CHAPTER 8

REPARATION: MONETARY COMPENSATION AND TRIBUNALS

SECTION 1

What was recommended?

8.1 In relation to monetary compensation, *Bringing Them Home* made numerous specific recommendations, outlining to whom compensation might be paid and under what principles such a system might operate. Again, these recommendations were based on van Boven:

> Compensation shall be provided for any economically assessable damage resulting from violations of human rights and humanitarian law, such as:
>
> (a) Physical or mental harm, including pain, suffering and emotional distress;
>
> (b) Lost opportunities, including education;
>
> (c) Material damages and loss of earnings, including loss of earning potential;
>
> (d) Harm to reputation or dignity;
>
> (e) Costs required for legal or expert assistance.[1]

8.2 *Bringing Them Home* stated that all the 'harms' and 'losses' suffered by people affected by forcible removals are recognised under the common law or under contemporary statutory regimes as 'losses for which compensation can be awarded':

> People who have suffered these harms and losses should not be denied a remedy just because the perpetrators were mainly governments or because the victimisation was on such a vast scale.[2]

8.3 However, in evidence to the Committee, one of the authors of the report, Sir Ronald Wilson, suggested that in fact monetary compensation on an individual basis was not seen to be particularly important during the course of the *Bringing Them Home* Inquiry:

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1 *Bringing Them Home*, p. 302

2 *Bringing Them Home*, p. 302; See pp. 302-304 for selection of submissions to the National Inquiry that support the provision of monetary compensation to the victims of forcible removal

> I believe that any question of money compensation would be secondary. We listened to 535 people who were actually removed or personally affected by the removal, and there was not a great concentration on money compensation. I recall several occasions when we had discussions in communities and the question of money was raised at an individual level. The answer was, 'What would I do with the money, but I would love to see my country before I die.' [3]

8.4 The *Bringing Them Home* recommendations relating to monetary compensation address both claimants and the specific heads under which claims may be made. In theory, the claimants could be an extremely broad group since the recommendation refers to 'all who suffered', and the heads of damage refer to 'all affected' by forcible removal. It is recommended that individuals who were 'forcibly' removed be able to claim a minimum lump sum on the basis of removal:[4]

> *Claimants*
>
> 4. That reparation be made to all who suffered because of forcible removal policies including,
>
>   1. individuals who were forcibly removed as children,
>
>   2. family members who suffered as a result of their removal,
>
>   3. communities which, as a result of the forcible removal of children, suffered cultural and community disintegration, and
>
>   4. descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land.
>
> *Heads of Damage*
>
> 14. That monetary compensation be provided to people affected by forcible removal under the following heads.
>
>   1. Racial discrimination.
>
>   2. Arbitrary deprivation of liberty.
>
>   3. Pain and suffering.
>
>   4. Abuse, including physical, sexual and emotional abuse.
>
>   5. Disruption of family life.
>
>   6. Loss of cultural rights and fulfilment.

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3 *Transcript of Evidence*, Sir Ronald Wilson, p. 737

4 *Bringing Them Home*, pp. 304-313

7. Loss of native title rights.

8. Labour exploitation.

9. Economic loss.

10. Loss of opportunities.

National Compensation Fund

15. That the Council of Australian Governments establish a joint National Compensation Fund.

National Compensation Fund Board

16a. That the Council of Australian Governments establish a Board to administer the National Compensation Fund.

16b. That the Board be constituted by both Indigenous and non-Indigenous people appointed in consultation with Indigenous organisations in each State and Territory having particular responsibilities to people forcibly removed in childhood and their families. That the majority of members be Indigenous people and that the Board be chaired by an Indigenous person.

Procedural Principles

17. That the following procedural principles be applied in the operations of the monetary compensation mechanism.

1. Widest possible publicity.

2. Free legal advice and representation for claimants.

3. No limitation period.

4. Independent decision-making which should include the participation of Indigenous decision-makers.

5. Minimum formality.

6. Not bound by the rules of evidence.

7. Cultural appropriateness (including language).

Minimum lump sum

18. That an Indigenous person who was removed from his or her family during childhood by compulsion, duress or undue influence be entitled to a minimum lump sum payment from the National Compensation Fund in recognition of the fact of removal. That it be a defence to a claim for the responsible government to establish that the removal was in the best interests of the child.

Proof of particular harm

19. That upon proof on the balance of probabilities any person suffering particular harm and/or loss resulting from forcible removal be entitled to monetary compensation from the National Compensation Fund assessed by reference to the general civil standards.

Civil Claims

20. That the proposed statutory monetary compensation mechanism not displace claimants' common law rights to seek damages through the courts. A claimant successful in one forum should not be entitled to proceed in the other.

Commonwealth Government response

8.5 The Commonwealth government did not consider that financial payments or compensation were an appropriate response and argued several grounds to reject the recommendations. First, the removals did not come within the meaning of 'gross violation of human rights'; second, the Commonwealth was not responsible for most of the removals; and third, financial compensation was not the most important issue as far as indigenous people were concerned, as demonstrated by *Bringing Them Home*.

Violations of human rights

8.6 The Committee has noted in Chapter 1 that the government does not accept all aspects of the *Bringing Them Home* report. While the government stated that it considers that the separation policies caused considerable harm to groups and individuals, the allocation of responsibility for the actions, and the classification of them as a breach of human rights, as opposed to responsibility now for reparation,[5] seems to have been given little merit. This is not to deny that the actions that occurred during the decades of separation may now, at the end of the twentieth century, be classified as violations of human rights.

8.7 The Government rejects the idea that gross violations of human rights occurred, and enters into, in Minister Herron's submission, a discussion about actions that could be seen as 'gross'. The Committee notes the point of view.

8.8 The Commonwealth criticised the *Bringing Them Home* Inquiry for accepting accounts of individual experiences without 'subjecting them to scrutiny', or 'requiring corroboration or verification',[6] stating:

> It would be imprudent, if not irresponsible, for governments to make compensation payments on such an untested and uncritical basis. The facts

5 In this context, the word 'reparation' is not used to suggest an agreement with the van Boven principles, but in the ordinary sense of 'repairing' damage

6 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 590

> of those cases which have been subject to judicial scrutiny demonstrate this point.[7]

8.9 The Commonwealth also rejects the findings that child separation practices amounted to genocide, and that relevant policies and practices adopted in the Northern Territory amounted to 'violations of human rights'.[8] Basically, the *Bringing Them Home* Inquiry's analysis and the application of international law to support its recommendation that reparation should be made for 'acts of genocide or violations of human rights'[9] is seen by the Commonwealth Government as a somewhat dubious use of the law:

> … the extent to which the principles are applicable to the issue of reparations to Aboriginal children separated from their family is questionable.
>
> ….
>
> Once the assertion that child separation practices were genocide is dispelled, the relevance of the principles is limited.[10]

8.10 It is true that the van Boven principles do not have any 'formal status' in international law. Their status, however, is surely irrelevant if one is arguing that there are no violations of human rights. Further, it is possible to agree that there have been violations of human rights and to devise reparation for these, which do not accord with van Boven. In fact, this appears to be the nature of the Commonwealth's argument since part of its submission agrees that perhaps there were some violations and therefore, the government has provided remedies against the standards of agreed (not draft) 'principles':

> Existing international law requires States to provide effective remedies for violations of international human rights obligations. The government's response to the BTH Report clearly satisfies this requirement.[11]

