

CHAPTER 1

INTRODUCTION

Section 1

Referral of the Inquiry

1.1 On 24 November 1999, the Senate referred to the Legal and Constitutional References Committee an inquiry into the implementation of recommendations made in a report by the Human Rights and Equal Opportunity Commission (HREOC). This report, completed in 1997, arose from the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, and was entitled *Bringing Them Home*.¹ It subsequently became known as the Stolen Generation report.

1.2 The Committee was to report on this inquiry by 5 October 2000. On 5 September 2000, the Committee sought and was granted an extension to 28 November 2000. On 28 November 2000, the Committee sought and was granted an extension of time to report to 30 November 2000.

Terms of Reference

1.3 The Senate referred the following matters to the Committee:²

- (a) The adequacy and effectiveness of the Government's response to the recommendations of the report, *Bringing Them Home*;
- (b) After consultation and agreement with appropriate representatives of the stolen generations, to determine appropriate ways for governments to:
 - i) establish an alternative dispute resolution tribunal to assist members of the stolen generations by resolving claims for compensation through consultation, conciliation and negotiation, rather than adversarial litigation and, where appropriate and agreed to, deliver alternative forms of restitution, and
 - ii) set up processes and mechanisms, which are adequately funded, to:
 - (A) provide counselling,
 - (B) record the testimonies of members of the stolen generations,

1 The terms of reference of the Human Rights and Equal Opportunity Commission inquiry are at Appendix 4

2 See Senate *Hansard*, 24 November 1999, pp. 10493-10501

(C) educate Australians about their history and current plight,

(D) help them to establish their ancestry and to access family reunion services, and

(E) help them to re-establish or rebuild their links to their culture, language and history

(c) Effective ways of implementing recommendations of the *Bringing Them Home* report including an examination of existing funding arrangements;

(d) The impact of the Government's response to recommendations of the *Bringing Them Home* report, with particular reference to the consistency of this response with the aims of the Council for Aboriginal Reconciliation; and

(e) The consistency of the Government's response to recommendations of the *Bringing Them Home* report with the hopes, aspirations and needs of members of the stolen generation and their descendants.³

Conduct of the Inquiry

Advertisement

1.4 The Committee invited a range of individuals, organisations and state and territory governments to make submissions, and advertised the terms of reference in newspapers in all capital cities on 4 and 5 December 1999. The original closing date was 17 March 2000. However, a number of organisations and individuals stated they did not know of the inquiry, and the Committee agreed to extend the date for submissions to the end of May 2000.

Submissions - Extent of Response to the Inquiry

1.5 The Committee received 147 submissions (including supplementary submissions). All except three have been made public and are listed at Appendix 1. A wide range of organisations and individuals contributed, some making two or more submissions. This provided the Committee with a variety of information which contributed substantially to its deliberations.

State and Territory Governments

1.6 It was a matter of regret that a number of states did not respond to the inquiry, with originally only the Northern Territory, the Australian Capital Territory and South Australia providing submissions. In all three cases, the submissions comprised the earlier responses to *Bringing Them Home* with a covering letter. To the credit of the ACT government, their submission included the ACT government response to *Bringing Them Home*, and the ACT Implementation Report 1998-1999. The

3 Senate *Hansard*, 24 November 1999, p.10587. In advertising and during hearings, a slightly varied form of these terms of reference was used; this is at Appendix 3

Committee understands that the ACT Implementation Report 1999-2000 is forthcoming, and in fact all states and territories should have provided such a report by the end of October 2000.

1.7 Specifically, the NSW, Queensland and Tasmanian governments did not contribute to this inquiry. However, the Committee wishes to note that while the Office of the Minister for Aboriginal and Torres Strait Islander Affairs corresponded with individuals whom it thought should participate in the inquiry, it did nothing to request the participation of state and territory governments.⁴

1.8 Towards the end of the inquiry process the Committee received submissions from the Western Australian government and the Victorian government. These submissions have proved useful in clarifying some issues including funding and service development and have demonstrated the importance of state governments providing input on this matter. Even if states believed the inquiry related only to issues with which they had no concern, the fact that many services link in with existing programs, and there are many issues where both levels of government are involved, means that this perspective on effectiveness of implementation processes should be provided.

1.9 Further, the Committee believes that the lack of effective coordination and monitoring of implementation has resulted in a shortage of accurate and up to date information and of data on the evaluation of programs.⁵ Given this fact, contemporary material from state governments would have been of considerable assistance in assessing if projects were in place, if links had been established on national projects such as preservation of and access to records, and if states had been aware of the concerns that were raised with the Committee in respect of those programs in which they were participating.

1.10 Both Territories were in the position of not having operated as separate entities during the relevant time period, having been under Commonwealth management until 1978 in the case of the Northern Territory and 1989 in the case of the ACT. Both gave oral evidence to the Committee, particularly on the issues of dealing with the effects of separation in the present.

1.11 Nonetheless, as a result of having incomplete information about current actions, the Committee feels unable to comment in detail on the nature of State responses to certain recommendations.

1.12 Information was available to the Committee from the Ministerial Council of Aboriginal and Torres Strait Islander Affairs (MCATSIA) status report on the

4 See *Transcript of evidence*, Senator McKiernan and the Minister for Aboriginal and Torres Strait Islander Affairs, pp. 647-648

5 See below, Chapter 5; see also Chapter 2, Paragraphs 2.56-2.64, 2.148-2.155

responses made by each jurisdiction to *Bringing Them Home*⁶ and from Chapter 4 of the Sixth Report of the Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner (the *Social Justice Report*).⁷ That chapter reproduced research presented in *Bringing Them Home: Implementation Progress Report (IPR)*, which was the outcome of a follow-up project undertaken under the auspices of the Human Rights and Equal Opportunity Commission (HREOC) to collate the various government responses to *Bringing Them Home*.

1.13 The information in the MCATSIA status report and the Social Justice Report largely coincided but in some cases, more detail was given in one than in the other. Formal responses from New South Wales, Western Australia, South Australia and the Northern Territory were not available at the time that the research later published in the Social Justice Report was undertaken.

1.14 The Committee has supplemented information on state and territory projects where possible from other material provided and from evidence given orally by a range of witnesses.

Churches

1.15 Churches and religious bodies (such as orders of nuns) were heavily involved in the care of separated children, and made submissions to the *Bringing Them Home* inquiry. Nonetheless, there has been limited response by both churches and religious organisations to this inquiry. From evidence received, it appeared that many churches and religious organisations believed that government needed to take a lead in the area of compensation, and that churches were waiting for this to happen.⁸ Although they had taken a range of individual actions, they saw themselves as being limited with respect to matters which might require a national view or process, such as the national compensation fund. It is therefore difficult to gauge current involvement in, and commitment to, the *Bringing Them Home* recommendations by this key group,⁹ although the Committee made several attempts to do so.

1.16 One of the difficulties which the Committee noted with respect to information about action taken by the churches in particular was that it was almost impossible to

6 The Status Report is reproduced as Appendix 4 to the submission by the Minister for Aboriginal and Torres Strait Islander Affairs (*Submission 36*, pp 653-673). The dates of completion of the responses are: Tasmania (August 1997) Victoria (November 1997 and November 1998) Commonwealth (December 1997) Queensland (April 1998 and June 1999) Australian Capital Territory (July 1998) Western Australia (August 1998) Northern Territory (August 1998) South Australia (December 1998) NSW (June 1999)

7 See Human Rights and Equal Opportunity Commission, Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, Sixth Report 1998 (Sydney 1999). This will be referred to as the *Social Justice Report 1998*

8 See below, Chapter 8

9 See especially Chapters 5 and 8

determine who, in any church, had the authority to speak for that church.¹⁰ Thus, while various witnesses stated their own approach in respect of what they were doing, they were unable to speak for a whole organisation: ‘I do not know whether I speak for the whole Anglican church on that matter.’¹¹

I think that it will be something of a battle within the life of the church...for people to take hold of these realities. Within any group of people there are always those who do not want to hear. So I think we have as much a battle on our hands in the life of the churches as we do within the life of the nation. ...But there will always be a voice that will want to promote these issues within the life of the churches, and that voice has from time to time been reasonably well heard...¹²

Commonwealth government departments

Aboriginal and Torres Strait Islander Commission (ATSIC)

1.17 The Aboriginal and Torres Strait Islander Commission (ATSIC) provided the Committee with a comprehensive submission and supplementary submissions, and appeared before the Committee independently, and also later with the Minister for Aboriginal and Torres Strait Islander Affairs. The Committee would also like to note the timely response to questions on notice and clarifications of evidence.

