ahf.ca
7 Ottawa Citizen Online, www.turtleisland.org/news/news-residential.htm (March 2001).
8 *Safeguarding the future and healing the past - Government response to Law Commission of Canada Report*, June 2001, available at http://canada.justice.gc.ca
9 as above, chapter on *Healing the past: Addressing the legacy of physical and sexual abuse in Indian residential schools*.
10 *Safeguarding the future and healing the past,* available at http://canada.justice.gc.ca as above; Ottawa Citizen Online, already cited.
11 October 2000, *Residential schools: legacy and response*, available at www.anglican.ca/ministry/rs/litigation/#cases
12 Personal communication of the author with Michael Degagne, Director, Canadian Healing Foundation, August 2001.
13 *Safeguarding the future and healing the past,* already cited.
14 *Promotion of Unity and National Reconciliation Act 1995* (South Africa).
15 *Truth and Reconciliation Commission Final report,* 1998, volume 1 chapter 1, available at http://www.truth.org.za
16 as above, volume 5 chapter 1.
17 as above, volume 5, chapter 5.
18 Wilson, Richard, 2001, *The Politics of Truth and Reconciliation*, South Africa.
19 *Treaty of Waitangi Act 1975* (New Zealand): Chief Judge JV Williams, Reparations and the Waitangi Tribunal, *Moving forward* conference papers, already cited.
20 Durie and Orr, 1990, *The role of the Waitangi Tribunal and the Development of a Bicultural Jurisprudence* (1990) 14 New Zealand Universities Law Review 62.
21 Chief Judge JV Williams, Reparations and the Waitangi Tribunal, *Moving forward* conference papers, already cited.
22 as above.
23 as above.
24 as above.

PART 3 - ACHIEVING REPARATIONS

Members of the stolen generations have sought redress for the harm of forcible removal policies. The courts have proven to be an inappropriate forum to resolve the claims, even though governments insist that they will only pay compensation where ordered by the courts. Crimes compensation schemes have also been used by the stolen generations to seek compensation for crimes of sexual assault, so far without success.

Chapter 7 canvasses the these options and some preferable alternatives. It discusses the restorative justice approach, which emphasises the importance of addressing the therapeutic needs of people who have suffered harm as a result of wrongful acts. Schemes for survivors of institutional child sexual abuse in Ireland and Canada lead the way internationally in providing restorative justice programs for survivors of institutional abuse.

PIAC's reparations tribunal model seeks to provide redress for the harm caused by forcible removal policies in culturally appropriate ways. The original tribunal proposal has been modified to reflect the views of Indigenous people expressed during the *Moving forward* consultation project. Chapter 8 details the revised reparations tribunal proposal and recommendations for implementation.

Chapter 7 – Redress options

Justice and the courts

Legal claims by members of the stolen generations have been important symbolically as a means of obtaining redress.[1] The cases have consumed a great deal of time and resources, particularly in the Northern Territory where over 2,000 people have lodged claims.[2] However, to date the courts have found governments are not liable for the harm suffered by Indigenous children while state wards.

The cases have not aided restitution or advanced reconciliation. Some argue that legally, the cases have undermined claims by the stolen generations, particularly the claim that the policies constituted genocide.[3] There has also been a trend to characterise Aboriginal 'protection' and 'welfare' laws as benign in their intent - as 'beneficial' laws - even in the face of discriminatory operation. Jennifer Clarke described the High Court analysis of the Northern Territory laws in *Kruger v Commonwealth* as 'partial and unsatisfactory' – glossing over 80 year of legal history, drawing inappropriate analogies between vastly different regimes operating in the nineteenth and twentieth centuries.[4] In the *Cubillo* case Justice O'Loughlin found that a policy directed to the removal of all illegitimate children of white fathers from their Aboriginal mothers was in the children's best interests.[5]

Questions about the validity of individual acts of removal and the duty of care owed to children once in state care are enormously complex and variable. The courts are clearly reluctant to make findings against government officials exercising discretionary child welfare functions many years ago. In *Cubillo* Justice O'Loughlin said:

> The removal and detention of part Aboriginal children has created racial, social and political problems of great complexity… it must be left to the political leaders of the day to arrive at a social or political solution to these problems.[6]

Compensation and other forms of redress that form part of full and just reparations will not be met through the courts. Even if individual claims are successful in future the benefits will be limited to the individual in each case.

Legal basis of claims

The legal claims by Joy Williams in New South Wales and Lorna Cubillo and Peter Gunner in the Northern Territory have been based mainly on negligence, fiduciary duty (duty of trust) and statutory duty.[7] Joy Williams, an Aboriginal woman who was separated from her 18 year-old mother at the age of four weeks, claimed she was forcibly removed and inadequately cared for as a ward of the state.[8] Lorna Cubillo and Peter Gunner claimed unlawful removal from their Aboriginal mothers as young children and unlawful detention and inadequate care in homes run by religious organisations in the Northern Territory.

Neither case was able to establish that the respective governments owed a duty of care to state wards because of acts of removal or the standard of care in the homes.[9] In *Cubillo* Justice O'Loughlin considered that a duty of care might be imposed on a care relationship arising out of the exercise of a statutory power. He considered that the directors of the homes might therefore owe a duty to provide for the safety and well-being of children in their care, but not the state.[10]

The courts did not recognise a guardianship relationship between the state and the children as state wards, a relationship that would give rise to a fiduciary duty or duty of trust. In *Williams* and *Cubillo* the courts distinguished *Bennett v Minister for Community Welfare,* a 1992 case in Western Australia involving a claim by a state ward. In that case the *Child Welfare Act* 1947 (WA) included a guardianship provision which was relied on as the basis for a claim for breach of fiduciary duty.[11] In *Williams* the court found that the relevant child welfare statute in NSW imposed a duty to control wards of the state, which it said did not equate with guardianship.[12] In *Cubillo* Justice O'Loughlin also rejected the applicant's claims of fiduciary duty on the facts of the case. The Canadian courts, in contrast, have extended fiduciary principles in similar circumstances.[13]

There were significant deficiencies in the evidence presented in both cases.[14] The courts placed great emphasis on the documentary record because of the absence of witnesses and the fallibility of witnesses' memories after such long periods of time.[15] Unfortunately, much of the written record had been lost or destroyed in these cases leaving the courts with some difficulty in making findings of fact.

The credibility of the plaintiffs as witnesses was a significant problem in both cases due to the young age at which they were removed and the emotional distress suffered by them since. This is likely to be the case for many plaintiffs in such cases because of the psychological nature of the harm done.[16]

Limitations of litigation

The legal claims by members of the stolen generations deal with narrow legal issues such as whether a mother's consent technically complied with the law or whether the law authorised Aboriginal children to be wards of the state. The claims do not address the issue of greatest significance to Aboriginal people - the racism underlying the policies, the magnitude of the removals and the social, cultural and individual impacts.

Nearly $12 million has been spent on the *Gunner* and *Cubillo* cases alone, including legal fees and the costs of investigators.[17] In contrast the Federal Government has committed a total of

$117.6 million between 1997 and 2004 to address the needs of the estimated 20,000 to 25,000 Indigenous people who were removed under the policies.

The statutory bar on bringing legal proceedings after a specific period of time has elapsed since the harm occurred (usually three years) is a significant hurdle in these types of cases.[18] In most Australian courts an extension of time can be granted if the plaintiff can show special circumstances exist and there is no significant disadvantage to the defendant. In the *Cubillo* and *Williams* cases the courts were prepared to defer making a final decision on the question of limitations until after they had considered the substantive issues. However, both courts ultimately concluded that there would be 'overwhelming prejudice' to the defendant if time limits were waived. This was primarily because of the passage of time since the relevant events and the lack of reliable evidence.[19]

Non-Indigenous women who made claims against the NSW Government for forced relinquishment of their babies in the 1960s were also unsuccessful in overcoming the limitations restriction.[20] In Western Australia, there is no provision for the courts to grant an extension of time for bringing claims for damages.[21]

The personal difficulties experienced by the plaintiffs during the cases are well known. In *Cubillo* for example, Justice O'Loughlin agreed with Peter Gunner's psychiatric expert who told the court that 'he could not remember seeing a man who seemed "so beaten as Peter Gunner"'.[22] The plaintiffs in these cases had their lives opened up for scrutiny as part of a major public controversy, only to be disappointed by what the legal system could offer.

The adversarial nature of the litigation is particularly inappropriate for plaintiffs who have, by the nature of their claims, suffered emotional and psychological harm and are required to undergo extensive cross-examination in relation to difficult and sensitive matters. It is also an inappropriate process for resolving important social and political issues.

Compensation for sexual assault

Court claims

Many of the children removed under forcible removal policies experienced physical and sexual assault in the institutions, in foster care and work placements. *Bringing them home* estimated that sexual exploitation and abuse were part of the evidence presented by one in six witnesses to the National Inquiry.[23]

The claims in the *Williams* and *Cubillo* cases included claims for damage for physical and sexual assault. As with other aspects of the cases, the plaintiffs had to produce evidence of the claimed beatings and sexual misconduct. In the *Williams* case, the plaintiff withdrew a claim of sexual assault because she could not satisfy the onus of proof. Her claim was undermined by expert evidence that suggested her psychological disorder distorted her vision of reality.[24]

In the *Cubillo* case Justice O'Loughlin found that there had been sexual misconduct by a staff member at St Mary's home, including against Mr Gunner. His Honour described the acts, admitted by the staff member concerned, as 'perverted behaviour'.[25] Justice O'Loughlin found that the type of corporal punishment to which the children in Retta Dixon home were subjected would be regarded by today's standards as very severe and acknowledged that Mrs Cubillo suffered from these beatings. However, he did not find evidence of the children being 'flogged' for bed-wetting and speaking Aboriginal languages, as claimed.[26]

The court found that the Federal Government was not liable for these acts because it did not owe a duty of care or a fiduciary duty to the plaintiffs (as discussed at page 45).