8.11 The Commonwealth went on to argue that even if the van Boven principles applied, this would not create a problem because the government's response package, in conjunction with previously existing support programs and initiatives, would have provided the appropriate reparation under the circumstances.[12] In addition, it argued,

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7 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 590

8 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 610

9 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 610; See also, *Submission 93*, Human Rights and Equal Opportunity Commission, pp. 2215-2217

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

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

12 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, pp. 611-612

the van Boven 'draft' principles are satisfied by the 'legal and constitutional rights which people who were affected by past child separation practices enjoy':[13]

> In particular, the fact that legal proceedings relating to alleged child removal practices are currently progressing in different Australian jurisdictions indicates that a proper forum is available in which reparation may be sought.[14]

8.12 In addition, the Commonwealth stated that Australian courts allow indigenous people to exercise their legal rights 'without fear of intimidation or retaliation', and that the claimants in *Cubillo* and *Gunner* and *Williams*[15] all had the benefit of 'government funded legal aid' in relation to their claims.[16]

8.13 The failure of both HREOC and the Government to move on from the report and look to implementation leads them to engage in arguments which have little to do with the Committee's inquiry.[17]

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13 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 612

14 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 612

15 Ms Williams was born to an Aboriginal mother and a non-Aboriginal father in 1942. Ms Williams claimed she was removed from her mother as a young child and placed in the care of the Aborigines Welfare Board. Ms Williams claimed monetary compensation in the order of $1.9m - $2.5m and aggravated damages. The judgement of Justice Abadee, handed down in August 1999, found against Ms Williams on all causes of action. On 12 September 2000, the NSW Court of Appeal dismissed Ms Williams' appeal against that decision

16 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 612

17 The Human Rights and Equal Opportunity Commission acknowledged that the Commonwealth Government was correct in noting (in its submission) that the van Boven principles are subject to a 'process of ongoing consideration' within relevant UN human rights 'expert' bodies (*Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 100), but then goes on to argue why they should nonetheless be used: The point about the van Boven principles is that they represent a synthesis of existing human rights norms and practice in relation to the concept of reparations. The van Boven principles draw upon relevant treaty provisions, provisions contained in the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination against Women and the International Convention on the Elimination of All Forms of Racial Discrimination. The van Boven principles draw upon the jurisprudence or the decisions, the general comments, of the treaty bodies, in particular the Human Rights Committee, which supervises conformity with the Covenant on Civil and Political Rights. They also draw upon the very important jurisprudence of the Inter-American Court of Human Rights which, in a number of important decisions, has confirmed the existence of an obligation at customary international law that is outside the international treaty system to make reparations to victims of human rights violations. The van Boven principles acknowledge the work of international law publicists, including Professor Ian Brownlie at the University of Oxford, who also confirms the existence at customary international law of an obligation to make reparations to victims of human rights violations. (*Transcript of evidence*, p. 100) See also *Submission. 93*, Human Rights and Equal Opportunity Commission, pp. 2215-2217, and *Submission. 1*, Associate Professor Chris Cunneen and Ms Terry Libesman, p. 7. The Human Rights and Equal Opportunity Commission also stated that the right to redress for human rights violations is recognised in the provisions of numerous human rights instruments, including: Universal Declaration of Human Rights (article 8); International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (article 6); International Covenant on Civil and Political Rights (articles 2(3) and 9(5); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (article 14(1));Convention on the Rights of the Child (article 39);European Convention for the Protection of Human Rights and

8.14 In addition, the Commonwealth stated that the process of determining eligibility for compensation would be 'very divisive of the population concerned'.[18]

Commonwealth as responsible only for the Northern Territory

8.15 In terms of potential liability, the Commonwealth government stated that child welfare policies and the administration of Aboriginal Affairs were the exclusive province of the states during the main decades of separation, with the exception of the Northern Territory.[19]

8.16 Until the 1967 referendum,[20] the Commonwealth did not have an Aboriginal affairs power, and therefore had no constitutional basis with which to intervene in any welfare or Aboriginal matters within the states, had it been aware of any 'unacceptable practices'. The Commonwealth therefore, in 'traditional legal theory'[21] was only responsible for the Northern Territory until self-government in 1978 and the ACT until self-government in 1989.

No payment without legal obligation

8.17 Further, Minister Herron argues that monetary compensation is 'inappropriate' and 'improper' unless a legal liability can be established in individual cases through a 'proper process of claims assessment'.[22] To support his claims, the Minister argued that this is 'general policy', referring to the 'separated child case' in

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Fundamental Freedoms (articles 50, 5(5));American Convention on Human Rights (articles 10, 63(1) and 68); and African Charter on Human and Peoples' Rights (article 21(2)). The Human Rights and Equal Opportunity Commission also stated that the right to redress for human rights violations is recognised in the provisions of numerous human rights instruments, including: Universal Declaration of Human Rights (article 8); International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (article 6); International Covenant on Civil and Political Rights (articles 2(3) and 9(5); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (article 14(1)); Convention on the Rights of the Child (article 39); European Convention for the Protection of Human Rights and Fundamental Freedoms (articles 50, 5(5)); American Convention on Human Rights (articles 10, 63(1) and 68); and African Charter on Human and Peoples' Rights (article 21(2)) (*Submission 93*, pp. 2216-2217)

18 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 617

19 *Transcript of evidence*, Senator Coonan; and the Minister for Aboriginal and Torres Strait Islander Affairs, p. 662

20 The referendum of 1967 was a submission to the electors of proposed laws for the alteration of the Constitution, entitled: (i) Constitution Alteration (Parliament) 1967, and (ii) Constitution Alteration (Aboriginals) 1967. The first of these proposals sought to alter the Constitution so that the number of Members of the House of Representatives could be increased without necessarily increasing the number of Senators. This proposal was rejected. The second proposal sought to remove any ground for the belief that the Constitution discriminated against people of the Aboriginal race, and, at the same time, to make it possible for the Commonwealth Parliament to enact special laws for these people. This proposal was carried.

21 *Transcript of evidence*, Senator Coonan; and the Minister for Aboriginal and Torres Strait Islander Affairs, p. 662

22 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 570

NSW (*Williams*) and evidence given in the Federal Court, which the Minister claims reveals 'the hazards of accepting such claims without thorough scrutiny and testing'.[23]

8.18 A number of witness submissions disagreed with the Commonwealth's response, on grounds that it ignored the 'human rights violations' and because it would force individuals to take on the law as individuals. The major difficulty with respect to the latter approach was the substantial problems raised in respect of liability.