1.18 The Committee appreciates the workload and pressures experienced by ATSIC, given that this agency has limited involvement with the implementation of the *Bringing Them Home* recommendations.¹³ However, the Committee believes that some of the issues raised by indigenous people and others during hearings suggested clear divisions among indigenous groups, some of whom believed ATSIC was not working in their best interests. ATSIC’s response to some of these matters (especially in its last submission)¹⁴ explained why there were differences but did not really address the concerns. Given that many indigenous organisations in the Northern Territory and some in Western Australia seemed generally united in respect of these matters, this is an issue which requires further consideration by ATSIC.

Department of Health and Aged Care – Office for Aboriginal and Torres Strait Islander Health (OATSIH) and Department of Family and Community Services (FACS)

10 However, see *Transcript of evidence*, National Assembly of the Uniting Church, p. 289, which suggests a church-wide response; see also their submission, *Submission 13*

11 *Transcript of evidence*, Anglican Diocese of Sydney, p.197

12 *Transcript of evidence*, Anglican Diocese of Sydney, p. 199; see also *Transcript of evidence*, Australian Catholic Social Welfare Commission, p. 603: ‘The commission is essentially concerned with matters of policy and does not have a mandate to speak on behalf of the Catholic Bishops of Australia.’

13 See especially Chapter 2

14 See *Submission 32C*, Aboriginal and Torres Strait Islander Commission

1.19 The Office for Aboriginal and Torres Strait Islander Health, in the Department of Health and Aged Care, provided a detailed submission to the Committee outlining the programs and expenditure of the relevant allocations under the Government's response including the provision of counsellors, regional centres for emotional and social well-being and parenting and family support programs. The department appeared before the Committee twice and provided several further submissions comprising answers to questions on notice.

1.20 The program and funding for the development of indigenous family support and parenting programs was in the process of being transferred from the Department of Health and Aged Care to the Department of Family and Community Services during Committee hearings. The Committee has commented elsewhere on the quality of information provided by the Department of Health and Aged Care, specifically OATSIH,¹⁵ and has expressed concern about whether the funding has been allocated appropriately.

1.21 With respect to FACS, the Committee notes that this department did not originally make a submission or contribute to the submission made by Health and Aged Care. The information it did provide was sparse.¹⁶ Regardless of issues of program transfer, the department had useful information available to it on the manner in which it might propose to link currently funded projects to other services. No reason was provided as to why such information could not have been included in the submission.

1.22 The Committee has also commented on the excessively bureaucratic approach of both FACS and OATSIH in matters relating to the Parenting and Family Support program. Information had to be extracted slowly and piece by piece, which does not augur well for the provision of user-friendly information by these departments.

National Library of Australia and National Archives of Australia

1.23 The Committee received comprehensive submissions from the National Library of Australia and the National Archives of Australia describing the progress of the programs being administered by the respective bodies.¹⁷

Human Rights and Equal Opportunity Commission (HREOC)

1.24 The Committee also received a thorough submission from the Human Rights and Equal Opportunity Commission (HREOC), although it notes that much of this submission – and, indeed, much of the material from ATSIC – was more a critique of the federal government response to *Bringing Them Home* and the government's submission to this inquiry. Later submissions provided additional information in

15 See below, Chapter 2, Paragraph 2.73

16 See *Submission 101*. For further discussion on the transfer of this program, see *Transcript of evidence*, Office for Aboriginal and Torres Strait Islander Health, pp. 38-40

17 These are discussed in Chapters 3 and 5

response to Questions on Notice. The Committee was able to take oral evidence from the Commission at the Committee's hearing in Sydney.

1.25 The Committee notes, however, that there was a lengthy delay in receiving answers to questions taken on notice by the Commission. More importantly, however, the Committee regrets that several parties including HREOC indulged in detailed rebuttal of various points of *Bringing Them Home* or responses to this, rather than assisting the Committee in its deliberations on distinctly different issues.

1.26 The Committee is aware that it was at times difficult to comment on concerns without assessing or presenting different versions of 'the truth' about past policies and practices. However, it has itself limited its comment to some few issues which are important primarily in the context of assessing both the appropriateness of the original recommendations of *Bringing Them Home* and the effectiveness of implementation of these.¹⁸

Public Hearings

1.27 The Committee held nine public hearings: on 11 July in Canberra, 12 July in Sydney, 13 July in Melbourne, 9 August in Perth and on 11 and 12 August 2000 in Darwin. Further hearings were then held in Canberra on 17 and 18 August and 4 September 2000. The names of those who appeared as witnesses to assist the Committee have been listed at Appendix 2.

1.28 The Committee would have liked to have been able to visit many more areas than it did, but was constrained by time. It notes that some witnesses felt they had been disadvantaged or perhaps not taken seriously because the Committee could not visit their communities.¹⁹ The Committee would like to emphasise that this is far from the case.²⁰ Time is a real constraint – the Committee would have preferred, for example, to have hearings in Darwin on a day other than when the Cubillo/Gunner decision was handed down. Many Committee members, however, have a good background in, and understanding of, the issues and this was enhanced by the high quality of many of the submissions from areas where hearings could not be held.

1.29 The Committee was also able to hold a video-conference hearing in order to take evidence from two organisations in the Kimberley, and found their information of considerable value.²¹

1.30 The Committee would also like to express its appreciation to all witnesses who gave of their time, and those in particular who had had little previous experience in public hearings and contributed very useful evidence in respect of problems arising

18 See below, especially Paragraphs 1.49-1.77

19 See *Transcript of evidence*, Central Australian Stolen Generations and Families Aboriginal Corporation, p. 455

20 See, for example, *Transcript of evidence*, Senator McKiernan, p. 456

21 The transcript of this hearing is included in the transcript for 17 August 2000

from their own efforts towards re-union, healing and dealing with complex issues arising from past experiences. The Committee appreciates that it is difficult to talk about many issues relating to the past and also about rejection in the present, about racial issues and how these have affected the lives of individuals and communities.

Section 2

The Human Rights and Equal Opportunity Commission Report, *Bringing Them Home*

The status of reports

1.31 A number of witnesses expressed concern that many of the recommendations of *Bringing Them Home* had not been implemented. Although there may be a number of grounds for the non-implementation of recommendations, there was little apparent recognition of the fact that there is no obligation on governments to implement any recommendations made in reports by government agencies or by Parliamentary committees.

1.32 The Committee believes it is essential that in all inquiries of this nature, it is made clear to witnesses that report recommendations are for consideration, not automatic acceptance and implementation. From comments made to this Committee, it seems that this was not always known:²²

The impact of the Human Rights and Equal Opportunity Commission Inquiry into the Stolen Generation has once again raised community expectation well beyond what the Government(s) are prepared to deliver. This high expectation has created confusion and conflict among service organizations. The responses by government in particular to the allocation of funds to ATSIC for the enhancement of funds to Link-Up services in the NT has created huge conflict...²³

1.33 Given the pain that much of the *Bringing Them Home* inquiry engendered, which has been exacerbated by a rejection of certain recommendations and then by comments in the Government's submission to this inquiry,²⁴ the Committee has sought to make it apparent that it is not in the position to enforce agreement to what it may suggest or recommend.