Crimes compensation tribunals

Members of the stolen generations have sought compensation for crimes committed against them while wards of the state or in foster care under criminal injuries compensation schemes. People seeking compensation under these schemes generally need to prove that the relevant crime occurred and that harm resulted to them as a result of the crime. There is no prerequisite that a person has been prosecuted or convicted of the crime. The claimant does not need to establish liability. Usually the tribunal relies on police reports of the crime and expert evidence as to the psychological impacts.

Mrs Valerie Linow, an Aboriginal woman from NSW, brought a claim under the NSW scheme for alleged sexual assault while she was a domestic worker on a rural property in NSW. The Aborigines Welfare Board had placed her at the property when she was 14 years old and a ward of the state.

The substance of Mrs Linow's claim was for the psychological trauma suffered as a result of the assaults. Her application included some corroborative evidence in the form of police documents that reveal the early stages of a police investigation. It also included reports from a psychiatrist, detailing Mrs Linow's history and the psychiatric injuries she suffers as a result of the sexual assaults and other life events.

The tribunal agreed to consider the claim even though the relevant acts occurred in the 1950s.[27] The Tribunal Assessor accepted, on the balance of probabilities, that 'the applicant was subjected to a series of indecent and sexual assaults by the alleged offender'.

However, Mrs Linow's claim was denied because the Assessor was not satisfied 'that the [psychiatric] injury was caused as a result of the sexual assaults'. The Assessor noted that if Mrs Linow had been reared in a loving family, she would not have suffered from the psychiatric disorders.[28]

The applicant's claim appears to have failed on the basis that the devastating effects of her removal were so extreme that the subsequent events of abuse did not cause harm to the applicant.[29] The decision is the subject of an appeal.

PIAC has been told that members of the stolen generations in Victoria have successfully made claims under the criminal injuries compensation scheme in that state. They received about $4,000 for sexual assaults. The Victorian scheme provides a maximum of $7,000. In contrast the NSW scheme provides a maximum of $50,000 under the *Victims Support and Rehabilitation Act 1996* (NSW).

Mrs Rosalie Fraser, an Aboriginal woman from Perth, used the crimes compensation framework in Western Australia as the basis for attempting to negotiate an *ex-gratia* payment from the State Government for assaults against her while in foster care. The negotiations were ultimately unsuccessful, being entirely dependent on Ministerial discretion.[30]

Church compensation schemes

Non-Indigenous children in Australia have been awarded compensation by the churches for inadequate care, including sexual abuse, in church-run institutions. An example is the claim of 200 child migrants who, as boys, were expatriated from England and Malta and placed in orphanages in outback Western Australia run by the Christian Brothers. Many of the boys were physically and sexually abused. In 1995 the claims were settled for a total of $5 million dollars, with every claimant receiving a minimum amount, and those most severely harmed receiving up to $25,000.[31]

Compensation for labour exploitation

An important aspect of the policies applying to Indigenous people during the past century was government control of Indigenous labour. This resulted in low wages being paid to Indigenous people and deductions from wages of Indigenous people to government controlled welfare funds. The Queensland Government has offered up to $55.6 million to 16,400 Indigenous people in Queensland to help ease the pain of these policies.

The most significant symbol of these policies was the Aboriginal Welfare Fund, into which a portion of Indigenous peoples' wages were paid from 1943 to the 1960s. Indigenous people were not informed of how much money was in their accounts and had to seek permission to spend even small amounts. The Fund was frozen in 1993, and by 2002 it contained $8.6 million.[32]

The offer is a one off payment of up to $4,000 for non-payment of award wages to Indigenous peoples under the policies. The Government is not acknowledging legal liability as part of the deal. The offer is being made as an alternative to litigation, so people who accept the offer must waive their right to sue.

A number of cases of this type have been settled out of court. The Queensland Aboriginal and Islander Legal Services Secretariat (QAILSS) is said to have 4,000 further claims waiting to sue. The Queensland Premier has acknowledged that the claimants have reason to feel angry and bitter. However, he says the process 'could deliver some overdue justice to ageing people and advance the cause of reconciliation'.[33]

The package will include written apologies, a statement in the Queensland Parliament and a protocol for commencement of all government business requiring acknowledgement of traditional owners.

In July 2002 QAILSS commenced consultations with Indigenous people affected by the offer with $200,000 funding from the Government.[34] The Government requires people to decide if they will accept the offer by the end of August 2002. Aboriginal leaders have been critical of the offer and the time frame imposed. The Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr William Jonas, describes the amounts offered as 'totally insulting' and says the Government should give people proper time to consider the deal.

Restorative justice

The restorative justice approach to conflict resolution is based on the premise that the most effective response to conflict is to redress the harm caused by a wrongful act. It is becoming popular in a number of western legal systems as an effective alternative to the traditional judicial model. Where possible, it brings together all the affected parties - the wrong doer, those who have suffered harm and family or community members - to work through the best response to the harmful act. A common theme of restorative justice is that it shifts the focus to redressing the harm caused and making reparations, rather than on punishment.[35]

The traditional judicial model requires a decision-maker to discern facts that are relevant to a particular legal claim. It is adversarial, producing winners and losers. In contrast, the benefits of alternative mechanisms that facilitate all the relevant parties coming to a mutually agreed outcome are now well-recognised.[36]

Restorative justice programs are most developed in the field of criminal justice. In Australia these programs have included diversionary programs for juvenile offenders, utilising family and community conferencing. These programs have often failed young Aboriginal people

because they have not been built around self-determination and community negotiation. As a result, young Aboriginal people have generally not benefited from family conferencing programs.[37] Restorative justice has also been applied to a limited extent in the context of child care and protection in Australia. It gives families the main responsibility for decisions about care arrangements.[38]

Restorative justice also has a place in resolving conflicts in the civil courts. A Canadian study on why survivors of sexual assault choose to take legal action found that the reasons are mostly therapeutic. The primary motivations were not just to seek monetary compensation, but also to obtain appropriate social responses to injustice. The women surveyed expected to be heard, to have their experience acknowledged and validated and sought to prevent recurrence. Deterring the perpetrators was an expected outcome of legal action for a third of those surveyed and nearly as many said they were seeking revenge. [39]

The restorative justice approach is reflected in the international human rights framework for reparations for human rights abuses. In this context restorative justice is broader than a concern with the individual. It is concerned with the role of the state in a civil society in acknowledging harm and responding to wrong doing.[40]

Redress for institutional child abuse

In Canada and Ireland governments have devised major redress programs for survivors of abuse in institutions run or regulated by government, based on restorative justice. Common features of the schemes are:

- the needs of survivors are central to the scheme
- the harm caused is assumed from the outset
- survivors are offered the opportunity to put their experience on the public record
- validation or proof of claims is conducted in a non-adversarial way
- monetary compensation is paid to support the recovery of survivors.

Schemes such as these have been recommended by at least one public inquiry into institutional child abuse in Australia. The Commission of Inquiry into Abuse of Children in Queensland Institutions, known as the Forde Inquiry, made over 40 recommendations to address past child abuse and prevent its recurrence. These included recommendations for reconciliation, apology and support, including compensation for survivors of abuse. The Forde Implementation Committee, established in 1999 to report to the Queensland Parliament on implementation of the report, had significant concerns about implementation in this area. Its final report in August 2001 said significantly more work needs to be done on compensation. It found that the Forde Trust Fund established by the Queensland Government with a contribution of $2 million was inadequate to meet the high level of demand. The Committee says the Government continues to adopt the position that compensation must be pursued through the courts. It calls for a significant change of approach by the Government and churches.[41]

Ireland

The Government of Ireland has established two separate processes for dealing with children who suffered abuse in state-run or state-regulated institutions. The initiatives cover reformatory and industrial schools, orphanages, children's homes and hospitals. In 2000 the Government established a Commission to Inquire Into Child Abuse. The Commission's role is to investigate child abuse in institutions, enable survivors to give evidence, prepare a report and make recommendations for prevention and action to address the continuing effects of child abuse. It has the power to regulate its own procedures by use of standing orders. [42]

The Commission will report to the Parliament on its findings about abuse that occurred during particular periods, at particular institutions, and about management, administration and regulation of an institution. It is prohibited from identifying survivors or making findings about particular circumstances of alleged abuse.[43]

In February 2001 the Irish Government announced a statutory-based compensation scheme for survivors of child abuse in state institutions. It will run for three years to ensure that claims are dealt with quickly and effectively. The stated objective of the scheme is to provide fair financial redress to survivors of abuse, through a process that avoids the stress, delay and uncertainty of adversarial hearings. Unlike the Inquiry it is 'concerned only with the measures needed to give people who are injured financial support in their recovery from injury.' The main elements of the scheme include:

- *ex gratia* payments for survivors
- validation of claims by the compensation body will be conducted in a non-adversarial way, with inquiries confined to establishing essential facts combined with medical and psychiatric assessment of a claimant
- compensation will be paid for present and continuing damage and for past damage from which the claimant has now recovered
- criteria for awards are set out in the legislation, including the amount for different types of abuse.[44]

The Irish Government's program also includes a counselling program provided by all health boards for survivors of child abuse.