8.19 HREOC stated that it was hypocritical for the Commonwealth to insist that legal liability be a prerequisite to considering compensation claims when 'victims' of 'forcible removal' were prevented from establishing such liability through a range of factors:

> At its simplest, there is no capacity within the legal system of Australia to establish such liability in a court of law in relation to a number of the grounds established in *Bringing them home*…. genocide is not prohibited in Australian law. Similarly, there is no redress available for laws, policies and practices prior to 1975 that were racially discriminatory. In some states, for example, Western Australia, limitation periods also prevent civil actions from being brought. It is the argument of the Human Rights and Equal Opportunity Commission, therefore, that legal action is not an option for individuals unless some specific type of liability can be established, and any provisions concerning time are relaxed. However, the issue of liability is a complex one, and in most cases thus far has not been successfully demonstrated.[24]

8.20 The Commonwealth acknowledges that the 'particular treatment of an individual' might attract legal liability through an abuse of power or other illegality in the removal or by virtue of the person's treatment in an institution,[25] but rejects the notion that there could be any liability attributed to it for the 'mere existence of policies':

> Government policies are generally non-justiciable and the legislation on which the policies were based can only be struck down on the grounds of constitutional invalidity. The *Aboriginals Ordinance 1918 – 1957* was found to be constitutionally valid in the case of *Kruger* and *Bray*.[26]

8.21 The Commonwealth also stated that, although it is claimed that the government is liable for the torts of negligence, breach of statutory duty and breach of duty as a guardian, it denies that it is liable at law for the 'actions of officials' acting

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23 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 570

24 *Transcript of evidence*, Human Rights and Equal Opportunity Commission, p. 97; see also *Submission 4*, Women's Legal Centre, pp. 29-30

25 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 614

26 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 614

'within the ambit' of their statutory powers.[27] The three cases (*Cubillo/Gunner, Williams and Kruger*) already heard, demonstrated the difficulty of establishing breaches of statutory duty on the part of governments.[28]

8.22 The Commonwealth outlined the arguments in relation to the responsibility it is alleged to have held: [29]

- that the officials empowered to take Aboriginal children into care owed fiduciary duties to them, which the government of the day vicariously owed; and
- that the government independently owed fiduciary duties to Aboriginal people.

8.23 However, in response, the Commonwealth stated:

> Fiduciary duties arise out of special relationships of responsibility and trust, such as doctors and their patients, and they impose on the person in whom trust is invested, a duty to always put the interests of the fiduciary first and not to take on any inconsistent duties. The Commonwealth maintains that fiduciary duties are not owed to people placed in its care to the extent that such duties would be incompatible with the nature of government where there are duties to all, which required a balancing of competing interests. [30]

8.24 Certain of these issues were accepted by some witnesses, who pointed out that it was the very existence of such parameters that made a different approach both necessary and humane. The Public Interest Advocacy Centre (PIAC) agreed that even if it were established that there had been a breach of duty of care, the damage suffered by the plaintiff would have to be proved to be causally linked to that particular breach of duty:

> Given the period involved and the widespread problems faced by Indigenous Australians regardless of whether or not they were removed from their family, this would be a complex task. It would be difficult to separate out damage caused by particular conduct whilst a person was in the care of the State from the broad range of impacts that the disadvantage and racism faced by Aboriginal people has had. [31]

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27 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 615

28 *Transcript of evidence*, Senator Coonan; and Minister for Aboriginal and Torres Strait Islander Affairs, p. 662

29 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 615

30 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 615

31 *Submission 68*, Public Interest Advocacy Centre, p. 1503

Services not money

8.25 In its submission, the Government suggested that a 'programatic response', directed to the 'current needs' of individuals and communities, is 'the appropriate response'.[32] This, it claims, is effectively what *Bringing Them Home* concluded:

> The Commonwealth Government's response has focussed on the second category of recommendations, ie assisting separated persons reunite with their families. The BTH report itself identified family reunions as "the most significant and urgent need of separated families" and emphasised that "reunion is the beginning of the unravelling of the damage done to indigenous families and communities by the forcible removal policies".
>
> The Government has delivered a comprehensive programmatic response to the traumatic effects of child separation practices, composed of a package of initiatives totalling $63 million over four years, which will facilitate family reunion, and assist Indigenous people to cope with the stress and trauma of family separation.[33]

Organisational responses

8.26 The Committee received evidence to support the services provided by the Commonwealth's response package. However, criticism of the Commonwealth was heard relating to the adequacy and effectiveness of these services (and is considered in Chapter 2) and the belief that in addition to these services, monetary compensation should also be paid.[34]

8.27 ATSIC, in its submission acknowledged the Commonwealth's contribution to the expansion of family tracing and reunion services and of culturally appropriate counselling services for those Aboriginal and Torres Strait Islander people separated from their families and communities.[35] However, ATSIC stated that its position is such that reparation and compensation should be made to those who were separated, to their communities and to the Aboriginal and Torres Strait Islander nations.[36]

8.28 The Victorian Aboriginal Legal Service submitted that whilst the family reunion initiatives that have been taken by the Commonwealth deserve recognition,

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32 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 612; See also, discussion of Commonwealth Government response in Chapter 2

33 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 591

34 See *Submission 11*, Retta Dixon Home Aboriginal Corporation; pp. 182-183 *Submission 22*, Yirra Bandoo Aboriginal Corporation, pp. 406-412; *Submission 25*, National Sorry Day Committee, p. 425; *Submission 29*, Kimberley Aboriginal Law and Culture Centre, p. 466; *Submission 54*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, pp. 1016-1017; and *Submission 58*, Kimberley Stolen Generation Committee, pp. 1115-1116

35 *Submission 32*, Aboriginal and Torres Strait Islander Commission, p. 508

36 *Submission 32*, Aboriginal and Torres Strait Islander Commission, p. 508

the package was something 'less than a serious and effective commitment'.[37] In addition, the Victorian Aboriginal Legal Service recommended that governments in Australia approve the setting-up of a tribunal as envisaged in *Bringing Them Home* in order to respond to the claims for compensation from 'stolen generations' people.[38]

8.29 Similarly, the Human Rights Committee of the Law Society of NSW stated that the Government's focus on 'strengthening families' in fact discounts any criticism to the lack of a response to specific recommendations.[39] The Human Rights Committee believed this approach to be, of itself, inefficient when designing programs which impact on social change in a democratic society.[40] Indeed, the Human Rights Committee submitted that monetary compensation should be addressed and an effective means of doing so could be to establish a tribunal similar to the NSW Victims Compensation Tribunal.[41]

Potential cost of claims

8.30 In its submission, the Commonwealth government attempt to make what it claims to be a 'conservative calculation' of the potential cost of compensation claims.[42] The calculation is based on average compensation of $100,000 per person to an estimate of 39,250 separated people. The total compensation bill, according to the Commonwealth, would be in the order of $3.9 billion, or the equivalent of four times the annual ATSIC budget.[43]

8.31 It may be that this amount is cited in order to suggest that the total sum would be excessive/unaffordable. It is far from clear what individuals are seeking and witnesses noted that recognition of the past is at least as important.[44]

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37 *Submission 56*, Victorian Aboriginal Legal Service, p. 1094

38 *Submission 56*, Victorian Aboriginal Legal Service, p. 1104

39 *Submission 59*, Human Rights Committee of the Law Society of New South Wales, p. 1129

40 *Submission 59*, Human Rights Committee of the Law Society of New South Wales, p. 1129

41 *Submission 59*, Human Rights Committee of the Law Society of New South Wales, p. 1131

42 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 623

43 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, pp. 570, 622-623; The Commonwealth Government stated that the figure of 39,250 children forcibly removed is a conservative estimate on the premise that only 5 percent of children were *forcibly and wrongly* removed. "A conservative calculation might be to assume average compensation of $100,000 per person and to assume a compensable population of *less* than HREOC's 10 percent or the associated estimate of 78,5000 eg. by assuming that as many as 50 percent of the estimated one in ten separated children were not forcibly separated or were forcibly separated for good reason. (78,500 x 0.5 x $100,000)"

44 'Families' in this context refers to institutional families or organisations of people who were raised in the same institution. See above, Chapter 1, Paragraph 1.78 and footnote 82, and also *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 176

Cost of litigation

8.32 While the above figures may seem extraordinary, numerous submissions[45] sought to draw the Committee's attention to the amount of money so far spent in litigation:

> Of the Department of the Prime Minister and Cabinet's allocation in relation to indigenous legal related costs since 1994-95, approximately 55% related to separated children cases.[46]

8.33 In addition, the Department of Prime Minister and Cabinet stated that the Gunner-Cubillo case cost $8 million.[47] That figure is only the cost of the Government's defence in that particular case.