1.34 Equally, it is noted that a government may develop policies and programs which differ from those recommended, as it is free to interpret recommendations or alter them to meet other priorities. The fact that not all recommendations have been met, or may not have been met in certain ways, is not necessarily evidence that government has rejected the essence of a report. In meeting the terms of reference of this inquiry, the Committee was mindful of these facts and therefore has considered

22 See, for example, *Submission 50*, Karu Aboriginal Child Care Agency, p. 962

23 *Submission 50*, Karu Aboriginal Child Care Agency, p. 963

24 See *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs

both the effectiveness and appropriateness of the implemented recommendations, and the extent to which others may no longer be necessary or may need to be revised.

The role of the Human Rights and Equal Opportunity Commission

1.35 *Bringing Them Home* has been a controversial report, perhaps primarily because it assessed past as well as present legislation from an international law and human rights perspective. The effect of this was to view past actions from a standard that was not a well-integrated part of either domestic or international values at the time. Consequently, the picture of Australian law and action in respect of indigenous people that was presented in the report was alien to many:

...the redefinition of the issues as a social problem rather than a legal problem may help to remove constraints associated with admission of liability for previous Government actions. This will also allow affected people to examine their own emotions and deal with them in sophisticated ways.²⁵

1.36 The Commission was established under the *Human Rights and Equal Opportunity Commission Act 1986*, which provides the Commission with the responsibility for numerous international instruments ratified by Australia. It also empowers the Aboriginal and Torres Strait Islander Social Justice Commissioner to report on and promote the human rights of Indigenous Australians.²⁶

1.37 The terms of reference given to the Commission in 1995 for the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* required them to cover a number of issues relating to past and present legislation. The conclusions of the Inquiry were presented, in part, in terms of international instruments, perhaps to provide solutions to identified disparities in indigenous access to the benefits of a range of human rights, and access to reparation for what was seen as gross violation of human rights. Such solutions may well have been thought not to have been available through state and territory legislation, and, in any event, to be the responsibility of the Commonwealth under international law.

1.38 The inquiry report, *Bringing Them Home*, refers to international instruments which Australia allegedly breached, such as:

- The United Nations Charter, 1945;
- The Universal Declaration of Human Rights, 1948;
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD), 1965; and

25 *Submission 59*, Human Rights Committee of the Law Society of New South Wales, p. 1130

26 *Human Rights and Equal Opportunity Commission Website*, www.hreoc.gov.au

- The Convention on the Prevention and Punishment for the Crime of Genocide (Genocide Convention) 1948.²⁷

1.39 *Bringing Them Home* was the product of an inquiry which was directed to collect evidence on the extent of ‘forcible’²⁸ removal of indigenous children; the effects of removal; if there were appropriate services available for those affected, including access to records and re-unification; the extent to which current legislation and practices may continue separation or removal; and the need, and justification, for compensation.²⁹

1.40 The major conclusions of *Bringing Them Home* were that:

- Almost all removals could be seen as ‘forcible’, regardless of any apparent measure of acquiescence;
- The removals had a substantial effect on both the communities from which children were removed, and on the children themselves (including loss of language, of culture, decline of the community as a cultural entity because of the limitation of roles of community members and the reduction in the community’s active and participating members); loss of family relationships and normal family contact; interruption to or limitation of normal social interaction skills because of institutionalisation or alienation; and, eventually, loss of access to land rights by those removed;
- There was limited, if any, recognition of these facts by the community at large. There must be recognition, apology, systematic planning of measures to overcome the past and prevent repetition. A commitment had to be made by governments, and monitored by an independent body.
- There was no provision of services or procedures which could help overcome such large scale problems, but such programs and services must be developed to address a number of identified needs;
- Certain patterns of removal were being continued in the present, consciously or otherwise, because of the practices of welfare and police authorities in states and territories;
- Such practices were contrary to international instruments and must be compensated for according to international principles such as had been developed by van Boven (the van Boven Principles);³⁰ and

27 *Bringing Them Home*, p. 266

28 The term ‘forcible’ was not in the terms of reference, which referred to ‘compulsion, duress or undue influence.’ In the report, all three were classified as ‘forcible’ means of removal. See *Bringing Them Home*, pp. 5-10

29 See *Bringing Them Home*, Terms of Reference, reproduced below at Appendix 4

30 These are reproduced below at Appendix 6

- There should be reparation and financial compensation for some parties. A substantial number of reparation measures were directed generally to ‘all those affected’ and not to ‘all those removed’.³¹

1.41 *Bringing Them Home* based many of its recommendations on the application of international instruments and international human rights law,³² including those recommendations pertaining to acknowledgment and apology, reparations, guarantees against repetition, measures of restitution and monetary compensation. However, a number of these instruments had not been developed³³ during part of the period of removals, and few had been incorporated into domestic legislation.

1.42 The series of measures contained in the recommendations of *Bringing Them Home* can be grouped under various headings.³⁴ Recommendation 2 refers to ‘reparation’, in the broadest sense and covers:

Acknowledgment and apology

- Recommendation 1 - collection and preservation of testimony;
- Recommendation 5 – apology and acknowledgment from parliaments and police forces; and
- Recommendation 6 – apology from churches.

Guarantees against repetition.

- Recommendation 7 - commemoration;
- Recommendation 8 - education;

31 This has subsequently led to some uncertainty about the proposed target population for programs and other measures.

32 Recommendations based on international instruments: The Van Boven Principles (Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law) are the basis of the recommendations relating to reparation. *Bringing Them Home* states that gross violations of human rights were committed against indigenous people (see *Bringing Them Home*, pp. 266ff.) The term ‘reparations’ covers Recommendations 3-41. The instruments which the Human Rights and Equal Opportunity Commission states Australia breached are set out at p. 266, and the reparations relate to these breaches. With respect to Recommendations 44-53, these are based on the Convention on the Rights of the Child, and reference is also made to indirect racial discrimination in relation to treatment of indigenous children and young people: thus, there is also an influence in these recommendations from instruments such as the Universal Declaration of Human Rights, the Convention on the Elimination of all Forms of Racial Discrimination, and the Genocide Convention.

33 ‘Developed’: the ‘meaning’ of conventions varies according to time and a State party’s interpretation of them. There is no reference in *Bringing Them Home* or any submissions to this inquiry to any federal government assessment in the 1940’s-1960’s of the implications of conventions with respect to domestic policy or legislation. This suggests there is little material available on what was understood to be any domestic implications arising from conventions. For a consideration of the role of Federal Parliament in the development of human rights issues in the context of international instruments, see George Williams, ‘The Federal Parliament and the Protection of Human Rights’, Department of the Parliamentary Library, *Research Paper 20*, (1998-99)

34 See *Bringing Them Home*, Recommendation 3.

- Recommendation 9 - professional training;
- Recommendation 10 - implementation of the Genocide convention;
- Recommendation 43 - self-determination in a range of areas;
- Recommendation 44 - minimum standards of treatment for indigenous children; and
- Recommendations 45 - 53 - national standards framework, based on the Convention on the Rights of the Child and the right to self-determination.

Measures of restitution

- Recommendation 11 - Assistance to return to country;
- Recommendation 12 – Language, culture and history centres;
- Recommendation 13 - Indigenous identification;
- Recommendation 21, 22, 23, 24, 25, 26,27,28,29,30,38, 39 - maintenance of records, access to records, reunion, return of persons removed overseas;
- Recommendation 40 - counselling services by churches and non-government welfare agencies;
- Recommendation 41 - return of land (where indigenous children were accommodated); and
- Recommendation 42 - development of a social justice package (for indigenous families and children); implementation of the recommendations of the Aboriginal Deaths in Custody report (Royal Commission into Aboriginal Deaths in Custody, 1992) which address the underlying issues of social disadvantage.

Measures of rehabilitation

- Recommendation 32 - research into effects of ‘policies’;
- Recommendation 33 - indigenous healing and well-being models to be used;
- Recommendation 34 – appropriate training for all health professionals and all health students
- Recommendation 35 - indigenous mental health programs;
- Recommendation 36 - parenting services;
- Recommendation 37 - appropriate mental health services for prisoners;
- Recommendation 40 - appropriate counselling services by churches and non-government welfare agencies;
- Recommendation 42 – social justice (see also above, Restitution); and
- Recommendation 43 - self-determination.