Canada

The Law Commission of Canada conducted a review of the processes for dealing with institutional child physical and sexual abuse in government-run and government-funded institutions during the late 1990s.[45] It specifically included Indian residential schools. The Commission's report, *Restoring Dignity: Responding to child abuse in Canadian institutions*[46], recommended a process for redress that takes into account the needs of survivors, their families and communities in a manner that was fair, fiscally responsible and acceptable to the public. It framed this ideal through eight criteria that included respect, engagement and choice, accountability, fairness, reconciliation, compensation, the needs of families and communities and prevention.

The Commission applied these criteria to a range of redress processes including the courts, police, ombudsman, public inquiries and community initiatives. It recognised that community initiatives could meet the most compelling needs of survivors by involving them in the design and delivery of helping and healing initiatives. The Commission concluded that governments should not attempt to monopolise approaches to redress and should support grassroots community programs.

The Commission reviewed existing alternative redress programs for meeting the needs of survivors by providing financial and other compensation. Key features of the programs are an opportunity to establish a permanent record of personal experiences and an apology. The Commission concluded that redress programs were the most effective official response to meeting its eight criteria for redress options. However, it did not recommend a single approach because the needs of survivors and their communities are so diverse.[47] Instead, the Commission devised five principles to be respected in all processes through which redress is sought:

- former residents should have the information necessary to make informed choices about what course of redress to take

- former residents should have access to counselling and support throughout the process
- those who conduct the process should have the training to understand the circumstances of survivors
- ongoing efforts to improve existing redress options should be made
- the process should not cause further harm to the survivors, and should acknowledge that confronting a painful past is far from easy.[48]

The Canadian Government believes the redress programs it currently provides for survivors of Indian residential schools reflect these principles.[49]

The Government of Ontario in Canada negotiated a particularly interesting scheme under an agreement with former inmates of Grandview Training School for Girls. The details of the agreement, which provide a useful case study, are set out below.

Case study – Grandview Agreement

The Government of Ontario negotiated a unique compensation agreement to deal with claims of abuse by former inmates of Grandview Training School for Girls.[50] The Agreement commences with the statements that society 'has a direct responsibility to provide the support necessary to facilitate the healing process of survivors of sexual and physical abuse' and 'individual based solutions offered by the civil justice system are inadequate…'.

The process provided for former Grandview residents to apply for 'healing packages' – specific medical and other benefits, funds for educational and vocational training, scar reduction, and access to a crisis line. Awards of up to Canadian $60,000 were also available. The packages were available to women who could prove their claims through an independent investigation process. Hearings were conducted before adjudicators, all women, who were selected on the basis of appropriate expertise. The hearings were held in private at neutral locations. Legal assistance was provided to prepare claims, but claimants were rarely represented in the adjudication hearings.

The Grandview process has considerable benefits compared to claims in the courts and victims compensation schemes. Most Grandview survivors sought public affirmation of wrong, or closure. They also expected an apology, which had been delayed pending legal proceedings.

Research on claimants' experience of the adjudication procedure found that 85 per cent of Grandview survivors reported overwhelming approval for their adjudication experience. Civil litigants before the courts and victims compensation tribunals, in contrast, reported great difficulty with their hearings.[51]

Lessons for reparations

The experience of litigation and restorative justice models helps to inform an appropriate process to provide redress for forcible removal policies in Australia.

The traditional approach of the courts, which requires a single determination of facts, focuses on legal issues and not on the needs of the parties, is not appropriate. Equally, an adversarial process for validating claims is not appropriate. Essential elements of any scheme for redress must include an apology, appropriate support and compensation.

The opportunity for people to place their experience on the public record in an appropriate environment is also essential. The process must be able to provide guarantees against repetition.

The people who have suffered harm must be central to any process. They need to know what to expect and to some extent, should be able to shape the process to ensure it meets their needs and those of their community.

Families and communities play a crucial role in healing. Grass roots community initiatives are better able to address the most compelling and specific needs of survivors, and should be supported as part of any overall redress package. No single model should be imposed by government.

Notes

1 Clarke, already cited pp 220 - 221, esp note 6, and at p 226, note 37 (on the symbolic value of the 'stolen generations' litigation to Aboriginal people).
2 A total of 742 writs have been issued on the Commonwealth arising from the claims. Aboriginal legal services in Brisbane, Melbourne, Perth and Adelaide told the project that they collected thousands of statements during 1997-98, but litigation was not commenced except in South Australia. In NSW PIAC assessed and referred over 50 claimants to community legal centres and private lawyers that agreed to represent members of the stolen generations and their families during 1997-98.
3 *Kruger v Commonwealth* (1997) 190 CLR 1, Dawson J p 70, Toohey J at 88, Gaudron J p 107, McHugh p 144 and Gummow p 158; Clarke, already cited, p 219; also see chapter 2 of this report.
4 Clarke, already cited, pp 222-223, 226 and 254 – 255.
5 Clarke, already cited, pp 254-255.
6 *Cubillo v Commonwealth* (2000) 174 ALR 97.
7 In *Williams v The Minister* the statement of claim included trespass. In *Cubillo v Commonwealth* and *Gunner v Commonwealth* the claims included false imprisonment.
8 *Williams v The Minister, Aboriginal Land Rights Act 1983*, [1999] NSWSC 843 (26 August 1999) and on appeal [2000] NSWCA 255 (12 September 2000).
9 Clarke, already cited, pp 272-277; Cody, Anna, 2000, *Case note, Williams v The Minister, Aboriginal Land Rights Act 1983*, Australian Journal of Human Rights, volume 7(1) 155 at pp 164 – 168.
10 Clarke, already cited, pp 284 - 286; Cody, already cited p 163.
11 *Bennett v Minister for Community Welfare* (1992) 176 CLR 408, under section 10 *Child Welfare Act 1947* (WA).
12 Anna Cody, as above at pages 163-164; *Williams v The Minister, Aboriginal Land Rights Act 1983*, [1999] NSWSC 843 (26 August 1999) at 301.
13 *Cubillo v Commonwealth* (2000) already cited, pp 499, 500, 503 - 505; Clarke, already cited, pp 284-286.
14 Clarke, already cited, pp 264 and 294.
15 Cody, already cited; Clarke, already cited, pp 264 - 265.
16 Cody, already cited, p 168 and Clarke, already cited, pp 258 and 265.
17 Over $11.5 million of Federal Government funds were spent on the *Gunner* and *Cubillo* cases to August 2001, of which $770, 000 was for private investigators; Bob McMullan, *Moving forward* conference papers, already cited.
18 Discussed in PIAC submission to the Senate Inquiry into the Stolen Generations, chapter 4, already cited.
19 as above
20 *Welfare v State of New South Wales* 1993, heard before Master Greenwood. PIAC represented Ms Welfare in the claim. The decision is discussed in PIAC, 1999, *Submission to the Legislative Council Standing Committee Adoption Inquiry* and see *Releasing the Past, Adoption Practices 1950 - 1998*, Final Report of an Inquiry by the NSW Legislative Council Standing Committee on Social Issues, December 2000.
21 *Social Justice Report 2000*, already cited, p 142.
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23 *Bringing them home*, p 194.
24 Cody, already cited, pp 160 - 161.
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32 Premier Peter Beattie, 16 May 2002, Media Statement, *State government officers reparations to about 16,400 Indigenous Queenslanders,* available at www.thepremier.qld.gov.au
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34 Minister for Families, Aboriginal and Torres Strait Islander Policy and Disability Services, 3 July 2002, Media Statement, *Beattie Government urges Indigenous Queenslanders to accept reparations offer,* available at http://statements.cabinet.qld.gov.au/cgi-bin/display-statement.pl?is=7436&db+media
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37 *Social Justice Report 2001*, already cited, chapter 5; *Bringing them home,* chapter 24.
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40 Cuneen, Chris, *Reparations and restorative justice: responding to the gross violations of human rights,* chapter 6, Strang and Braithwaite, already cited.
41 *Report to the Queensland Parliament by the Forde Implementation Monitoring Committee*, August 2001, available at www.qld.gov.au
42 *Commission to Inquire Into Child Abuse Act* 2000 (Ireland), ss 1-4 and s 7.
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46 Law Commission of Canada, 2000, *Restoring Dignity: Responding to child abuse in Canadian institutions*.
47 as above, pp 8 - 9.
48 as above, p 10.
49 *Safeguarding the future and healing the past, the Government of Canada's response to the Law Commission of Canada's report*, already cited.
50 All of the girls sent to Grandview became wards of the province of Ontario. The Grandview Agreement refers to the *Agreement between the Grandview Survivors Support Group and the Government of Ontario 1994*.
51 Feldthusen, Hankivsky and Greaves, already cited, pp 82 - 83.

Chapter 8 - Revised tribunal model

PIAC has revised its proposal for a reparations tribunal in light of feedback from the *Moving forward* project. It has also considered some practical ways to implement the proposal in light of existing government and church programs and the Federal Government's opposition to the tribunal.

The essential elements of the original proposal have been retained. It offers an alternative to litigation and seeks to fulfil the promise of full and just reparations for a gross violation of human rights. It would not require governments or churches to admit legal liability, but simply to acknowledge the nature of the policies and the harm done.