8.34 To illustrate the inefficiency of the pursuit of litigation, PIAC stated:

> Litigation also involves enormous costs. The *Gunner* and C*ubillo* cases, funded by ATSIC and defended by the Australian Government Solicitor, for example, have cost over $10 million to date. These amounts will continue to increase with appeals and the commencement of further cases, at a cost to the taxpayer and no benefit to the members of the Stolen Generations.[48]

8.35 Similarly, the National Sorry Day Committee stated:

> The tragedy is that the court scenario could well have been avoided. We are convinced that, had the Government responded with greater understanding to the story which the report revealed, many who have turned to the courts would not have done so, and the $10 million spent so far on the Gunner-Cubillo case could have been used to heal and unite, rather than divide and anger.[49]

8.36 The Committee is mindful of the litigation costs so far, particularly in light of some 700 other writs served[50] in the Northern Territory.

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45 See *Submission 68*, Public Interest Advocacy Centre, p. 1495; *Submission 56*, Victorian Aboriginal Legal Service, p. 1094; *Submission 25*, National Sorry Day Committee, p. 427; and *Transcript of evidence*, Croker Island Association, p. 512

46 *Submission 36A*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 2665; See also, *Transcript of evidence*, Mr Vaughan, pp. 687-688

47 *Transcript of evidence*, Mr Vaughan, p. 687. Other estimates of $10 million or more include the cost of the Government's defence and the additional allocation of funding for Legal Aid

48 *Submission 68*, Public Interest Advocacy Centre, p. 1495

49 *Submission 25*, National Sorry Day Committee, p. 427

50 *Social Justice Report 1998*, p. 117

Quantification of loss

8.37 The Commonwealth Government stated that there is no 'existing objective methodology' for attaching a monetary value to the loss suffered by victims of 'alleged government failures' of the type evident in relation to separated children:

> There is no comparable area within the common law of judicial awards of compensation and no basis for arguing a quantum of damages from first principles. Principles governing the quantification of damages at law can afford guidance (as stated by HREOC) but there would be enormous difficulties applying them in cases such as these.[51]

8.38 In relation to the heads of damage recommended by *Bringing Them Home* (recommendation 14), the Government stated that the assumption behind the *Bringing Them Home* analysis and the litigation bought to date appears to be that compensation should be paid for 'every negative manifestation in a person's life', whether or not that 'misfortune' can be attributed to the events in which the government was allegedly involved.[52] The Government stated that this is consistent with the 'high price' put on compensation claims. Nonetheless, the Government view was that no amount of money would meet the needs or expectations of individuals:

> It is unlikely that any mechanism could objectively and equitably determine variable levels of compensation according to the experiences of individuals in a way that could satisfy their high expectations. On the other hand, payment of a standard, lower rate of compensation would be inequitable as it would equate the different experiences of individuals.[53]

8.39 HREOC agrees that the quantification of past and future loss may present difficulties but rejects the view that this justifies, in part, the government's position regarding compensation.[54] HREOC refers to the New South Wales Law Reform Commissioner, Professor Regina Graycar, who stated:

> Even the most minimal familiarity with the legal frameworks used for compensating various sorts of injuries would make it clear that the Government's argument [that there is no comparable area of compensation] is little more than a rhetorical device. What is, or is not, compensable at law is more a mater of political judgement and government policy than it is a matter of any inherent legal understanding of compensability. [55]

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51 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 620

52 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, pp. 620-621

53 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, pp. 621-622

54 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2234

55 Professor Regina Graycar, as quoted in *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2234; See also, *Transcript of evidence*, Public Interest Advocacy Centre, p. 131; and *Submission 1*, Associate Professor Chris Cunneen and Ms Terry Libesman, pp. 12-13

Is a workable compensation scheme possible?

8.40 The Minister stated that it would not be possible to implement a workable scheme under which it is possible to 'identify persons who have suffered loss' and to 'quantify that loss'. In addition, Minister Herron stated that any national compensation scheme would require the co-operation of all governments responsible for past practices and it is 'unlikely' that 'general agreement could be reached' on the range of issues arising for determination in the context of setting up a scheme.[56] State and territory government responses to compensation are considered below.

State and Territory Government responses

8.41 No state or territory Government has offered to pay compensation or contribute to any national compensation fund. The responses of the states and territories fall into four basic categories:

8.42 NSW stated that monetary compensation is a matter for the Commonwealth.[57]

8.43 The Victorian government's position is that no monetary compensation will be offered to individuals 'affected by past policies of separation of children from their families'.[58]

8.44 The governments of Queensland, Western Australian and South Australia all refer to the High Court case of *Kruger*, in which it was determined that removals were not unconstitutional. In doing so, all three states stated that they support the Commonwealth's position, that it is 'not appropriate to provide monetary compensation'.[59]

8.45 The Tasmanian government stated that the specific question of monetary compensation was something that 'must be addressed nationally'.[60] In addition:

> The Tasmanian Government recognises that, whilst monetary compensation through court action or the establishment of a national Fund may be appropriate for individuals affected by such practices, the broader effects on the Aboriginal community can be better addressed through meeting recommendations of the Report which form the basis for restitution and rehabilitation. It is the intention of the Tasmanian Government to address the concept of reparations as a whole …[61]

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56 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 615

57 Ministerial Council for Aboriginal and Torres Strait Islander Affairs, *Collected Responses* p 28

58 *Submission 109*, Victorian Government, Minister for Aboriginal Affairs, p. 2945

59 Ministerial Council for Aboriginal and Torres Strait Islander Affairs, *Collected Responses* pp. 143, 166 and 209

60 Ministerial Council for Aboriginal and Torres Strait Islander Affairs, *Collected responses*, p. 255

61 Ministerial Council for Aboriginal and Torres Strait Islander Affairs, *Collected Responses*, p. 255

8.46 Both the ACT and Northern Territory governments stated that they could not be held responsible for compensation in relation to forcible removal policies and practices, as neither government was an entity or contributed to the practice of forced removal during the period of time in question.[62]

8.47 The *1998 Social Justice Report* referred to the 'watching brief' of state and territory governments in relation to developments in the major test cases relating to child separation: [63]

> The 'watching brief' adopted by governments in respect of these cases has, invariably, two points of focus: first, the grounds (if any) that courts indicate would provide sufficient basis for damages to be awarded; and, secondly, if awarded, the magnitude of damages.
>
> Another issue of particular concern for governments is whether the provision of assessed or ex gratia payments under any administrative (that is, non-curial or non-tribunal) scheme, would necessarily displace any additional civil action in the courts concerning the same issue (as would appear to be the intended effect of Rec. 20). State and Territory Governments, in other words, are especially concerned over the possibility of being exposed to a 'double jeopardy' in respect of compensation payments.

8.48 According to the most recent status report of MCATSIA, the above positions continue to be the views of all state and territory governments.[64]

62 *Submission 64*, Northern Territory Government, pp. 1229-1230, 1234-1236; *Submission 42*, p. 753; See also *Transcript of evidence*, Senator Crossin, Mr Beadman, pp. 442-443

63 *Social Justice Report 1998*, pp. 117-118

64 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 662

SECTION 2

Alternative Dispute Resolution Tribunal

Litigation: Inequitable outcomes?