Monetary compensation

- Recommendation 3 - components of reparation; and
- Recommendation 14 - heads of damage.

1.43 The process by which the National Compensation Fund should operate is set out in Recommendations 15, 16, 19 and 20.

1.44 The remaining recommendation, Recommendation 2, would establish an implementation, monitoring and audit process. Although the Council of Australian Governments (COAG) has been allocated other roles in these recommendations (see especially Recommendations 15, 16, and 44) there is limited consideration of the process by which it would fulfil these functions. As is discussed below, COAG has played no part in the implementation of any recommendations.³⁵

Basis of these measures of reparation

1.45 The basis of these measures of reparation are the van Boven principles. In particular, the components of reparation (set out above) are the same as Item 7 of the principles. *Bringing Them Home* also appears to have based its ‘procedural principles’ (Recommendation 17) on Item 8 of the van Boven principles: ‘every State shall make known, through public and private mechanisms, both at home and where necessary abroad, the available procedures for reparations’.

1.46 The rather formal terminology of the van Boven principles and their location within an international law context may also have contributed to some resistance to their use. Because they are applied to ‘formal’ reparation for actions that were not at the time they occurred considered inappropriate, they may be seen as a heavy-handed approach. The government, for example, notes that they are only draft principles,³⁶ and feels they should apply only to what the government considers to be the ‘most serious’ violations of human rights.³⁷

Distinction between the objectives of the Bringing Them Home inquiry and the inquiry undertaken by the Senate Committee

1.47 One of the major difficulties experienced by the Committee was to mark a clear distinction between the report, *Bringing Them Home*, and the Committee’s own terms of reference.

1.48 The objective of the Senate reference was not primarily to assess the validity or accuracy of the *Bringing Them Home* report, but:

- to determine if the recommendations of that report had been implemented;

35 See especially Chapter 5

36 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 611

37 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 611

- if they were effective;
- if there were reasons why some recommendations had not been implemented; and
- if there were other ways in which the expected outcome of those recommendations could be met, or, indeed, had been met.

1.49 In discussing these matters, it was difficult for witnesses and Committee members to agree on the relevance of information provided, or the precise scope of the Committee's terms of reference. For example, *Bringing Them Home* discussed the link between past separation and removal policies and current rates of institutionalisation of indigenous people (whether in prison; foster care or other forms of care). It made several recommendations concerning these matters, and therefore the Senate Committee had a responsibility to assess if these had been implemented and, if so, how well. However, this did not mean that the Senate Committee was required to prove or disprove the accuracy of these conclusions, although it was free to note any opinion held on these.

1.50 Similarly, others argued about the purpose or objectives of removals, or the numbers of persons removed. The Committee considers such matters are relevant, but only insofar as these issues affect current need, help identify the value of new and proposed services, and identify those who may have been excluded. The intentions and thoughts behind the various processes of separation are complex, requiring detailed and expert assessment. Much of this remains to be done.

1.51 The definition of 'forcible' removal used in *Bringing Them Home* may result in the inclusion of many people who, for example, *required* medical treatment,³⁸ whose parents did genuinely agree that they move for education purposes,³⁹ who moved with a sick family member,⁴⁰ or who may have been at serious risk.⁴¹ Many people today must still move from communities for medical treatment – it is one of the consequences of distance and small and isolated populations.⁴² To classify such actions as forcible is to be quite unaware of the restrictions and limits faced at the time by much of the Australian population.

1.52 In the context of the Committee's inquiry, the more pertinent matter is not why children were removed but the extent to which the effect of removal shapes needs for programs and services, and whether different groups of removed persons have different needs and can express them effectively. The structure of services and other

38 *Transcript of evidence*, Sister Heath, p. 400

39 *Transcript of evidence*, Sister Heath, p. 401

40 See *Transcript of evidence*, Sister Heath, p. 400

41 See *Transcript of evidence*, Sister Heath, pp. 402; 406-407

42 The failure or refusal to return children after such treatment would be a separate issue

measures offered by the government should reflect some awareness of ages and numbers of persons deemed to have been removed or separated.

1.53 However, the difficulty in determining numbers of persons either separated or affected by separation has made this task complex. Opinions vary partly because of the different interpretations of the word ‘forcible’, and some uncertainty about the period of time discussed. For some, the word ‘forcible’ would not include those children in the categories mentioned above. In other work done on estimating numbers, the exact meaning of ‘removed’ was not clear, and the amount of time children spent away from their parents was not defined.

1.54 In *Bringing Them Home*, reference was made to an estimate by an historian, Peter Read, that some 5,625 children had been removed in New South Wales between 1883-1969.⁴³ Other references were made to different studies, some small-scale, and one ABS survey (1994), which has also been used in calculating current needs for counselling services.

1.55 The Government submission to this inquiry referred to the use of Read’s evidence, and of a range of other work mentioned in *Bringing Them Home*.⁴⁴ It concluded that much of the information used to determine percentages of removed persons was unsound.

1.56 Sir Ronald Wilson in evidence to the Committee stated that ‘we could not get accurate figures of actual people removed’.⁴⁵ In his submission he stated, with reference to *Bringing Them Home*, that:

On the basis of evidence from researchers [the report] concluded that during the period in the 20th century when the assimilation policies were being pursued, the number of children forcibly removed lay between one tenth and one third of all children.⁴⁶

1.57 However, the conclusion arrived at in information mentioned in *Bringing Them Home* covers the period 1910-1970, which is more extensive than the assimilation period.⁴⁷

1.58 In the recent Gunner/ Cubillo decision (August 2000) it was stated that broad generalisations cannot be made about individuals being part of a ‘Stolen Generation’:

43 The work by Read which estimated that 100,000 persons had been removed, was later revised to state that only 50,000 persons had been removed and the other 50,000 were their descendants: see *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p.587

44 See *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p.585ff

45 *Transcript of evidence*, Sir Ronald Wilson, p. 739

46 *Submission 76*, Sir Ronald Wilson, p. 1585

47 The assimilation period is defined as between 1930 and the end of the 1960’s. See ‘From Dispossession to Reconciliation’, Department of the Parliamentary Library, *Research Paper 27* (1998-99) pp. 4-5 for discussion of the ‘haphazard’ and then more systematic assimilation under State legislation

In particular, the mere fact that a part-Aboriginal child was placed in an institution does not, without more, justify that person claiming that he or she is a member of “the Stolen Generation”. In every case, it will be necessary to question why was the child institutionalised?⁴⁸

1.59 As the *Bringing Them Home* definition of ‘forcibly’ removed might still consider such children or their parents to have been subject to ‘undue influence’, it is possible that there will always be different estimates.

1.60 Many of the recommendations in *Bringing Them Home* are addressed broadly to indigenous communities and indigenous people generally. The relationship between the nature of the recommendation and the target population is thus not always precise. The federal government response to *Bringing Them Home* identified some priority areas to which funding would be allocated. Some of these, such as the oral history project, did not require any estimate of population to be served. Others, however, including Link-up, counselling and parenting/family support do depend on careful targeting to be successful.

1.61 In light of these factors, the Committee operated on the basis that it should determine as much as possible the connections between *Bringing Them Home* recommendations and current programs and services:

- where recommendations had been implemented, the Committee should assess if the programs developed have been appropriate, relevant and directed to the right people; if they had actually reached the right people; if they had met the needs identified by *Bringing Them Home*; and if other evidence suggested that some changes should be made; and
- where governments or other parties did not accept a recommendation, or changed it, the Committee needed to assess if that response was adequate and appropriate; or if some other approach was required.

1.62 The Committee’s task therefore did require some assessment of the *Bringing Them Home* recommendations as they stood some three years after being published, including whether the thrust of the recommendations had been consistent with the evidence provided in the report; and whether any changes made to these recommendations in the implementation of programs was appropriate and justifiable.