Principles

The *Moving forward* meetings and submissions supported the tribunal being explicitly based on a number of principles:

- **acknowledgement** that forcible removal policies were racist and caused emotional, physical and cultural harm
- **self-determination** for Indigenous peoples, recognising the distinct identity of the stolen generations and their right to shape reparations
- **information and access** for Indigenous people affected by forcible removal policies to facilitate their access to the tribunal or other redress options
- **prevention** of contemporary Indigenous child separation from their families.

The *Moving forward* meetings highlighted the need for acknowledgement of the nature of forcible removal policies as a fundamental aspect of the tribunal. The concept of reparations, and therefore the tribunal, is based on the recommendations of the National Inquiry and international human rights principles. The meetings also discussed the importance of acknowledging that the removals involved compulsion, duress and undue influence and the powerlessness of Indigenous women when confronted by the state.

The principle of self-determination means that Indigenous peoples devise and deliver policies and programs to meet their needs. For the stolen generations this means recognising their distinct identity and special needs. It also means respect for Indigenous elders and cultural norms through tribunal processes.

Some people were concerned that the tribunal may undermine their rights and entitlements under the law. A submission to the project from the Retta Dixon Association said tribunals 'usually take away as many rights as they provide'. The *Moving forward* meetings agreed that people should have a choice whether to claim compensation before the courts or the tribunal. People in the Northern Territory supported an exception to allow people who have commenced legal claims before the tribunal is established to have access to the tribunal.

A high priority for the stolen generations is to ensure that Indigenous child separation from their families is minimised. It is therefore important that the tribunal has a role in contributing to prevention strategies.

Recommendation 5

State, territory and federal governments, in co-operation with the churches, establish a tribunal to make full and just reparations for forcible removal policies based on the following principles:

- **acknowledgement** of the racist nature of forcible removal policies and the harm caused
- **self-determination** of Indigenous peoples, including the stolen generations
- **access to redress** for Indigenous peoples affected by forcible removal policies
- **prevention** of the causes of contemporary separation of Indigenous children from their families in the present and future.

Functions

The *Moving forward* consultations did not support the all-encompassing functions originally proposed for the tribunal.[1] The clear view was that the functions of the tribunal should be:

- providing a forum in which Indigenous people affected by forcible removal policies could tell their story, have their experience acknowledged and be offered an apology
- providing reparations measures in response to applications through appropriate reparations packages
- making recommendations about government and church practices on Indigenous child separation and about measures that might be taken to heal the past and prevent recurrence.

There was strong support for the tribunal to hear stories only from Indigenous peoples, consistent with its purpose of providing reparations. Some people supported government and church officials appearing for the purpose of offering an explanation and apology, but not to give testimony.

Making recommendations about government practices was regarded as an essential role for the tribunal. The tribunal should be able to highlight the causes of the continuing high rate of Indigenous child separation and problems with government practice in areas such as access to family records and genealogy. Recommendations for churches to take action on relevant issues would also be an important part of the tribunal's role.

PIAC's proposal that the tribunal monitor government and church implementation of *Bringing them home* was not generally supported. There was a firm view that governments must be accountable for their policies and effective program delivery. These should be the subject of clear performance criteria and reported on publicly, as proposed in recommendation 1, above. Organisations such as ATSIC and the National Aboriginal Community Controlled Health Organisations are regarded as having a responsibility to advocate for the stolen generations to ensure the effective implementation of government programs.

The suggestion that the tribunal devise programs for community development similar to the Canadian Healing Foundation, was generally not supported. The view was that there are already many government agencies with responsibility for community development within Indigenous communities. More co-ordination is needed in this area, not more organisations. However, there was support for the tribunal to provide funding to stolen generations groups to carry out support and development activities as part of reparations packages.

Recommendation 6

The tribunal have the following functions:

- provide a forum for Indigenous peoples affected by forcible removal policies to tell their story, have their experience acknowledged and be offered an apology
- provide reparations measures in response to applications through appropriate reparations packages
- make recommendations about government and church activities that affect contemporary Indigenous child separation and measures that might be taken to heal the past.

Reparations packages

Types of reparations

The *Moving forward* meetings emphasised that reparations packages provided by the tribunal should support individuals, groups and communities to move on with their lives in a positive way. The reparations measures provided by the tribunal need to reflect the basis of reparations, a gross violation of human rights and the needs expressed by those affected by forcible removal policies.

The *Moving forward* meeting participants were invited to discuss the types of reparations they might seek as an outcome from the tribunal, other than hearings and apologies. The national conference also discussed priorities for reparations measures. The types of measures identified reflect modest expectations:

- resources for stolen generations groups to provide culture and history centres, or healing centres, including funding and land or premises
- community education programs about the history of forcible removals
- community genealogy projects for Indigenous communities to help identify membership of the stolen generations and their descendants
- monetary payments for individuals to meet current needs such as funding to travel to see family
- access to appropriate counselling services
- access to language and culture training
- memorials that appropriately reflect the consensus views of local stolen generations
- monetary compensation for people who can prove that they suffered particular types of harm, such as sexual and physical assault.

The tribunal could provide most reparations measures through grants of funding and recommendations for action by governments and churches. For example, the tribunal could provide funding for a culture and history centre for a stolen generations group. It could facilitate the provision of premises for the centre by making a recommendation to a relevant church or to the Indigenous Land Fund.

Participants in the *Moving forward* project recognised that there is a role for the tribunal to comment on government policies. However, they said the wider aspirations for reparations, such as social justice packages to address the underlying disadvantage of Indigenous peoples, could not be addressed through a tribunal.

Issues such as contemporary Indigenous child separation and training of Indigenous archivists, genealogists and historians could arise in the course of hearings and applications for reparations to the tribunal. The tribunal could make recommendations on these policy and program issues, similar to the role of the Waitangi Tribunal in New

Zealand or the Commission of Inquiry into Institutional Child Abuse in Ireland (discussed in chapters 6 and 7).

Facilitating group outcomes

The *Moving forward* meetings and the national conference supported reparations measures based on group or community outcomes. Canadian redress programs and the Waitangi Tribunal were discussed as models. The Canadian redress programs for survivors of residential schools was widely supported during the *Moving forward* meetings. The programs include exploratory dialogues with survivors, Aboriginal leaders and healers and church representatives to inform the models for resolving legal claims of institutional child abuse. The Waitangi Tribunal focuses on reparations for losses experienced by tribal groups rather than individuals. Both programs explicitly aim to bring about healing and begin to build new relationships between Aboriginal peoples and government.[2]

The *Moving forward* issues paper suggested that the tribunal offer procedures for groups of people to make applications for reparations. The proposal was based on class actions procedures in the courts. The procedures allow individuals who have a claim that raises common issues of fact or law and which arise from similar or related circumstances, to make a claim together, represented by a member of the class.[3]

The *Moving forward* meetings supported the tribunal making reparations packages for groups of people and stolen generations organisations. The procedures for class actions are not suited to group outcomes as they only provide for individual class members to receive compensation. The tribunal would need procedures to facilitate group or community claims, such as healing centres or resource centres and memorials.

An emphasis on grouped or community solutions for the stolen generations and their descendants is consistent with the principles of the reparations tribunal.

Recommendation 7

The tribunal provide appropriate reparations measures in response to applications to assist Indigenous people to overcome the harm caused by forcible removal policies, with an emphasis on group resolution of claims.

Compensation

Basis for compensation

Bringing them home recommended that Indigenous people who were removed under duress, compulsion or undue influence be entitled to a one-off payment of compensation. It also recommended that compensation be paid for specific types of harm that are recognised within the current Australian legal framework, such as assault, labour exploitation or loss of culture and land rights. All people affected by the policies could apply for the compensation for specific damages.[4]

Compensation has been a symbolic, political aspect of the claims for reparations for forcible removal policies. This was reflected in the discussions at the *Moving forward* meetings. To many of the stolen generations monetary compensation is important as a measure of recognition of harm. Others find it objectionable that life-changing trauma and grief can be quantified in monetary terms.

Many members of the stolen generations who attended the *Moving forward* conference were concerned about the attention compensation has received in the media. A common view was that compensation should not be allowed to distort public debate about the need for other aspects of reparations.

There was no agreement in the *Moving forward* meetings about the amount of compensation that would be appropriate. Most people's expectations about what compensation could achieve were modest - money to travel to see family, enrolling in Aboriginal language and culture courses or funding for stolen generations' support groups.

The *Moving forward* meetings agreed that compensation should be available to the children who were removed under forcible removal policies and to their families where particular types of harm can be established. In this context, family is understood to mean family members who experienced direct loss and grief, such as parents and siblings. There was also support for descendants to be compensated where they can prove certain types of harm.

Proving damage

Bringing them home and PIAC proposed that people seeking monetary compensation would need to prove the types of damage they have suffered in accordance with the same standards required by a court (on the balance of probabilities). This means an applicant would have to convince the tribunal that it is more likely than not that they suffered the damage or loss. The Canadian and Irish redress programs for sexual abuse require the same standard of proof (discussed in chapter 7).

Applicants and the tribunal are likely to encounter difficulties with evidence given the passage of time since the relevant events. PIAC proposes a number of measures to address these problems. First, the tribunal would need an investigative function so that it would not have to rely on an adversarial process between applicants and governments (or churches) for evidence. Second, the tribunal should not be strictly bound by the rules of evidence or by strict legal formalities or forms, like administrative review tribunals in Australia. This would mean that any cogent and relevant information would be allowed to be considered. The processes used by HREOC for the National Inquiry are an example of how these measures might work.