8.49 The PIAC argued that access to compensation through the pursuit of individual claims based on the common law will have 'arbitrary' and 'inequitable' results for those individuals:[65]

> Those who succeed will be those who can overcome hurdles such as locating evidence of wrong doing and the harm that resulted, and limitation periods. Those who cannot meet these requirements will receive nothing, even though they suffered the same or perhaps greater harm as a result of systematic government practice. Litigation therefore is an inequitable and arbitrary mechanism for redressing the harm suffered by all members of the Stolen Generations, their families and communities.

8.50 The Retta Dixon Home Aboriginal Corporation noted in its submission that it is important to acknowledge that some people may have suffered more than others in terms of specific harm.[66] While some organisations wish to play down the belief that some people are 'more stolen' than others, this may not always accord with individual circumstances.

Other statutory schemes

8.51 PIAC recognised that governments have legislated to overcome the difficulties of establishing 'standards of care and causation' in a number of areas. Two well known examples of statutory compensation schemes are those for victims of crime and war veterans.[67] PIAC stated that these schemes reflect a 'public policy decision' of government to provide for people who suffer loss as a result of violent crime, and a commitment to take care of war veterans:

> The State pays compensation to people who can demonstrate that a violent crime occurred and that, as a result, they suffered harm. The victims do not have to establish a duty of care or its breach by the State. Claims usually involve a written application from the victim setting what happened, a police report, and medical certificates or reports attesting to the physical injury or psychiatric disorder.
>
> Claims for compensation for injury or illness caused by war service are also provided as part of a statutory scheme. Claimants must show that they were

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65 *Submission 68*, Public Interest Advocacy Centre, p. 1495; See also *Transcript of evidence*, Catholic Commission for Justice, Development and Peace, pp. 241-242

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

67 *Submission 68*, Public Interest Advocacy Centre, p. 1503; See also *Submission 4*, Women's Legal Centre, pp. 29-30

> in war service and that they suffered injury while in war service. Again, there is no issue of establishing a duty of care.[68]

8.52 As is noted by the Women's Legal Centre, alternative dispute resolution tribunals also have other benefits such as public recognition of the event and of society's obligation to rectify the injury. In this sense, tribunals can help to meet the need for 'acknowledgment' and 'justice':

> Awards of compensation are a symbolic means of apologising for that harm and are the only recognition of their loss that the victim of crime receives.[69]

8.53 PIAC submitted that the government should establish a statutory based scheme for compensation to the members of the stolen generation, which would include strict liability (as demonstrated above) for the harm suffered as a result of forcible removal.[70] PIAC argued that the public policy justification for providing strict liability is that it gives 'statutory recognition' of the harm that flowed from forcible removal, and provides redress for that harm. Further, PIAC submitted that it would recognise that much of the harm that resulted formed 'breaches of common law standards of care' and 'breaches of international law', at the same time as recognising that forcible removal was 'morally wrong':[71]

> A statutory compensation scheme, with strict liability tests for entitlement and relaxed rules of evidence, provides significant advantages to people forcibly removed such that an amount less then common law damages may be appropriate.[72]

8.54 The Committee considers all of the above suggestions to have merit and to be worthy of further consideration. We recognise that an admission of breaches of law, and a statement on 'moral' issues, may not be relevant if there is no component of individual guilt and responsibility, given that many churches have made their apologies. However, the extent to which other organisations would wish to concede a moral wrong remains to be determined.

Reparations Tribunal

8.55 PIAC stated that given the disadvantages of litigation (limitations, liability, evidentiary hurdles, adversarial and inequitable outcomes), a 'Reparations Tribunal' should be seriously considered as an alternative. According to PIAC, a statutory

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68 *Submission 68*, Public Interest Advocacy Centre, pp. 1503-1504; See also, *Victims Compensation Act 1986* (NSW) and *Veterans Entitlement Act* 1986 (Cth)

69 *Submission 4*, Women's Legal Centre, p. 30

70 *Submission 68*, Public Interest Advocacy Centre, p. 1504

71 *Submission 68*, Public Interest Advocacy Centre, p. 1504

72 *Submission 68*, Public Interest Advocacy Centre, p. 1507

reparations scheme offers significant benefits for governments and affected people alike, including: [73]

- Ensuring that all those affected would receive a reasonable share of limited funds;
- Providing a scheme for financing a range of reparation measures;
- Containing the potential for litigation, thus creating finality and certainty for governments and affected peoples; and
- Offering an effective mechanism for providing social justice for Aboriginal and Torres Strait Islander people.

8.56 PIAC suggested that the 'Reparations Tribunal' should have the power to order or recommend all forms of reparation, including monetary compensation, acknowledgment and apology, guarantees against repetition, measures of restitution and measures of rehabilitation.[74] PIAC submitted that the role of the Reparations Tribunal in determining claims would be to promote dialogue and co-ordination between claimants, service providers and other relevant parties. Such flexibility would recognise that those affected by forcible removal have different needs and expectations, and would facilitate appropriate responses.[75]

Monetary compensation

8.57 Under the Reparations Tribunal model proposed by PIAC, the tribunal would be empowered to award lump sum monetary compensation to individuals who were forcibly removed. The tribunal would facilitate an equitable apportionment of the realistically limited funds available to compensate the stolen generations, therefore overcoming the need for costly, protracted and traumatic litigation. In addition, PIAC recommends people who were forcibly removed would be eligible to claim monetary compensation upon 'proof of particular types of harm'.[76]

Acknowledgment and apology

8.58 Individuals or groups would be able to approach the tribunal to seek an apology from a specific individual, local entity, state or federal government or non-government party involved in their removal. The tribunal would have the power to recommend that an apology be made.[77] In addition, other forms of acknowledgment may be sought such as a claim for a local commemorative monument or the

73 *Submission 68*, Public Interest Advocacy Centre, p. 1496

74 *Submission 68*, Public Interest Advocacy Centre, p. 1506

75 *Submission 68*, Public Interest Advocacy Centre, p. 1506

76 *Submission 68*, Public Interest Advocacy Centre, p. 1507

77 *Submission 68*, Public Interest Advocacy Centre, p. 1508

establishment of a local commemorative day, all of which the tribunal would have the power to recommend.[78]

Guarantee against repetition

8.59 PIAC suggested that claimants to the tribunal may seek reparation in the form of a guarantee against repetition. PIAC stated that such claims, by their nature, may be broadly framed and have effect beyond any particular claimant group. For example, a family or community of individuals may seek, as reparations, the inclusion of education about the stolen generations in the school curriculum.[79]

Measures of restitution

8.60 PIAC submitted that claims to the tribunal for restitution are likely to be those seeking support for people returning to their land, increased funding to language, cultural and history centres, funding to assist in re-establishing Indigenous identity, family tracing and reunion services and the preservation of and Indigenous access to records.[80] It was also suggested that the tribunal could establish a relationship with relevant service providers to facilitate the implementation of such recommendations.[81]

Measures of rehabilitation

8.61 PIAC saw merit in enabling the tribunal to facilitate the granting of such reparations measures as recommending that individuals be guaranteed counselling or other mental health assistance. This could be achieved, it is suggested, through a voucher or referral system, or through packages of reparation measures that could be designed around families' needs. In addition, community needs may be broader and involve research into parenting models. The tribunal could recommend that government and/or non-government parties provide resources for such research.[82]

8.62 PIAC did not however, clarify how such a system might operate in terms of multiple claims for more than one aspect of reparation, nor did it address the issue of duplication in recommending certain services under reparation. For example, PIAC did not address how the tribunal might coordinate numerous claims within one state or territory for a particular service:[83]

> We are suggesting that, in consultation with Indigenous people, some kind of schedule of damages or eligibility for reparations flow from each of these [heads of damage]. It would obviously be needed to be worked out mathematically whether, if groups come and claim three of these heads of

78 *Submission 68*, Public Interest Advocacy Centre, p. 1508

79 *Submission 68*, Public Interest Advocacy Centre, p. 1508

80 *Submission 68*, Public Interest Advocacy Centre, pp. 1508-1509

81 *Submission 68*, Public Interest Advocacy Centre, p. 1509

82 *Submission 68*, Public Interest Advocacy Centre, pp. 1509-1510

83 *Transcript of evidence*, Senator Coonan, Public Interest Advocacy Centre, p. 126

> damage, should or would they be entitled to more than a group or individual who can prove one head of damage. There would obviously be some discretion, but also some kind of schedule or equitable manner of working out those questions needs to be developed and worked on.