1.63 As broad an understanding as possible of the terms of reference has been accommodated, but where a submission or evidence did not refer to the terms of reference, the Committee has generally not taken this material into consideration.

Appropriateness of, and Target groups for, services

1.64 A priority of the Committee’s assessment has been to identify the effectiveness of the implementation process, including the overseeing role

48 Cubillo v Commonwealth (2000) 174 ALR 99

recommended. In doing this it has concentrated on two items in particular, whether the services, programs and other measures taken meet needs, and whether those with greatest need have access.

1.65 However, the Committee has also sought to determine if the recommendations of *Bringing Them Home* and the responses to these have been appropriate in a broader sense – if programs and other measures are an institutional and possibly piecemeal response, insufficiently flexible, and not part of a holistic approach. Evidence given to the Committee on this varied, and some people suggested that to a degree the process had gone astray from the beginning:

1.66 For example, although reference had been made to the importance of self-determination in *Bringing Them Home*, it was stated that the responses which had been implemented had not always taken this into account:⁴⁹

What I am suggesting is that a requirement of self-determination would require that the response itself to the people that are suffering be determined by negotiation....I am suggesting that reparations tribunals and things might be putting the cart before the horse.⁵⁰

1.67 A further matter that requires consideration is whether the approach of *Bringing Them Home*, which sought to demonstrate that the effect of separations had been broad, meant that insufficient attention had been given to those actually removed. Did the recommendations appropriately take into account their varied situations which could include an acknowledgment that some people could not ‘go home’ or, that if they did, they could not stay?⁵¹

It is suggested that the *Bringing Them Home* Report attempted to create the Stolen Generations as a pan-Aboriginal issue when it was not. As a result, the Human Rights and Equal Opportunity Commission (HREOC) recommendations did not refer to the Stolen Generations Community but rather ‘the indigenous community’. This process of pan-Aboriginalisation meant that the Stolen Generations were excluded from the discourse regarding their own reparation in the HREOC report.⁵²

Target groups

1.68 It is not entirely clear from *Bringing Them Home* who was to be included in the target group of various recommendations relating to reparation, and to compensation. This is evident from the different groups to whom the recommendations are directed, which are sometimes obscure and sometimes quite

49 However, see Chapter 2, and see also Chapter 6

50 *Transcript of evidence*, Mr Martin Flynn, p.380

51 See, for example, *Submission 99*, Croker Island Association, p.2284: ‘We feel deep remorse that we can not go back and participate in aspects of law and culture because being removed as children our rights were removed from going through the processes of culture, eg. boys to men, girls to women.’

52 *Submission. 66*, Yilli Rreung Regional Council (Northern Territory) p.1389

extensive. Many witnesses also referred to the line in *Bringing Them Home* which stated that no Aboriginal person had been unaffected by the separation process.⁵³ This appears to have been seen as meaning that every indigenous person, or even people who did not know they had an indigenous background, could be considered as ‘affected’. In a broad sense this may be true, but in terms of addressing known problems, it is somewhat idealistic and impractical.

1.69 In considering the relationship between what was proposed and what occurred, this must be borne in mind. Especially in the context of what was recommended and the apparent outcomes of these recommendations, the Committee noted that many programs were directed to indigenous communities generally. It was not clear that such communities had at any time suffered ‘cultural and community disintegration’ as mentioned in *Bringing Them Home*.⁵⁴ In fact, as this term is not defined in the report and no evidence was provided that any such community had revived or had survived, the relationship between the chosen communities and this target group was uncertain:⁵⁵

RDH does not consider that item 3 of Recommendation [4] applies to any extent in the Northern Territory, IF AT ALL. It may be that some family based communities in the NT suffered community disintegration, however the people involved appear to be covered under item 2 of this recommendation (family members who suffered).⁵⁶

1.70 In respect of other programs, such as the parenting and family support programs, it was not clear if older parents were being targeted although it is possible that the descendants of removed persons were. However, as the parenting and family support program was not far developed at the time of the inquiry, this service could not be measured in any detail.⁵⁷ The link between institutional care and later poor parenting has been noted. However, it may also be a mistake to attribute all poor parenting to such factors given the existence for some of an institutional ‘family’,⁵⁸ and the difficulty of making a specific connection between cause and effect over a number of generations. In this case, it is important to make clear the links between specialist services and target populations so that other causal factors – if they exist – can also be identified and addressed.

53 *Bringing Them Home*, p. 37; see *Submission 50*, Karu Aboriginal Child Care Agency, p. 962: ‘it has been unequivocally established that no Indigenous family has evaded the effects of forced removal.’

54 See *Bringing Them Home*, Recommendation 4, p. 283

55 See Chapter 2 which discusses health services and the demographic basis of programs

56 *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 187

57 See Chapter 2

58 Some groups in homes were in effect a family and have retained these relationships to the present: see below, Paragraph 1.79 and Footnote 82. However, it is not intended to suggest that these relationships were an adequate substitute for children’s natural families

1.71 A number of recommendations concerning current child welfare policies are directed in theory to many indigenous children and young people (Recommendations 44-53). Although the Committee is sceptical about including younger people⁵⁹ currently under some form of order (through police or welfare action) in the 'removed' category, it assumes that even if they and their families are also to be included in the category of those eligible for reparations, this would not thereby render eligible the entire indigenous population.

Issues arising from the use of the terms 'forcible removal' and 'separated'

1.72 One factor that did emerge from the evidence, although somewhat slowly, was a distinction between various groups of separated people. *Bringing Them Home* itself may well have contributed to this, because its definition of 'forcible' removal or separation included a wide range of actions: children receiving medical treatment,⁶⁰ children receiving education,⁶¹ children who were classified as half-caste,⁶² those who were removed but not necessarily assimilated, and the movement of communities from various areas.⁶³

1.73 Although *Bringing Them Home* notes that there are many issues of separation which its terms of reference do not cover,⁶⁴ this is presumably because these separations result from private and individual actions between indigenous people, and are not seen as part of 'public' practices or legislation. With respect to other separations, the reader is left uncertain in many instances as to what occurred, and whether all children mentioned were all permanently removed, assimilated, segregated, institutionalised or fostered/adopted. To the authors, this may have been irrelevant, but in fact it is quite important to all readers and to separated or 'stolen' people themselves: '...their distinct identity was ignored in the recommendations of HREOC.'⁶⁵

1.74 Thus, when the Committee heard evidence that the benefits of funding were going to indigenous communities and not to separated people, it sought to determine if this was the case and whether a more specialised meaning of 'separated' was being used. Although *Bringing Them Home* made statements about no family having been unaffected by the removal process, this, as noted above, was not seen by the Committee as meaning that the funding would be distributed to every indigenous

59 However, the Committee is of the view that the current cohort of younger people is in a very different situation (perhaps with some exceptions) to 'stolen' children

60 See, for example, *Transcript of evidence*, Sister Heath, p. 400

61 *Transcript of evidence*, Sister Heath, p. 401

62 Several witnesses commented that children were removed in some areas because they were not wanted by the tribe if they were half-caste: *Transcript of evidence*, Mr Reginald Marsh, pp.168-169; *Transcript of evidence*, Sister Heath, pp. 402-403

63 See *Transcript of evidence*, Garden Point Association, p. 513

64 See *Bringing Them Home*, p. 12

65 *Submission 66*, Yilli Rreung Regional Council, p. 1393

person on the basis they were either a separated person, descended from them or had been affected by the removal of others. While there was broad agreement from witnesses that, overall, much of the indigenous population suffered from similar problems and had been locked into low socio-economic status, the ‘separated’ population was seen by many to be somewhat more limited. Evidence to this Committee suggested that the ‘stolen generation’ group was quite distinct within a broader group of ‘separated’ people.⁶⁶

1.75 Rightly or wrongly, and partly as a result of reports by the media, separated children were seen predominantly as those indigenous (formerly ‘half-caste’)⁶⁷ children who had been ‘removed’ (because they had European blood)⁶⁸ and sent to institutional care until they were near-adults. However, the recommendations of *Bringing Them Home* do not often distinguish this group of people from others:

HREOC describes the experience of the Stolen Generations as one of a series of acts of ‘past dispossession, oppression and degradation’ perpetrated against all indigenous Australians. By so doing, the uniqueness and particularity of the wrong suffered by those individuals and their descendants is lost. The experiences of the Stolen Generations becomes one of the experiences of Aboriginal people *per se*. A wrong to be listed along with (inter alia) indigenous community dispossession from land, denial of equal wages, and denial of citizenship rights.⁶⁹

1.76 With respect to the most historically recent policy or practice, those who were institutionalised were those who were thought capable of assimilation.⁷⁰ The long-term effects of this divorce from the community were extensive, particularly with respect to land and to the difficulty in establishing any claim to traditional land.⁷¹ Others who may have been ‘half-caste’ but who were not removed, or if removed (or moved) were still in some contact with community, were in a somewhat different situation.⁷² Similarly, those whose community had long moved from traditional lands,

66 In saying this, the Committee notes that there are obviously differences within groups and communities, even though health, opportunities, income and employment are major issues across the board; see below, Chapter 5, where reference is made to complaints by some witnesses that they are seen as one group and not as people with different needs

67 Some witnesses to the Committee objected to this term (*Transcript of evidence*, Jarrah, p.201); it is used only to indicate the basis on which children were removed – technically speaking, they may have been much more ‘European’ in background

68 Being removed (because of being fair, of European background etc) is not seen as a ‘reason’ by some people; it differs from removals based on ‘health’, ‘education’ and so forth which, had it not been for the Human Rights and Equal Opportunity Commission’s somewhat tortuous use of the word ‘forcible’ might not have come under the classification of ‘separated’

69 *Submission 66*, Yilli Rreung Regional Council, p. 1398

70 Some people may object to this term also, but it refers primarily to the policy and practices of the times and is not meant to suggest that people ceased being indigenous

71 See *Submission 99*, Croker Island Association; *Submission 58*, Kimberley Stolen Generation Committee

72 *Transcript of evidence*, Yirra Bandoo Aboriginal Corporation, pp. 518-519

nonetheless would have lost both immediate family and community through being institutionalised.⁷³

1.77 *Bringing Them Home* provides examples of many different types of separation, but perhaps should have made some significant differences more clear. For example, the case of children sent to Palm Island⁷⁴ relates to separation from a parent and a placement with indigenous people who clearly disliked them in the belief they were white, and then accepted them. It contains many of the key components of ‘separation’ of loss, isolation, absence from a familiar community of other indigenous people, violence and fear. These are ameliorated only by two facts – later acceptance and the presence of a sibling.

1.78 The loss of identity and of culture and contact appears to be the most crucial fact of all, and is evident in some instances where there may also be ameliorating factors. The Kimberley Stolen Generation Committee, for example, comprises people who were moved a considerable distance from their homeland and are now co-located with people who have lived in the area.⁷⁵ The Larrakia people from near Darwin⁷⁶ were in fact not moved from their land, but some of their children were institutionalised nearby, which allowed some contact to continue with community.⁷⁷ In later years the Larrakia ‘stolen children’ found they were competing for their land with others who had been moved there,⁷⁸ or wanting to establish relevant language programs.⁷⁹ Children from Alice Springs were sent to Croker Island,⁸⁰ or to Garden Point, moved to New South Wales in the war, and then returned.⁸¹ They, along with some of the children from Retta Dixon home, also in Darwin, had as their closest ‘kin’ those with whom they grew up – that was their family.⁸²

73 This would include urban residents, those living on the edges of towns, and those who lived a peripatetic life, distant from traditional lands

74 *Bringing them Home*, pp.88-89

75 *Submission 58*, Kimberley Stolen Generation Committee, p. 1116 ‘After being away from their traditional homelands and people for so long some stolen generation people may find it difficult to have their place in this particular society restored. Therefore an avenue needs to be provided whereby these people can be accommodated in their new homeland.’ ‘Due to the native title claims these people have become fringe dwellers in most towns throughout the Kimberley.’ (p.1117)

76 See for example, *Transcript of evidence*, Yirra Bandoo Aboriginal Corporation, p. 518; *Submission 66*, Yilli Rreung Regional Council, p. 1404

77 *Submission 22*, Yirra Bandoo Aboriginal Corporation, p. 403

78 *Transcript of evidence*, Yirra Bandoo Aboriginal Corporation, p. 521; *Submission 22*, Yirra Bandoo Aboriginal Corporation, p. 405

79 *Transcript of evidence*, Yirra Bandoo Aboriginal Corporation, p. 518

80 See *Submission 99*, Croker Island Association

81 See *Submission 63*, Garden Point Association, p. 1206

82 For examples of institutional family, see *Transcript of evidence*, Yirra Bandoo Aboriginal Corporation, pp.522-523, and *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 173; and see *Submission 58*, Kimberley Stolen Generation Committee, p. 1117: ‘The common factor that keeps these stolen

1.79 All of these situations are different, and those who lived through them were differently affected. It could be argued that those who had some equivalent of a family situation may be the least damaged psychologically; but in other ways, their link with their original country may also be the most distant. In addition, there does appear to be an issue of ‘assimilation’⁸³ that also arouses hostility or rejection.⁸⁴

1.80 From evidence to the Committee, it appeared that the term ‘stolen generations’ was seen by those who had been deprived of a current link with community to belong to them.⁸⁵ They were ‘stolen’ or ‘forcibly removed’ not because of a general move of their community or because of a specific requirement such as a need for medical attention, but for a number of reasons, all connected with race.⁸⁶

1.81 Others, however, believed that they had a claim to being ‘stolen’ or ‘separated’ because they came under the broad category of other ‘forcible’ removals as established in *Bringing Them Home*:

There have been representations from members of the Stolen Generations ...that such wording [that is, the terms ‘past laws, practices and policies...’] equates to ‘pan-Aboriginalisation’. However, this⁸⁷ is the broadly accepted definition of ‘stolen Generation’ held by the Government.⁸⁸

1.82 It is also important to realise that *Bringing Them Home* came many years after the establishment of organisations such as Link Up in NSW (in 1980)⁸⁹, which had as its mandate the re-unification of families and groups. A number of organisations had also developed and established themselves across the country in subsequent years. The possibility that those who were late on the scene might have been the most lost and disoriented is not necessarily something that other groups responded to favourably, for many reasons.

people together is the power of their own unity...They identify with each other because they have been identified as half-castes’; and *Submission 63*, Garden Point Association, p. 1206

83 There may once have been envy of those who seemed favoured because they were lighter, although this is not discussed in evidence. In the current situation of land rights, where community links are more important, being light may be an instant sign of disadvantage, allowing ‘revenge’ for assumed previous advantage

84 See *Transcript of evidence*, Retta Dixon Home Aboriginal Corporation, p. 535

85 Thus, the organisations which have the term ‘stolen generation’ in their name argue they are the ones who have the least now and need most access to all the programs including language and culture

86 In different areas, and different times, it seems that the rationale behind removal of such children varied considerably. This is not a matter which the Committee believes comes within its terms of reference, or at least not in any detail, as its major task is to see if *Bringing Them Home* recommendations have been implemented, and if actions taken are appropriate and meet needs, even if they differ from the recommendations

87 ‘This’ being ‘people affected by past laws, policies and practices’

88 This term was used especially in submissions made by Yilli Rreung, *Submission 66*

89 *Transcript of evidence*, Garden Point Association, p. 505

The NSW Link Up service was established to meet the needs of Indigenous people separated from their families due to the past laws, policies and practices of Australian Governments. *This includes, but is not limited to, those people removed under Australian assimilation policies.* It also includes those who were separated due to ‘reasons’ such as ‘welfare of the child’, ‘for the purposes of education’, and for the purposes of ‘environmental health issues’.⁹⁰

1.83 Although this statement was made in the context of explaining the direction of Link Up services,⁹¹ it does make a point about different categories of removed people. The end result has been as Karu put it succinctly that while ‘there is the notion that those who were the most stolenest’ should be the only ones that should benefit, be represente[ed] and employed by the organization,’⁹² this is not accepted. Sometimes it is more than just lack of acceptance, leaving the ‘assimilated’⁹³ as something of outcasts.