Third, PIAC also suggests the tribunal be allowed to take into account difficulties in ascertaining facts or circumstances, such as the passage of time and absence of official records. This is based on the powers of the Repatriation Commission, which considers entitlements of war veterans to pensions and compensation for medical treatment.[5]

Even with these measures in place few people are likely to be able to establish proof of damage. The experience of many war veterans, for example, is that they are not able to provide sufficient evidence to satisfy the requirements of the Repatriation Commission.

Applicants who are able to provide evidence are likely to find that the amounts of compensation awarded are modest. The appropriate compensation suggested by the Federal Court in the *Cubillo* case was $125,000 for Mr Gunner and $110,000 for Mrs Cubillo for claims including sexual assault and cultural losses.[6] The amounts were presented in theory only as the Federal Government was not found liable to pay compensation. The maximum amount of compensation offered for victims of crime in most states and territories is $50,000. However, the amount that has actually been paid is closer to $4,000 (see page 47).

The project reference group agreed that people affected by forcible removal policies who can show that they suffered particular types of harm should be entitled to compensation. This would include harm such as sexual abuse and labour exploitation. It also agreed that the criteria for deciding the amounts of compensation is a matter for negotiation between governments, churches and the Indigenous peoples, particularly the stolen generations.

Recommendation 8

The tribunal provide monetary compensation to Indigenous peoples affected by forcible removal polices who can prove that they suffered particular types of damage recognised under current Australian law, such as sexual and physical assault or labour exploitation.

Who can apply?

The *Moving forward* meetings and submissions discussed who should be entitled to reparations, other than compensation. In *Bringing them home* HREOC suggested that the following classes of people be entitled to reparations:

- Indigenous people who were forcibly removed from their families as children
- family members who suffered as a result of the removals
- communities that suffered cultural and community disintegration as a result of the forcible removal of children
- descendants of those forcibly removed who have been deprived of community ties, culture, language, and links and entitlements to their traditional land because of the removals (discussed on pages 10-12).

The definition was widely accepted at the *Moving forward* meetings and in the submissions to the project. However, there was discussion about the place of Indigenous children and young people removed under contemporary welfare policies and the descendants of people removed under the forcible removal policies.

There is a practical problem in defining precisely where and when assimilation policies ceased, and therefore who was 'forcibly removed'. A large proportion of Indigenous children continue to be separated from their families under child welfare systems that *Bringing them home* found to be paternalistic and indirectly racist.[7]

Many people in the *Moving forward* meetings held the view that Indigenous children separated from their families after 1970 should be distinguished from those removed under forcible removal policies. Government policies had changed by 1970 and could no longer be described as a breach of human rights. After 1975 people had the right, in theory, to seek redress for racial discrimination under the *Racial Discrimination Act 1975* (Clth) or to complain to government Ombudsmen. In recent years the role of Aboriginal Child Care Agencies and the adoption of the Indigenous Child Placement Principle have played an important role in changing government approaches to Indigenous child welfare.

However, many descendants of the stolen generations told the *Moving forward* project that their losses need to be recognised. Ms Diane Jarret, Aboriginal Cultural Heritage Research officer, told the national *Moving forward* conference she believes 'the children of the stolen generations' should be recognised for the purpose of reparations as well as future generations. Ms Jarret's mother was a member of the stolen generations. Diane and her siblings were removed from their mother as children in the 1970s and placed in a home as her mother was not able to care for them. The home offered no Aboriginal culture and Ms Jarret grew up confused about her identity and Aboriginal family connection.[8]

Bringing them home recognised that descendants had lost culture and family connection and often grew up with parents who lacked adequate parenting skills. Intergenerational grieving, caring for traumatised parents who suffer from mental illness or substance abuse and loss of family connections were among the impacts identified during the *Moving forward* meetings.

The *Moving forward* project reference group agreed that reparations is for the purpose of making amends for the harm of forcible removal policies. Reparations should therefore be available to those people who were harmed by those policies.

Recommendation 9

The tribunal provide reparations to Indigenous peoples who were removed from their families under forcible removal policies, family members who suffered as a result of the removals and their descendants who suffered harm.

Hearings

Therapeutic purpose

The *Moving forward* meetings, the submissions and the national conference made it clear that the highest of priorities for the stolen generations is to have their experience placed on the official record and acknowledged. Some people also seek an apology or explanation from government officials, clergy who ran institutional homes or perpetrators of physical or sexual abuse. The hearing process was seen as a means to affirm identity and to allow people to move on. The same objectives are used for hearings using the restorative justice model discussed in chapter 7. The inappropriateness of government funded oral history programs to achieve this objective is discussed in chapter 5.

Determining facts

The tribunal would need to make determinations of fact for the purpose of establishing people's entitlement to a reparations package and what the package might most appropriately include. A strong preference was expressed during the *Moving forward* project for the hearing process to be separate from the processes used for making findings of fact. The process to decide facts and entitlements would be best dealt with in a distinct process, where legally defined standards of proof are required. The Canadian redress programs for Indian residential schools are an example of this approach, with hearings held separately from the process of fact-finding and 'validation' of claims.

The process used by HREOC during the National Inquiry also separated the investigation process from the hearings. It recognised the value of hearing and documenting Indigenous people's stories, taking a conscious view that it would hear 'stories' from 'story tellers' rather than 'testimony' from 'witnesses'. The process was effective to describe the effects of forcible removal policies and was necessary to provide the healing function of the Inquiry. According to Sir Ronald Wilson, the National Inquiry was 'careful to ensure it was in line with Indigenous aspirations'. However, the approach has been criticised as lacking an adequate basis for discovering 'facts' according to the usual legal standard of proof. It is said to have confused truths and to have used heart-wrenching accounts of events to fudge selective evidence.[9]

Sir Ronald Wilson says that processes such as cross-examination may have exposed factual errors, but *Bringing them home*'s recommendations were not based on any individual story. They were based on documented evidence of government policies, programs and laws found during HREOC's investigations. The stories described the effects of the policies and any discrepancies within the stories were peripheral to the wider findings.[10]

Protecting personal information

Many people expressed concerns about protecting their personal stories and other information collected by the tribunal. Most participants in the *Moving forward* meetings wanted the information collected by the tribunal to be kept secure and not to be published or used in any way without their consent. The potential for people's stories to be used in litigation caused a great deal of distress in the Northern Territory. People had been reluctant to seek the help of counselling services or contribute to the National Library Oral History project for fear that records of their comments could be subpoenaed.[11] Some people also said they resent the stories they had told the National Inquiry being reproduced by other authors in subsequent publications.

Privacy laws in Australia require personal records to be kept secure and prohibit the use of records for purposes other than the purpose for which they were collected without consent. However, these laws cannot prevent the use of personal information authorised under other laws, including the authority of the courts to subpoena documents.[12] There are no laws protecting the privacy of personal information held by state and territory government agencies, except in NSW and Victoria.

There are precedents for protecting the identity of people involved in proceedings involving children and families. For example, parties to cases in the Family Court and in children's courts are not allowed to be identified. Applicants to the proposed reparations tribunal should be informed of their rights to privacy of personal information and any limitations on those rights.

Processes

The importance of the proposed tribunal providing a supportive environment for people to tell their story and have it acknowledged was stated frequently during the *Moving forward* project. A number of measures were suggested to achieve this:

- build trust in the tribunal through widely publicising its existence, procedures and the outcomes that are available through reparations packages
- ensure processes are flexible and reflect the diverse needs and wishes of applicants and Indigenous communities
- provide applicants with information and support throughout their dealings with the tribunal with culturally appropriate counselling and support services.

Close links with organisations such as Link Ups, appropriate counselling services, stolen generations support groups, Aboriginal health services and Aboriginal legal services would be essential to ensure the tribunal could to make appropriate referrals. Link Up information and support services, assistance with tracing records, arranging reunions, research and certification of descent would complement the work of the tribunal.

Participants in the *Moving forward* meetings and submissions to the project expressed a variety of views about the types of hearing processes that the tribunal should adopt. One option was for people to tell their story in a private setting in the local community with the participation of local Indigenous elders. Another was formal public hearings of the tribunal with an official apology provided as part of the process – akin to the Waitangi Tribunal. Some people supported a 'welcome home' ceremony where the community symbolically welcomes back a person who had been removed. Link Ups already provide support for family reunions that can include welcome home ceremonies, but they are not able to meet the demand for this service.

The *Moving forward* meetings agreed that individual applicants to the tribunal should be able to show that they are people of Aboriginal or Torres Strait Islander descent affected by forcible removal policies. A part of the legal requirements for establishing Indigenous identity is recognition of a person as Indigenous by an Indigenous community. The meetings agreed that the tribunal should recognise organisations such as Link Ups and Aboriginal and Islander Child Care Agencies as Indigenous communities for the purpose of certifying descent.[13]

Most people in the *Moving forward* meetings supported the initial application process requiring only a certificate of Indigenous identity and a brief statement about the circumstances and impact of the removal. Applicants who are seeking a reparations package that does not include compensation would not need to provide further information, unless their claim is contested.

Most *Moving forward* meetings and submissions supported PIAC's suggestion that lawyers have a limited role in the tribunal. The *Moving forward* issues paper suggested that legal representation be allowed where the tribunal believes that not to do so would prejudice the applicant.

There was strong support for applicants to be assisted by someone other than a lawyer if they wish, such as a friend, counsellor or advocate.

Recommendation 10

10.1 The tribunal conduct hearings primarily to hear people's stories and document their experiences, with fact-finding for the purpose of verifying claims conducted through a separate, non-adversarial process.