Reparations Tribunal: An alternative?

8.63 The majority of submissions received by the Committee addressed the issue of compensation and many suggested consideration of an alternative mechanism. However, PIAC submitted the most comprehensive account of an alternative model. PIAC agreed, for the most part, with the recommendations of *Bringing Them Home* in terms of membership of the tribunal and procedural rules.[84]

Evidence

8.64 HREOC and PIAC submitted that the tribunal should adopt relaxed rules of evidence in an attempt to avoid the 'unfairness' of requiring claimants to prove events on the basis of the availability and accuracy of written records and first hand oral evidence.[85] PIAC further submitted that the rules of evidence should be 'sufficiently flexible' to accommodate the needs of the claimants to it, and those who wish to provide evidence orally, or by sworn statement or affidavit, applicable to both individual and group evidence.[86]

8.65 PIAC referred to their experience with class actions or group proceedings stating that once the question of liability has been determined, the parties will come to a settlement arrangement. PIAC stated that for people who claim to be a member of a particular class or subclass and who claim particular types of harm, quite specific types of evidence that need to be established will be agreed upon.[87] PIAC highlighted the example of the claim against Kraft in the peanut butter poisoning case:[88]

> … all people had to do was sign a statutory declaration that they had missed a day of work because they had been sick; they did not need a doctor's certificate. The only people who needed a doctor's certificate were those who claimed more severe illness and, therefore, larger amounts of money. There are lots of examples in this area to show just administratively that this can be quite simple.

8.66 In the spirit of cultural appropriateness, PIAC submitted that claimants should be able to give evidence in their own language and that the tribunal should engage interpreters to accommodate these claimants. In addition, PIAC suggests that

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84 *Submission 68*, Public Interest Advocacy Centre, p. 1511

85 *Submission 68*, Public Interest Advocacy Centre, p. 1511

86 *Submission 68*, Public Interest Advocacy Centre, p. 1511; See also *Submission 6*, Jilpia Nappaljarri Jones, p.42; and *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 188

87 *Transcript of evidence*, Public Interest Advocacy Centre, p. 132

88 *Transcript of evidence*, Public Interest Advocacy Centre, p. 132

applicants should be given the option to have their application heard in public hearings (with the tribunal being able to hear evidence 'in camera' if necessary) or have their application 'assessed on the papers'.[89]

8.67 The Retta Dixon Corporation stated that members of the stolen generation should be able to have their cases presented in their absence if they so desire and that victims must not be subjected to cross-examination by legal practitioners, or in a quasi-legal setting.[90]

Legal representation or informal approach?

8.68 Several submissions[91] proposed that proceedings be relatively informal, suggesting as desirable relaxed rules of evidence and proceedings not being bound by time limits. However, in some instances, it was thought that there should be legal representation.[92] This would tend to increase the cost of the process, its formality, and the likelihood of substantial legal cost for any defence. Most 'alternative' models, therefore, are essentially legalistic, and it is not clear that this is the best approach. Given that the major concerns expressed were related to the emotional distress involved at reviving the past and then having to provide some evidence about it, the only way of avoiding distress while remaining within a legal framework is for the individual to be represented by another party.

Appeals

8.69 PIAC submitted that it is well-established law that decisions of both government and private tribunals are reviewable by the courts on questions of law, including whether the requirements of procedural fairness were met.[93] PIAC submitted that this principle should be reinforced in the proposed tribunal's statutory scheme, which would provide for appeals from the tribunal to the Federal Court on questions of law.[94]

Sunset clause

8.70 PIAC submitted that sufficient time needs to be provided for the tribunal to complete the task of receiving and processing claims. However, PIAC submitted that the tribunal should have a limited life to ensure that finality can be achieved. Therefore, PIAC recommended that claims should not be lodged more than ten years

89 *Submission 68*, Public Interest Advocacy Centre, pp. 1511-1512

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

91 See *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 187; *Submission 25*, National Sorry Day Committee, p. 427; *Submission 63*, Garden Point Association, p. 1212; and *Submission 54*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 1054

92 See *Submission 46*, Kingsford Legal Centre, p. 929

93 *Submission 68*, Public Interest Advocacy Centre, p. 1512

94 *Submission 68*, Public Interest Advocacy Centre, p. 1512

after the commencement date of the tribunal and that claims lodged in that period, but not yet processed, should be allowed to be finalised.[95]

Commonwealth government response to alternatives

8.71 The Commonwealth stated that it does not support the payment of monetary compensation to individuals in the absence of any legal liability to do so.[96] The government submitted that the proposal to establish an alternative dispute resolution tribunal to resolve the compensation claims is 'misguided' and appears to be based on establishing a 'scheme' for compensation.

8.72 The government stated that if there were to be an alternative dispute resolution process, a tribunal would be the only alternative mechanism appropriate, as all claims would need to be subject to 'thorough inquiry and investigation'.[97] However, the government then stated that due to the complex nature of the claims, the tribunal would have to determine 'extremely complex factual, and possibly even legal matters' in order to resolve a disputed claim[98] and, as a result, a tribunal would be ill-equipped to handle these disputes unless it functioned in a similar manner to a court.

8.73 In addition, the government stated that it does not see that any alternative dispute resolution process would be 'appropriate' in relation to this matter, unless it involved the 'rigorous testing of claims', in which case, the Commonwealth stated that it does not see that a tribunal would provide any advantage over the 'normal litigation process'.[99] Indeed HREOC stated that claims for compensation should be subject to 'proper scrutiny'.[100]

8.74 The government stated that the process could not be expected to be quicker, cheaper or necessarily avoid 'traumatic adversarial processes':[101]

> … it is not unusual for tribunals to adopt similar processes to courts. This reflects the inherent advantages of a judicial approach to adjudication in terms of according natural justice. For example, although most tribunals are

95 *Submission 68*, Public Interest Advocacy Centre, p. 1513; See also, *Transcript of evidence*, Public Interest Advocacy Centre, p. 133

96 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 624

97 See also *Transcript of evidence*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 664 in which the Minister states that the Government could not see any equitable way of establishing a tribunal and the Government did not want to subject people to a tribunal process that would involve complex factual and legal issues

98 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 624; See also *Transcript of evidence*, Senator Coonan, Minister for Aboriginal and Torres Strait Islander Affairs, p. 662

99 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 625; See also, *Submission 36A*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 2669; and *Transcript of evidence*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 645

100 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2210

101 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 624

> not required to adhere to the formal rules of evidence, they often do so because the purpose of the rules is to exclude unreliable evidence and thereby maximise consistent decision-making and just outcomes.[102]