Racial issues

1.84 This separateness, if not the consequences, was recognised by some witnesses:

I believe that the stolen generation people represent 99 per cent of the link up population. We have been totally ignored. This does not provide a process of empowerment. We decided that because we are distinct institutional groups in the Northern Territory we should have our own worker. We have a separate history from other groups and so forth. The current system does not provide that.⁹⁴

1.85 Another dimension to this was added when members of ‘Stolen Generation’ organisations openly stated that they were discriminated against by indigenous communities because of their European background.⁹⁵

1.86 In many instances, people have stated that they were removed because of their Aboriginality, by which is generally meant they were vulnerable and subject to arbitrary actions because they were indigenous, and to be indigenous was to be classed as socially irresponsible, neglectful and incapable of looking after children. They also

90 *Submission 32C*, Aboriginal and Torres Strait Islander Commission, p. 2337 – emphasis added. See also *Transcript of evidence*, Croker Island Association, p. 502: ‘We are of the belief that service providers are serving people not affected by the assimilation policy.’

91 Link up services are discussed below in Chapter 2

92 *Submission 50*, Karu Aboriginal Child Care Agency, p. 963

93 See *Transcript of evidence*, Garden Point Association, p. 505

94 *Transcript of evidence*, Ms B. Cummings, p. 457. Witnesses from this group also attributed certain of the difficulties in their obtaining funding to gaps in *Bringing Them Home*, which they believed reflected a lack of understanding of their particular situation: *Transcript of evidence*, North Australian Aboriginal Legal Aid Service, p. 454

95 See Paragraphs 1.85-1.87

mean that they would not have been ‘stolen’ if they had not been indigenous, in that some other solution would have been found for the perceived problems of poverty and neglect: ‘Were it not for their Aboriginality the children would not have *been stolen*.’⁹⁶ This may be so, but it depends also on the reason for separation. With respect to ‘half caste’ children, and certainly in the Northern Territory and elsewhere, it is considered that many children were removed because of their European background:

The other point I wanted to make ...is about the issue of Aboriginality....In the Northern Territory [people] were removed because they had white blood.⁹⁷

The failure of the government to recognise that children were snatched because of the colour of the skin is perhaps one of the biggest failures that this country has yet to come to terms with.⁹⁸

1.87 There are many opinions as to what having European blood actually meant – that the child would not be welcome in the tribe, that children (especially girls) would be more vulnerable when older, that the state should assume more responsibility in lieu of the missing or absent father, and so forth. All of these issues and others were raised in hearings and submissions.⁹⁹ The Committee has noted these matters insofar as they help to explain certain current concerns.

1.88 These distinctions were not recognised or emphasised in *Bringing Them Home*, and perhaps for these reasons it was assumed that ATSIC and indigenous organisations would be effective fund managers and service providers. Although the following quotation does not make a distinction between separated and ‘stolen’,¹⁰⁰ it does note the need to distinguish between mainstream indigenous, ‘separated’ and ‘stolen’:

...one of the main criticisms of the *Bringing them home* report was that it failed to identify the stolen generations community as certainly part of the Aboriginal community but a discrete part of the Aboriginal community, with its own experiences, its own histories and very much its own traditions and culture, stemming from the experience of removal... if you look through the *Bringing them home* recommendations, inevitably the recommendations will suggest that the indigenous community be consulted,

96 *Submission 66*, Yilli Rreung Regional Council, p. 1412

97 *Transcript of evidence*, Central Australian Stolen Generations and Families Aboriginal Corporations, p. 463; see also *Transcript of evidence*, Northern Land Council, p. 479 and *Transcript of evidence*, Croker Island Association, p. 509

98 *Submission 58*, Kimberley Stolen Generation Committee, p. 1117

99 See *Transcript of evidence*, Mr Reginald Marsh, pp. 171-174; *Submission 102*, Mr Geoffrey Partington, pp. 2300-2305

100 This may be because other separated people are deemed to be within the mainstream indigenous groups – this point was not considered during the hearing

that ATSIC be consulted, and that appropriate indigenous organisations be consulted.

There was a strong feeling coming across, I think, in the *Bringing them home* report – and I think this came from the way that the class of stolen generations was analysed – that stolen generations equated to indigenous and that therefore, by addressing indigenous concerns, stolen generation concerns would be addressed. I think this underlies the problem with a lot of the funding flowing to existing indigenous organisations.¹⁰¹

1.89 A related and equally important point as far as Northern Territory stolen generation organisations are concerned is that the Commonwealth was responsible for the Territory during the relevant periods,¹⁰² and therefore the inquiry and recommendations should have emphasised this. Instead, it was thought, others became involved, the inquiry was diverted, and funding for recommendations was dispersed to general groups.¹⁰³

1.90 The Committee believes that in order to properly assess the appropriateness of the *Bringing Them Home* recommendations and of any response to these, the complex factors of race and identity must be at the forefront.¹⁰⁴ These may explain the apparent contradiction between organisations claiming that services *are* provided to separated people, and others claiming that ‘stolen generation’ people are discriminated against and excluded.

1.91 The Committee also notes that the different situations in the states and territories, and different policies and practices will have resulted in people having different experiences, and therefore different needs. This is acknowledged by some organisations and is the basis of their belief that they have to be consulted on what is required:

The experience of the removals policy in the Northern Territory, indeed, the experience of the removals policy in north Australia was different from in Central Australia and was different from in western New South Wales and in Western Australia. Therefore, the responses to that are going to be different; it is impossible to have a single model.¹⁰⁵

¹⁰¹ *Transcript of evidence*, Mr Matthew Storey, pp. 460-461, and see also p. 467

¹⁰² *Submission 54*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 1018

¹⁰³ *Submission 54*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p.1024. However, see also *Submission 59*, Law Society of New South Wales, Human Rights Committee, p. 1129 which notes that the government response and funding ‘gives rise to a belief that the problem is regarded as aboriginal, rather than an issue for the Australian community as a whole.’

¹⁰⁴ See *Transcript of evidence*, Retta Dixon Home Aboriginal Corporation, p. 536

¹⁰⁵ *Transcript of evidence*, Mr Matthew Storey, p. 469

Target group -financial compensation

1.92 Recommendation 18 is directed only to those persons who were ‘forcibly’ removed in childhood. This recommendation refers to the payment of a minimum lump sum from the proposed National Compensation Fund, on the grounds of removal alone.

1.93 Recommendation 3, however, also includes a reference to financial payments (Recommendation 3, Part 5) and Recommendation 4 then outlines at least some of those groups to whom reparation (including financial payments) should be targeted. These groups include:

- Those removed forcibly as children;
- Family members affected by this removal;
- Communities which, as a result of such removals, ‘suffered cultural and community disintegration;’ and
- Descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to the traditional land.¹⁰⁶

1.94 Recommendation 14 outlines the basis on which people ‘*affected* by forcible removal’ could claim monetary compensation.

1.95 In short, those removed are entitled to a minimum lump sum; those affected, including those removed, can make claims for monetary compensation on several grounds.

1.96 Thus, some of the *Bringing Them Home* recommendations were intended to address specific and apparently identifiable groups and individuals, and not directed to the indigenous community generally, regardless of the arguments over the extent of ‘stolen generations’ and the percentage and numbers of those removed. However, some of the recommendations are not sufficiently precise, and others do appear to be generic in effect.