10.2 The tribunal be accessible and accountable, widely publicising its procedures and the reparations measures available.

10.3 The tribunal protect personal information of applicants, unless applicants consent to its publication or other use.

Membership and structure

The membership and structure of the tribunal were the subject of many varied views during the *Moving forward* consultations. However, a number of elements of the tribunal proposal were widely supported:

- the tribunal be a partnership of governments, churches and Indigenous peoples, including the stolen generations but independent of all of them
- the members of the tribunal be appointed by the partners according to set criteria for relevant skill and expertise
- maximum funding for reparations be made available and the cost of administering the tribunal be minimised as far as possible
- the tribunal have a state and local level presence and influence.

The *Moving forward* meetings strongly supported a tribunal structure that would minimise the cost of administration. A separate infrastructure for the tribunal was not supported. Instead, the meetings supported a tribunal that utilised the resources of appropriate, existing organisations. There was a variety of views on the organisations that would be most appropriate to auspice the tribunal. Some people suggested HREOC or ATSIC as possibilities. Many people favoured the tribunal having links to local communities and a permanent local or regional presence. This could only be accommodated with the use of existing

organisations. Essential requirements would be independence from the stolen generations who would be applying for reparations, but an understanding of their needs.

The need for the tribunal to have a presence at state and territory level was emphasised in a number of *Moving forward* meetings, particularly the meetings in South Australia, Western Australia and Victoria. Many practical aspects of reparations are the responsibility of state and territory governments, such as record keeping and child welfare laws. An understanding of the policies and practices in each state would be essential for tribunal decision-makers.

There were a range of views about the membership of the tribunal at the *Moving forward* meetings and in the submissions to the project. The need for tribunal members to be appropriately skilled was emphasised - cultural awareness and an understanding of the trauma of forcible removals were regarded as important attributes. Members of the tribunal would need to be provided with training about the trauma experienced by members of the stolen generations so that they could respond appropriately.

Most people supported tribunal members being appointed by agreement of all project partners, not just appointed by government. Some people said the tribunal should be made up entirely of the members of the stolen generations, but most supported a balance of Indigenous and non-Indigenous people with appropriate skills. Many people said tribunal members should be under an obligation to act in the best interests of applicants and to avoid conflicts of interest.

Recommendation 11

The tribunal be a partnership of governments, churches and Indigenous peoples, including the stolen generations, with the following features:

- members are appointed by the partners according to set criteria for relevant skills and expertise
- maximum funding for reparations be made available and the cost of administering the tribunal be minimised as far as possible
- local level presence in the community
- structures to influence state and federal government activities.

Implementation

PIAC proposed a legislative basis for the tribunal, based on a national legislative scheme. The *Moving forward* meetings supported a legislative basis for the tribunal. The meetings identified the need for state governments to play their part in providing reparations. Some submissions to the project were concerned that state governments are relying on the Federal Government to avoid fulfilling their own responsibilities.

PIAC's proposal that state and federal governments fund the tribunal, with voluntary contributions from the churches involved in administering forcible removal policies, was generally supported. There were mixed views on whether the churches should be expected to contribute to funding of the tribunal and its reparations measures. According to the report of the Senate Committee, some churches have indicated that they are willing to contribute to a national compensation fund if such a fund is established by the Federal Government.[14]

Jarrah, a stolen generations group in New South Wales, supports funding for the tribunal coming from a levy on all taxpayers so that the whole community takes some responsibility.

The Federal Government's opposition to the tribunal makes it impractical to continue to pursue a national model tribunal at present. State governments could implement the revised model tribunal as part of their policy commitment to reconciliation and partnership with Indigenous communities. The success of the Journey of Healing, as a community initiative with minimal funding, in bringing people together for reconciliation and healing, demonstrates the benefits of local and regional initiatives. State and territory government tribunals could be established in partnership with ATSIC and stolen generations groups.

The fundamental features of the tribunal could be delivered with modest financial support. It primarily requires a process for conducting hearings and acknowledging experiences, provision for memorials, funding for resource and cultural centres, and financial subsidies for family reunions. The cost of conducting hearings and providing appropriate reparation packages need not be prohibitive. HREOC conducted its National Inquiry over 18 months for $1.8 million, a fraction of the funds spent on litigation so far.

The recommendations from this project require governments and churches to review their reparations programs with the participation of the stolen generations. The programs, like the tribunal, must be developed in close consultation with Indigenous peoples, especially the stolen generations.

Recommendation 12

State, territory and federal governments and the churches develop and implement a process to establish a reparations tribunal in close consultation with ATSIC and stolen generations groups.

Notes

1 See chapter 3; Submission to the Senate Inquiry into the Stolen Generations 2000, PIAC, already cited.
2 The programs are discussed in chapter 6.
3 For example, *Federal Court of Australia Act 1976* (Clth), Part IVA.
4 *Bringing them home*, recommendations 14 and 19.
5 *Veterans' Entitlement Act 1986* (Clth), especially section 119.
6 Clarke, already cited, p 284; *Cubillo v Commonwealth* (2000), already cited, pp 577.
7 *Bringing them home*, pp 453 - 460.
8 Diane Jarret, *Healing ourselves, Moving forward* conference papers, already cited.
9 Patrick Carylon, 2001, 'White lies', *The Bulletin*, 12 June 2001, 26, p 28.
10 as above.
11 *Healing: a legacy of generations*, p 48.
12 *Privacy Act 1988* (Clth).
13 *Bringing them home,* recommendation 13.
14 *Healing: a legacy of generations*, pp 259 – 260.

GLOSSARY

ATSIC – Aboriginal and Torres Strait Islander Commission

CAR – Council for Aboriginal Reconciliation

Bringing them home – report of the National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families, 1997

Healing: a legacy of generations – report of the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generations, 2000

HREOC – Human Rights and Equal Opportunity Commission

Link Up – Indigenous community based organisations providing family reunion services primarily with funding from the Federal Government

MCATSIA – Ministerial Council of Aboriginal and Torres Strait Islander Affairs

NACCHO – National Aboriginal Community Controlled Health Organisations

National Inquiry - National Inquiry into Separation of Aboriginal and Torres Strait Islander Children from their Families conducted by HREOC during 1995-1996

NSDC – National Sorry Day Committee

OATSIH – Office of Aboriginal and Torres Strait Islander Health, Department of Health and Aged Care (now Department of Health and Ageing)

Senate Committee - Senate Legal and Constitutional References Committee Inquiry into the Stolen Generations, 2000

Social Justice Report – annual report to the Federal Attorney General by the Aboriginal and Torres Strait Islander Social Justice Commissioner, HREOC

1. Sydney, 20 March 2001, 10.30am – 3.00pm

Facilitators: Lola Edwards, NSDC (NSW), and Barry Duroux
Link Up NSW, both members of PIAC's Stolen Generations Reference Group

Meeting participants:
There were 14 participants - 7 men and 7 women - predominantly members of the stolen generations from Sydney and Bateman's Bay. Many of the women grew up together in the same institution. Participants included individuals, community activists, workers for Aboriginal health and legal services, people who work for State Government agencies (justice and community welfare), Aboriginal counselllors, and Link Up. Two PIAC lawyers and a policy officer from ATSIC also attended.

Primary issues:
- there was a strong theme of self-determination for Indigenous people and for members of the stolen generations to make decisions for themselves.
- the need for discriminatory and genocidal practices of governments to be acknowledged was raised repeatedly.
- there was emphasis on the need for the tribunal to have timely and supportive processes with appropriately trained indigenous therapists, lawyers and other support people drawn from the Indigenous community.
- the term 'reparations' was rejected - people need a word that they can identify with.
- compensation, and how it might work, was an important topic for the group.

2. Sunshine Coast, 3 April 2001, 9.30am – 2.00pm

Facilitator: Judi Wickes, National Sorry Day Committee

Meeting participants:
There were 11 participants - four men and seven women. The participants included individual members of the stolen generations from the local area, some people who were only just beginning the process of finding their Aboriginal family, Indigenous people working for Aboriginal health services, Queensland Health and the Department of Families and Link Up.

The ATSIC Commissioner for Brisbane gave apologies and met with the project worker later that day to discuss the project and hear what the group had said.

Primary issues:
- There was considerable anger and frustration about the amount of talking and lack of tangible action.
- There was a strong theme that the tribunal should be 'by black people, for black people'. There was resentment about other people claiming to speak on behalf of the stolen generations.
- The group spent quite some time discussing Aboriginal identity and how the tribunal's processes should be structured to avoid insults and alienation.
- There was concern that Aboriginal children face greater challenges than ever.
- The tribunal should harness the existing knowledge in the Indigenous community

through mechanisms such as training Indigenous fact finders, recognising the role of elders, and processes of community participation.
- The need for appropriate counselling services, Link Ups and cultural and family education was identified as a priority.

3. Bathurst (NSW), 11 April 2001, 10.30am – 1.00pm

Facilitators: Lola Edwards, National Sorry Day Committee and Carol Kendall, National Sorry Day Committee

Host: Bathurst Aboriginal Land Council

Meeting participants:
There were five participants – two women and three men. One participant identified as a member of the stolen generations, another identified as a descendant of the stolen generations. The others were members of the local Aboriginal community.

Primary issues:
- A major issue was Aboriginal identity – how the community identifies those removed, the insults of government proof of identity processes, the extent of the loss of language and culture in the Bathurst area.
- The need to address the problems of the current generation of Aboriginal children. A legacy of removals is reluctance to engage with government services such as schools and health services.
- The tribunal needs to be designed to give recognition to people's feelings. Community processes, such as group discussions should be available, not just one on one interviews or public hearings.
- The distressing experience of finding and reading personal files dominated much of the discussion. The insulting language, false claims, the type of information recorded, lost files. People need support and counselling through this process.