8.75 The government also considered the cost of an alternative dispute resolution tribunal stating that it would be 'expensive' to establish a new tribunal with the attendant administrative costs.[103] The government stated that there is no comparison in terms of claimant numbers or potential complexity. However, by way of example, the Commonwealth indicated that the National Native Title Tribunal costs $24m p.a., exclusive of the costs of claimants and respondents involved in the process, and of actual Federal Court determinations.[104]

8.76 The government suggested that the basic problem with a statutory compensation scheme is that it would 'distract attention and resources' from the 'primary needs' (family reunion and the like) of the separated children.[105]

Responses of those affected

8.77 In its submission, Yirra Bandoo Aboriginal Corporation stated that it supported the establishment of a tribunal as a means for addressing the need for appropriate compensation.[106] Similarly, the Victorian Aboriginal Legal Service stated that a tribunal is the only way that 'real justice' can be given to the victims as the victims currently face limitations, the death of witnesses and issues with the time that has lapsed.[107] The Victorian Aboriginal Legal Service advocated the Victorian Crimes Compensation Tribunal as a model for the establishment of any tribunal for members of the stolen generation:[108]

> What is happening now is that they [Victorian Crimes Compensation Tribunal] are not calling it compensation. They are actually talking about certain levels of severity. In other words, if there has been police notification that something has happened, rather than prove how bad the person has suffered, they link the amount that is payable to the severity of the crime. So they have moved away from the term 'compensation'. As I said, it is certainly not uncontroversial, but it is a way of avoiding having to go into depths of what a person has suffered and get psychological reports. The payment is actually based on the severity of the crime that has been

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102 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 625

103 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 625

104 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 625

105 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 625

106 *Submission 22*, Yirra Bandoo Aboriginal Corporation, p. 411; See also *Transcript of Evidence*, Croker Island Association, pp. 512-513

107 *Submission 56*, Victorian Aboriginal Legal Service, p. 1101

108 *Submission 56*, Victorian Aboriginal Legal Service, p. 1100; See also, *Transcript of evidence*, Catholic Commission for Justice, Development and Peace, pp. 241-242; and *Transcript of evidence*, Liberty Victoria, p. 282

> involved. So it is a simpler method of dealing with a situation where there is limited money.[109]

8.78 In contrast, the Retta Dixon Corporation stated that it remains 'unconvinced' about the proposal for a tribunal:[110]

> There are enough precedents to suggest that a tribunal or board would be as much responsible for denying rights to members of the stolen generation, as providing them.

8.79 However, the Retta Dixon Corporation did acknowledge the need for a mechanism that is 'fair', 'accessible' and 'not alienating', that will address need and legitimate claims for compensation.[111] Therefore, according to the Retta Dixon Corporation, it would be necessary to build safeguards into its structure and procedures so that people are treated fairly and do not have their normal rights diminished.[112]

Other alternatives

8.80 The National Sorry Day Committee proposed the establishment of an 'Aboriginal and Torres Strait Islander Mediation Commission'.[113] The National Sorry Day Committee proposed that the mediation commission would be a statutory body, authorised to hear the grievances of the Indigenous people, and to negotiate settlements with groups and individuals across the country. Its commissioners would be both Indigenous and non-Indigenous (similar to that recommended by *Bringing Them Home*[114]) and according to the National Sorry Day Committee, decisions of the commission would be binding unless overturned by a vote of Parliament.[115]

8.81 Similar to the model proposed by PIAC, the National Sorry Day Committee proposed that the mediation commission would need to be empowered to negotiate many different forms of compensation. For example, some claimants might want assistance to return to their land and people, including financial help for a deposit on a house, others may want a monument or other form or commemoration or help in the negotiation of access to or ownership of sites of significance.[116]

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109 *Transcript of evidence*, Victorian Aboriginal Legal Service, p. 233

110 *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 186

111 *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 186

112 *Submission 11*, Retta Dixon Home Aboriginal Corporation, pp. 186-187; See also, *Transcript of evidence*, Retta Dixon Home Aboriginal Corporation, p. 534

113 *Submission 25*, National Sorry Day Committee, p. 427

114 See *Bringing Them Home*, Recommendation 16b

115 *Submission 25*, National Sorry Day Committee, p. 427

116 *Submission 25*, National Sorry Day Committee, p. 427

8.82 Indeed, the National Sorry Day Committee stated that if the above proposal was considered 'too ambitious', a commission could be established with the specific task of mediating on reparations to those removed from their families.[117]

8.83 Alternatively, NASGAC and CASGFAC submitted that the tribunal in question should be specific to matters that have arisen in the Northern Territory:

> This variation from the recommendations of BTH recognises the special and particular responsibility the Commonwealth bears for individuals who were made wards under Commonwealth legislation and by a Commonwealth administration. No question as to the legitimacy of claims arising in other parts of the nation by virtue of actions of other governments is raised. [118]

8.84 NASGAC and CASGFAC stated that unlike the tribunal proposed by PIAC, the tribunal should deal exclusively with monetary compensation as opposed to other forms of reparation. As a body dealing with monetary compensation from the Commonwealth to members of the Northern Territory stolen generations, NASGAC and CASGFAC submitted that the tribunal would 'inevitably be a creature of Commonwealth statutory creation'.[119]

8.85 NASGAC and CASGFAC envisaged the tribunal adopting an inquisitorial rather than adversarial model, with the 'no fault' principles that operate in relation to a number of other statutory 'tort replacement' schemes applying. The statute of the tribunal would create two distinct departments: the tribunal proper to receive applications and carry out research, and the applicants' assistance division to assist in the preparation and submission of claims.[120] In addition, the Commonwealth would be represented at the tribunal albeit within the 'no fault' framework.

8.86 NASGAC and CASGFAC suggested various classes of claimants and therefore suggested that communities from which people were removed might not be eligible for the monetary compensation component of reparation. Eligibility to access monetary compensation would be limited to the following:[121]

- Those currently living individuals who were themselves institutionalised; and

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117 *Submission 25*, National Sorry Day Committee, p. 428; See also, *Transcript of Evidence*, National Sorry Day Committee, p. 66

118 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2738

119 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2738

120 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2739

121 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2739

- The estates of those who were institutionalised who have since passed away.

8.87 NASGAC and CASGFAC submitted that applicants should be entitled to a minimum lump sum payment if they can demonstrate that they are (or the deceased was) part of the 'benefiting class'. In addition, as proposed by *Bringing Them Home*, applicants could seek further compensation under the relevant heads of damage. In these matters, NASGAC and CASGFAC submitted that the onus of proof would be to the normal civil standard, 'taking into account procedural amendments regarding evidentiary rules'.[122] Inquiry in such proceedings would be into the establishment of damage, not the liability of the Commonwealth.[123]

8.88 Contrary to *Bringing Them Home* and PIAC, NASGAC and CASGFAC stated that they reject the recommendation that a defence to a claim be the establishment that the removal was in the child's best interest as it ignores the matter that even if a removal were somehow justified (or consensual) that the standard of care once a child was 'incarcerated' was such as 'to lead to a recognisable damage'.[124]

8.89 Similarly to PIAC, NASGAC and CASGFAC stated that there should be a right of appeal on the ground of error of law, and that an applicant could elect to pursue either the tribunal or the court system although, once an election had been made, it could not be reversed.[125]

Other suggested means for reparation

8.90 In addition to individual monetary compensation, the Retta Dixon Corporation proposed an annual recurrent budget for itself of $123,600 (in 1998 terms) established under a trust fund.[126] The Retta Dixon Corporation considered this amount to be adequate to provide it with the ability to link to and support stolen generation programs, and design specific projects that could deliver outcomes that match the specific needs:[127]