Other needs of removed people

1.97 It is also important that the experiences of removal are given positive value, and those removed, especially in the more distant past, should not be diminished by being seen only as unfortunate, as a part of the past that should be shunned, or as not quite indigenous enough. This approach is quite distinct from agreeing with the practice of removal or separation. It emphasises that the experiences of the removed children are as varied as are the effects. Individuals who were separated were not responsible, although they may need help addressing that issue. Further, individuals

106 *Bringing them Home*, Recommendation 4, p. 652

adapted to changed circumstances to differing degrees, and their experiences and their age at removal shaped them as they are now:

...how can you compensate for loss of identity? You cannot. No amount of money or whatever can change the way you feel, the way you think, the way you act, because where you are today is a result of your history.¹⁰⁷

1.98 It would be inappropriate to consider that their past can be thrown off, that they can easily ignore the events of many decades of their life, and return to societies which have also changed substantially. For this reason also, many of the recommendations of *Bringing Them Home* may not address the distinct experience of some removed people.¹⁰⁸

Limited consideration of certain recommendations

1.99 While this inquiry has a mandate to cover all of the *Bringing Them Home* recommendations, there are some which may be dealt with briefly. These include:

The implementation of the Genocide convention

1.100 In an earlier report,¹⁰⁹ the Legal and Constitutional References Committee recommended that *Anti-Genocide Bill 1999* be referred to the Attorney-General, the Attorney to report by 5 October 2000. The government did not respond at this time. Nonetheless, the Committee believes that the development of anti-genocide legislation is important.¹¹⁰

Freedom of Information Legislation in the Northern Territory

1.101 The Committee only touched upon the recommendation for freedom of information legislation in the Northern Territory (Recommendation 26). The Committee received no evidence to suggest that members of the stolen generation or their representative groups have had difficulties in accessing information held by the Northern Territory Government.

1.102 The Northern Territory government state in their submission that the issue of access to records, in relation to members of the stolen generation, is addressed in the *Protocol for Access to Northern Territory Records by Aboriginal People Researching Their Families*.¹¹¹ The Protocol has now been operational for nearly three years, and

107 *Transcript of evidence*, Northern Land Council, p. 486

108 See *Submission 66*, Yilli Rreung Regional Council, p. 1394

109 See Senate Legal and Constitutional References Committee, *Humanity Diminished: The Crime of Genocide* (June 2000)

110 See below, Chapter 7, Paragraphs 7.9-7.18

111 *Submission 64*, Northern Territory Government, pp. 1237-1241

allows stolen generation researchers access to records. In discussion of the Protocol and access to records, the Northern Territory Office of Indigenous Affairs state:¹¹²

The protocol was designed to flatten any obstacles that were in the way of access by people to these archival records and I believe it has done just that. We have certainly not had drawn to our attention the fact that obstacles remain; certainly no dissatisfaction has been expressed to us by the stolen generation representative groups. So the question of FOI legislation becomes a bit academic when there are no obstacles, that we are aware of, to access at the present time.

1.103 Evidence to the Committee on this matter from other witnesses was also generally positive. The issue of freedom of information legislation in the Northern Territory in respect of other matters, is not within the mandate of this Committee.

Return of those removed overseas

1.104 The Committee briefly considered the recommendations relating to the return of those removed overseas (Recommendations 31a, 31b, 31c). The Commonwealth government stated in its submission that the *International Transfer of Prisoners Bill 1996* was enacted in June 1997, consistent with recommendation 31.¹¹³ The Annual Report for 1999-2000 of the Commonwealth Attorney-General's Department states:

All states and territories passed complementary legislation to enable their participation in the proposed scheme for the transfer of prisoners under the International Transfer of Prisoners Act 1997. Work is continuing on domestic arrangements with the States and Territories, as well as appropriate international treaty arrangements with other countries.¹¹⁴

1.105 In addition, the government stated that there is already sufficient scope within existing migration and citizenship legislation for granting right of entry to people who were removed from Australia, or to the children of those removed.¹¹⁵ Again, the Committee received no evidence to suggest that this response was insufficient, or that members of the stolen generation had experienced difficulties in returning to Australia.

Amendments to the Family Law Act

1.106 The proposed amendments to the *Family Law Act 1975* were not the subject of serious concern throughout the Committee's inquiry. The Committee notes the statement made by the government:

112 *Transcript of evidence*, Northern Territory Government, Office of Aboriginal Development, p. 440

113 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 599. See also below, Chapter 6

114 Commonwealth Attorney-General's Department, *Annual Report 1999-2000*, p. 73

115 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, pp. 599-600

The *Family Law Act 1975* currently provides that children have a right of contact with other people significant to their care, welfare and development and that the Court must consider the child's background, including any need to maintain a connection with the lifestyle, culture and traditions of Aboriginal peoples or Torres Strait Islanders. This recognises the special needs of Indigenous children.¹¹⁶

Structure of the Report

1.107 The Committee has sought to answer certain questions about funding and recommendations which are seen as solutions to the needs of separated people. The structure of the report is intended to deal with each of the relevant recommendations, but within appropriate categories. In this way, the Committee believed it might more effectively illustrate and develop issues which are linked, while continually considering the key matters of appropriateness and access. The terms of reference of this inquiry are addressed as follows:

1.108 Term of reference (a) is considered throughout the report; term of reference (b) is considered in part throughout the report, but the Committee recommends that several matters require discussion and resolution at a national summit. Term of reference (c) is considered as appropriate in discussion of programs and services and their effectiveness, but is also a matter requiring further discussion. Term of reference (d) is considered specifically in Chapter 9, but builds on material from other chapters; and term of reference (e) is addressed primarily through assessments made of the benefits of existing programs and of matters that still need to be considered.

1.109 The structure of the report is as follows:

- Chapter 1 – Introduction: including making distinctions between *Bringing Them Home* and the Committee's work; highlighting of issues, including terminology, which may have contributed to confusion and also to separation between parties
- Chapter 2 – The government's response especially in respect of human services, the appropriateness of these, and their capacity to meet specific needs of different groups of people. There is also considers the question whether the funding was new or re-allocated
- Chapter 3 – This chapter examines further aspects of the government's response, including the oral history project, language and culture services, and also looks briefly at the issue of access to land.
- Chapter 4 – The Issues of Acknowledgment and Apology – this chapter examines the extent to which the government has responded to issues concerning an acknowledgment of the past and apology for it; *inter alia* it considers if the issue of an 'apology' is impeding progress on moving forward; it includes reference to the apologies of state governments and churches

116 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 605

- Chapter 5 - The implementation of recommendations - co-ordination, monitoring, and evaluation; arrangements that have been developed, whether these are effective, and what would be more useful. This chapter also includes reference to actions by the churches in respect of improving availability of their records as an example of the need for co-ordination and national level management of some issues
- Chapter 6 – National Framework Legislation and Standards. This chapter examines the extent to which the federal government and the various states and territories have considered legislation and provisions relating to the welfare and detention of indigenous children and young people. *Bringing Them Home* considered that these practices constituted a modern form of ‘separation’ or removal
- Chapter 7 – Guarantees Against Repetition – this chapter examines the extent to which there has been development in the areas of education, training and information services which would develop greater awareness of what occurred in the past. This would help prevent any similar action in the present or future
- Chapter 8 – Reparation and Compensation, including the value of a tribunal and what a tribunal would do. The chapter looks at the various options suggested for a tribunal and for the payment of compensation. Some suggestions propose a multi-faceted tribunal, which may be too complex to operate; for example, ‘telling the story’ of the past may need to be part of a long-term healing process, not part of a tribunal process. Reference is also made to what may be learned from overseas jurisdictions
- Chapter 9 – This chapter summarises the extent to which the effectiveness of implemented recommendations meets the aims of National Reconciliation and the hopes and aspirations of the Stolen Generations; and Issues for a National Summit . The Committee notes that a constant theme in submissions and oral evidence, and also a complaint made about *Bringing Them Home*, was that there has been insufficient consultation prior to implementation

References

1.110 References to submission pages are to the printed volumes of submissions, Numbers 1-10. References to the *Hansard* transcript (*Transcript of evidence*) are to the final corrected transcript.