4. Perth, 20 April 2001, 9.30am – 3.00pm

Facilitators: Rosalie Fraser, NSDC

Host: Aborigines Advancement Council

Meeting participants:
There were 19 participants - 10 men and 9 women. Almost all the participants were members of the stolen generations from Perth, Albany and Geraldton. They included a Link Up worker, counsellors from the Aboriginal health service (Derbarl Yerrigan) and people working for the WA Department of Health.

Primary issues:
- One of the key issues was the need for recognition of the role of people telling their stories in the community, and support from individuals in the community, as part of counselling, not just mental health professionals.
- There were serious concerns about record keeping by government and churches – the offensive language used, lost and destroyed records, and continuing difficulties in obtaining records.

- People did not feel confident about the privacy of information collected by the National Library's Oral History project.
- There was strong support for members of the stolen generations to control decisions about them through a process of election of representatives.
- Definitions of 'stolen generations' and 'forcible removal' were discussed.
- A permanent regional and local presence for the tribunal was regarded as fundamental.
- Compensation and the role of litigation took up a substantial part of the discussion. Many people felt that the restrictons on the right to sue the WA government (strict limitations periods) were racially based.

The group enjoyed a live performance from local stolen generation musician, Fred Penny. Fred had written a song especially for the occasion entitled 'Lowitja, Lowitja'.

5. Broome, 27 April 2001, 9.30am – 1.30pm

Facilitator: Mark Bin Bakar, Kimberly Stolen Generations Corporation

Host: ATSIC - Kullarri ATSIC Regional Council

Meeting participants:
There were 14 participants - seven men and seven women. Most of the participants had been separated from their families and grew up at the Catholic Mission at Beagle Bay. The others identified as their descendants. The participants included the Chairperson of the Kullarri ATSIC Regional Council.

Primary issues:
- a major theme was the need for the tribunal to have a permanent local community presence but also for their stories to be heard nationally – 'we are sick of telling our stories to each other in the bush'.
- the deep personal feelings of permanent alienation from familiy, loss of culture and right to land are strongly felt. The desire to own land as stolen generation people, and the effects of the native title process were significant.
- the Corporation is seeking a place to provide its Link Up service and to carry out its support and advocacy activities.
- the definition of who is the stolen generation was discussed. The Corportion has a definition in its membership criteria but this is under review.
- there were concerns about the effect and ownership of the stories they have told to the National Library, the Human Rights and Equal Opportunity Commission, and lawyers.
- the group spent some time discussing monetary compensation, the harm that it would be redressing and the practical uses of the money.
- the group discussed the *Gunner* and *Cubillo* cases and whether the tribunal offers justice. They want expert, independent legal advice so that they know their rights are being protected.

6. Darwin, 30 April 2001, 10.30pm – 3.30pm

Facilitators: Toni Ah-Sam, Northern Territory Stolen Generations Corporation and Jane Vadiveloo

Host: Vikkie Hoult, acting Chairperson, Northern Territory Stolen Generations Corporation

Meeting participants:
There were 26 particpants - five men and 21 women. Most participants were separated from their families and grew up in institutions in the Darwin area. Participants were members of local associations that represent the people who grew up in each home. For example, the Garden Point Association. Members of the Retta Dixon Home Aborignal Corporation chose not to attend the meeting.

Primary issues:
- a major theme was the right for members of the stolen generations to speak for themselves and make decisions on matters affecting them.
- the role of litigation as a legal and political strategy was a dominant issue – reflecting the impact of the *Gunner* and *Cubillo* claim and the *Kruger* case.
- there was a strong view that only the courts will deliver justice and the tribunal may not, at least in terms of compensation.
- the outcomes sought from the tribunal included place and land, telling your story, a Bill of Rights and monetary compensation. The need for people to be able to tell their story in a private and confidential setting was expressed by many.
- there was a discussion of definitions of 'stolen generations', based on the definition used by the various local associations and the Northern Territory Stolen Generations Corporation.
- there was a long discussion on the most appropriate scheme for monetary compensation, who should be entitled and to how much.

7. Alice Springs, 2 May 2001, 9.30am – 4.30pm

Facilitator: Jane Vadiveloo

Host: Zita Wallace, Central Australian Stolen Generations and their Families Corporation

Meeting participants:
There were 14 participants - seven men and seven women. All were members of the Central Australian Stolen Generations and their Families Corporation. Most had grown up in institutions in the Northern Territory, and many had grown up together. Some identified as descendants of the stolen generations.

Primary issues:
- a key issue was lack of recognition of members of the stolen generations by Aboriginal organisations, even though the community and clan groups recognised and welcome them as part of the community.
- a significant theme was the need to recognise the suffering of Aboriginal mothers who had their children removed from them.
- Priorities for reparations include measures to address contemporary removal, more funding for organisations such as Aboriginal Child Care Agencies and community education.
- the need for appropriate counselling to support people in their journey of healing and particularly when telling their story was identified.
- there was an emphasis on the need for stolen generations people locally to manage services that are targeted to assist them. The Corporation now runs Link Up in Alice Springs and is a very effective advocacy organisation.
- the need for the tribunal to have a permanent local presence was discussed. There should be field officers and fact finders as well as appropriate counselling and support for applicants.

- There was strong interest in monetary compensation, the types of schemes that might be used and the practical uses people would make of the money.

Meeting with UN Special Rapporteur on Racism
The meeting adjourned from 12.00 to 2.00pm to meet with the UN Special Rapporteur on Racism and his assistant who happened to be visiting Darwin on that day. Participants had the opportunity to tell their individual stories and to raise their concerns as a group. The Special Rapporteur said it was one of the most moving presentations he has attended.

The Special Rapporteur undertook to take up three issues in his meetings with Government during his visit to Australia and in his report to the UN. The three issues were contemporary removal of Aboriginal children from their families, the misdirection of the $63,000,000 intended for the stolen generations and the group's aspiration for a reparations tribunal, recognising that this first requires an apology.

8. Adelaide, 11 May 2001, 9.30am – 2.00pm

Facilitator: Richard Young, for Link Up

Host: Link Up & Nunkuwarrin Yunti

Meeting participants:
There were 19 participants - four men and 15 women. The participants included individuals who are members of the stolen generations – some grew up in mission institutions, some fostered, and some who had only recently discovered their Aboriginal family ties. There were also people who identified as descendants of the stolen generations. They were also Indigenous counsellors, workers from Aboriginal health and legal services, from ATSIC, and Link Up, as well as Indigenous staff of state government agencies (State Records and Aboriginal Affairs) and Catholic Education. Some non-Indigenous members of the National Sorry Day Committee also attended.

Primary issues:
- the group were very interested in the litigation across Australia, and the difference between how issues are defined by the courts and by the tribunal.
- a key theme was the need to recognise inter-generational grieving and loss of family functionality, so that the mental health problems and the burden of looking after anguished parents are recognised.
- the group agreed that there should be some international supervision of the tribunal, possibly through UN membership.
- distrust of government agencies in keeping information private was a strong theme - people must be able to control who has access to their information.
- the group emphasised the need to ensure people tell their stories in the appropriate context, allowing for the unspoken knowledge about people's lives and accommodating the potential impact on other individuals.
- during the discussion of compensation people suggested the option of having individual claims pooled for use in community programs or services – the ultimate in self-determination.

9. Melbourne, 17 May 2001, 10.30am – 2.00pm

Facilitator: Marjorie Thorp, PIAC stolen generations reference group

Hosts: Victorian Aboriginal Health Service, Fitzroy Vic
Ms Daphne Yarram, Binjirru Regional ATSIC Council
Mr Troy Austin, Tumbukka Regional ATSIC Council

Meeting participants:
There were 19 participants - 10 men and 9 women. The group included local members of the indigenous community and clients of the Victorian Aboriginal Health Service. Most were people working for Indigenous organisations - a worker from a regional Aboriginal Cooperative, workers from Aboriginal health and legal services, ATSIC, Link Up workers, and workers from the Victorian Aboriginal Child Care Agency. The chairpersons of the ATSIC Binjurru and Tumbukka Regional Councils also participated. A number of participants were non-Indigenous people who work for Aboriginal organisations.

Primary issues:
- a strong message was the view that there is a different legal system for Aboriginal people. Political solutions are needed to provide redress.
- the extent of child abuse in the Indigenous community, and the need for the community to develop responses was raised as a most important issue.
- the requirements for establishing Aboriginal identity are a barrier for many people. Genealogy is becoming critical with native title.
- the tribunal should be state based rather than national as Aboriginal people are mostly affected by state laws, programs and institutions.
- cultural concepts should drive solutions, and community processes and elders should be part of the process.
- the definition of forcible removal should take into account the wider legal and social circumstances of Aboriginal people of the day, and the impacts of removals on those left behind.
- tribunal processes and outcomes should to provide for family and group claims to reflect how people are affected and the best outcomes for them.
- people indirectly affected by removals, such as family members, descendants, and non-indigenous parents, should be recognised as 'co-affected' applicants.
- the tribunal should be linked to discussions about treaty. The legal basis of the tribunal, its capacity to make binding decisions, is fundamental.

10. Hobart, 18 May 2001, 9.30am – 1.00pm

Facilitator: Ms Debra Chandler, National Sorry Day Committee

Meeting participants:
There were 8 participants - 2 men and 6 women. Participants included non-Indigenous members of the National Sorry Day Committee, a priest of the Uniting Aboriginal and Islander Christian Congress, Indigenous members of the National Sorry Day Committee.

The ATSIC Commissioner for Hobart was not able to attend the meeting but met with the project officer later that day to discuss the issues. Notes from that discussion are incorporated below.

Primary issues:

- the dominant issue was the struggle for recognition of identity for the stolen generations. Many people, including some Indigenous leaders in Tasmania, do not accept there is a stolen generation. Definitions of 'forcible removal' and 'stolen generations' are quite contentious.
- recognition of Aboriginal identity is difficult and divisive in Tasmania. The community and elders are more accepting than organisations. Link Up has a potentially central role in verifying a person's Aboriginal identity.
- the need for a stolen generations support group, independent of services such as Link Up, and health services, was identified as a priority.
- the need for people to tell their story as part of their healing is still important. The need for people to have the opportunity to talk to a significant person who was present at the time of removal was discussed.
- community education was identified as a priority outcome from the tribunal.
- the tribunal needs to have state based structures as that is the level at which problems need to be addressed. Obtaining records is still difficult in Tasmania, and the tribunal could be a catalyst for a formal government policy.
- addressing the mental health needs of those removed is essential. The healing focus of the tribunal should be paramount.

Main themes in submissions and meetings — Appendix 2

There were some common themes at all *Moving forward* meetings. The individual and collective harm, loss and grief experienced by the stolen generations and their families were expressed at every meeting. There was clearly a great need for information about government decisions and services affecting the stolen generations. Other common themes were:

- a full apology and acknowledgment from the Federal Government is fundamental to moving forward
- what happened to the $63 million dollars committed by the Federal Government in response to *Bringing them home*?
- modest and practical ideas about how financial compensation would assist – mostly to pay for travel to see family
- the depth of harm can never be adequately compensated by money - payment of small nominal amounts would be insulting and unacceptable
- government and church records are significant as proof of what happened to people, the attitudes that formed the basis of decisions about their lives, and for tracing family
- people are tired of talking and feel the need for action is urgent
- members of the stolen generations seek a voice of their own, often through organisations, and input into and control of services targeting them
- a pervasive sense of distrust of government agencies
- the tribunal's processes must be simple and supportive and recognise the needs of people at different stages of the journey of healing
- the problems faced by the current generation of Indigenous children and young people need to be addressed urgently.

There were different views on some aspects of the tribunal proposal:

- whether the functions of the tribunal should be limited to responding to applications, or should also include monitoring government programs and funding community projects;
- the membership of the tribunal and how members are appointed;
- definitions of the stolen generations and who should be entitled to reparations, and compensation;
- the name of the tribunal – many are alienated by the word 'reparations' and 'tribunal' has bad associations for some;
- the type of scheme that should be used to provide individual compensation;
- the ability of the courts (legal claims) to provide justice and whether the tribunal would have a positive or negative affect on rights and redress;
- the extent to which the tribunal should have a local, state or national presence;
- the culpability of the churches and the role they should play in the tribunal.

All the written submissions to the project supported the tribunal as an alternative to litigation and as a social justice initiative. There was also support for a reparations tribunal in submissions to the Senate Inquiry from Indigenous organisations, although some were sceptical. The submission of the Retta Dixon Home Aboriginal Corporation to the Senate Inquiry expressed concern that the tribunal would undermine legal rights that are currently being sought through litigation.

The written submissions to the project emphasised the need to ensure that the tribunal has strong links to communities. They also discussed the importance of the tribunal having links to complementary services such as Link Up and appropriate counselling. Winangali emphasised the importance of the tribunal to have processes to keep people safe, while the Wuchopperen Health Service emphasised the need for support through the application process.

The burden for descendants of the stolen generations was the focus of a number of written submissions (Central Australian Aboriginal Legal Aid Service and the Sacred Site Within Healing Centre). Most submissions supported the tribunal having some role in addressing the problems of contemporary removals, but recognised that it would be limited.

Most submissions supported state and federal governments funding the tribunal, but there were some alternative views. Jarrah suggested a levy on all taxpayers so that the whole community takes some responsibility. There was no clear view of the role of the churches in the tribunal.

The need for tribunal members to be appropriately skilled, with substantial representation from the stolen generations was raised in some submissions. The appointment of members should not be only a matter for governments to decide – Indigenous communities should be involved in the decisions.

The submissions from the National Aboriginal and Torres Strait Islander Catholic Council and the National Council of Churches Aboriginal and Islander Commission emphasised that the tribunal must be based on a full acknowledgment of the wrongs of forcible removals. The church submissions regarded the tribunal's most appropriate role as responding to applications from individuals, groups and communities. Both were critical of the short time frame and limited extent of the consultation process used by the project.

Recommendations from the *Moving forward* national conference, August 2001

Appendix 3

General issues

1. That the federal, state and territory governments and the churches fully implement the recommendations of *Bringing them home*.

2. That governments and churches ensure the effective participation of stolen generations members in all decision making that affects them.

3. That the Federal Government apologise to the stolen generations in accordance with recommendation 5 of *Bringing them home*.

4. That the Federal Government provide annual funding to convene national conferences for the stolen generations.

5. That current funding arrangements be extended to provide adequate funding for National Sorry Day activities.

6. That human rights be constitutionally protected, as a guarantee against repetition.

7. That genocide be specifically prohibited by Commonwealth legislation.

8. That ATSIC, in collaboration with representative stolen generations organisations, disseminate these recommendations.

Identity, tracing and family records

9. That all levels of government and church agencies fully maintain all records relevant to institutions, and implement the recommendations in *Bringing them home* in relation to records management.

10. That state and territory governments waive all fees associated with retrieving and amending birth, marriage and death certificates of members of the stolen generations and their descendants so that they reflect their natural birth parents.

11. That the practice of burying members of the stolen generations with a grave identified by a number, rather than a name, be rectified by the establishment of a fund to pay for the funerals of members of the stolen generations, where appropriate.

Family re-union and counselling

12. That Federal Government funding for reunion and counselling services be the subject of adequate consultation with stolen generations members to ensure that it better meets the specific needs of members of the stolen generations. Participants were concerned that the current funding arrangements do not ensure that resources are being allocated to the appropriate organisations (particularly for counselling services)

13. That the Federal Government ensure, as an urgent priority:
    - funding for Indigenous counsellor positions is made available;
    - training and skills development for Indigenous counsellors include reference to the particular needs of the stolen generations (the Muramali Project was seen as a model in this regard); and

- all course curricula for Indigenous health studies incorporate stolen generations issues and healing principles.

14. That the Federal Government provide recurrent funding to Link Up for counselling services, family reunions and annual reunions of people removed to the same institutions.

15. That current funding arrangements be extended to provide ongoing counselling, relationships and parenting support for stolen generations members.

Memorials

16. That federal, state and territory governments consult with members of the stolen generations and their representative organisations in relation to maintaining former institutions of removal as memorial, monuments or historical sites. For example, that the NSW Government consult with people removed to Cootamundra Girls Home (now Bimbadeen College) about the maintenance of the site as a memorial; that Moore River native settlement/Mogumber Mission be restored to its original state and preserved as a memorial to the stolen generations, following consultation with those formerly removed to the institution.

Community Education

17. That reparations include community education and recognition of the experiences of removal.

Compensation

18. That a reparations package include financial compensation for people who were harmed by forcible removal policies. Compensation should take into account individual experiences and loss.

Reparations tribunal

19. That a reparations tribunal be established, following effective consultation with stolen generations members and their representative organisations.

20. That the tribunal be established as a partnership of government, churches and Indigenous organisations, including the stolen generations.

21. That the tribunal be funded by the federal and state governments and the churches who implemented the removal policies.

22. That the majority of the tribunal's membership be comprised of stolen generations representatives from all states and territories.

23. That the reparations tribunal have the following functions:
    i) to hear peoples' stories;
    ii) to investigate applications and obtain documents from governments and church agencies;
    iii) to grant reparations, including compensation;
    iv) to assist in the design of reparations programs;
    v) to make recommendations about policies and practices regarding past forcible removals, eg access to records, mediation and negotiation processes between

territory, state and federal governments and stolen generations groups;

vi) to make recommendations about policies and practices regarding contemporary separation of Aboriginal and Torres Strait Islander children from their families, including through the care and protection and juvenile justice systems;

vii) to make recommendations to governments in terms of the *Bringing them home* Report; and

viii) to carry out any other functions identified through consultations and negotiations with the members of the stolen generations and their families.

24. That the tribunal receive applications from individuals, families, communities and groups of people removed to the same institution.

25. That descendants of those forcibly removed be entitled to bring applications before the tribunal and receive reparations to deal with the ongoing consequences of removal.

26. The tribunal will:

i) liaise broadly with existing service providers at all levels of government; with Indigenous organisations such as ATSIC, land councils, and the Indigenous Land Fund; and with the churches;

ii) negotiate with the applicants to determine the appropriate package of reparations (in accordance with the principle of self-determination) and seek to reach a consensual agreement regarding the provision of such reparations; and

iii) have expedited procedures to prioritise applications from applicants to the tribunal who are old or sick or those making applications on their behalf.

27. That the tribunal must be represented in and accessible to people living in regional areas.

28. That HREOC, ATSIC and PIAC, in collaboration with representative stolen generations groups, design and implement a process of further consultation about a reparations tribunal.