> The agreed terms and conditions of the Trust would allow RDH to design and operate the projects its members consider necessary and able to achieve real benefits in line with the needs as identified by them and expressed in the Report [*Bringing Them Home*]. The suggestion, in broad financial terms,

122 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2740

123 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2740

124 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2741

125 *Submission 54A*, North Australian Stolen Generation Aboriginal Corporation and Central Australian Stolen Generation and Families Aboriginal Corporation, p. 2741

126 *Submission 11*, Retta Dixon Home Aboriginal Corporation, pp. 188-189

127 *Submission 11*, Retta Dixon Home Aboriginal Corporation, pp. 188-189

> is that legislation be considered that would allocate an amount annually into a Trust that would set aside capital reserves and provide for expenditure by the Trust, under agreed conditions, of the recurrent budget indicated, adjusted to keep pace with real terms, until sufficient capital reserve is achieved to allow interest earnings to match the annual expenditure.[128]

8.91 According to the Retta Dixon Corporation, compensation through such a Trust would empower the members of the stolen generation in the Northern Territory, through their institutional groups, allowing those directly affected to be involved in the decision-making process.[129] This proposal also had the support of Yirra Bandoo Aboriginal Corporation who stated:

> Surely it would not be hard to see there being a model where institutional groups start to be looked at as real players in this. If there were an opportunity for X amount of dollars over X amount of years to be put into a trust for community groups to get on with doing their business, it would meet the needs of a lot of members of the stolen generations. They could get on with their own business of doing programs in the way they see fit at a fraction of the cost of what is being outlaid. This is as opposed to when you ask the question, 'How much should a person be compensated?" There are models that you can look at.[130]

8.92 The Retta Dixon Corporation stated that the rationale for the proposed 'Institutional Group Trust' is as follows:[131]

- It provides a mechanism for the Commonwealth response to be better targeted to the needs as identified in the Report;
- It is a mechanism for aspects of reparation, including compensation, to be provided in the manner indicated in the Committee's Terms of Reference, which are in consultation, negotiation and agreement with the appropriate representatives of the Stolen Generations;
- It provides for the empowerment of the community of interest, the Stolen Generations, by their inclusion in provision of the linkages and support of their Institutional family members in the programs they need;
- It allows the responsibility for effective outcomes to reside with the people involved in the programs; and
- It thus optimises the chance for the Stolen Generations programs to be adequate, effective, implemented effectively and appropriately.

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128 *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 189

129 *Transcript of evidence*, Senator Cooney, Retta Dixon Home Aboriginal Corporation, pp. 530-532

130 *Transcript of evidence*, Yirra Bandoo Aboriginal Corporation, p. 527

131 *Submission 11A*, Retta Dixon Home Aboriginal Corporation, p. 2324

8.93 In relation to measures of restitution and rehabilitation, the Retta Dixon Corporation, in its submission, proposed that stolen generation institutional groups should be resourced to provide community workers and funded to conduct specific projects that would address these matters.[132]

8.94 However, the experience of members of the stolen generation in the Northern Territory appears to be different to that of members in other states. It appears that many members of the stolen generation in the Territory have kept close ties with their 'institutional family', hence the proposal for 'institutional funding'. The Committee received little evidence to suggest that this proposal would be appropriate or sufficient for many of those affected by forcible removal in other states. In some instances, there are institutional families in other states,[133] but people may also have separated and retained no connection with former residents.

Claimants

8.95 The government is concerned that if monetary compensation were offered, a large number of people, 'who are not genuine victims', will also lodge claims. Similarly, the government stated that it could 'open the floodgates' to demands for compensation for 'other historical injustices or perceived injustices'.[134]

8.96 As recommendation 4 of *Bringing Them Home* includes the provision of reparations to family members, communities and descendants of those separated as children, the government stated that this would place 'enormous strain' on available resources and potentially dilute its 'programmatic response'.[135]

8.97 Given the claimants recommended by *Bringing Them Home*, the government stated that the problem facing any tribunal would be to establish who, if anyone, is *not* entitled to compensation.[136]

8.98 The government stated that the issue of who might have been affected is more complex than appears to have been anticipated by *Bringing Them Home*, as any scheme would need to determine what effect child separation policies and practices had on the person and whether that effect amounted to some type of measurable loss.[137]

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132 *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 188

133 See *Submission 79*, Jarrah, pp. 1623-1642 and *Submission 94*, Residents of Cootamundra Girls Home, pp.2254-2264

134 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 623

135 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 612

136 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 617

137 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 617

8.99 PIAC agreed with those claimants identified by *Bringing Them Home* together with the recommendation for minimum lump sum payments.[138] In addition, PIAC submitted that it should not only be individuals who can make claims for reparation, but groups of people forcibly removed should also be able to claim for particular harm. For example, a group of former Bomaderry or Kinchela residents may bring a group claim for racial discrimination, physical and emotional abuse and pain and suffering.[139] According to PIAC, groups of claimants should then be able to seek orders to 'pool' their compensation, which might then be transferred to a particular project, initiative or organisation.

8.100 In contrast however, the Retta Dixon Corporation stated that it does not consider that item 3 of recommendation 4[140] applies to any extent in the Northern Territory, if at all:[141]

> 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).

Defining a 'separated child'

8.101 The Minister stated that if compensation were to be paid, it could not be paid to 'all those in the wide and diverse class making up the so called 'stolen generation'. Therefore, it would have to be 'restricted to cases of generally forced removal' where there was neither parental consent nor any specific welfare reasons justifying the removal of a child.[142]

8.102 However, PIAC stated that 'forcible removal' was defined to include *all* Indigenous children removed from their families, except removals which were truly voluntary, or where the child was orphaned and there was no Indigenous carer to step in.[143] Its argument is based on its use of the same terminology and approach as *Bringing Them Home*the National Inquiry.

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138 *Submission 68*, Public Interest Advocacy Centre, p. 1499

139 *Submission 68*, Public Interest Advocacy Centre, p. 1505

140 Recommendation 4(3): communities which, as a result of forcible removal of children, suffered cultural and community disintegration.

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

142 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 616

143 *Submission 68*, Public Interest Advocacy Centre, p. 1500; The Public Interest Advocacy Centre also stated that Compulsion is defined as meaning force or coercion. It includes officially authorised use of force and coercion and illegally exercised force or coercion, the removal of children by court order or pursuant to legislative powers. According to the Public Interest Advocacy Centre, duress can occur without the use of force. In the context of the stolen generations, duress took place through the use of threats, moral pressure or the infliction of hardship. Identifying duress involves understanding the power relationships which existed between government officials and Indigenous families at the relevant times. Many families who 'gave up' their child(ren) did so because there was no alternative. In a similar vein, undue influence means an influence by which a person is induced not to act of his own free will.

8.103 In terms of attempting to define who is a 'separated child', the government suggested that there are 'considerable' factual problems so long after the event, or indeed even recently, in determining who was a separated child:

> The *Bringing Them Home* report defined a separated child as someone who was separated from their parent or parents as a result of compulsion, duress or undue influence. It is possible to identify circumstances of compulsion in some circumstances when they were carried out under statute, such as in the Northern Territory trial. It is harder to establish where they were not carried out under statute. But it becomes more difficult still when you are dealing with cases of duress or undue influence where there was apparent consent on the part of the parent, say, in an adoption or fostering situation.
>
> It becomes difficult, obviously 40 or 50 years down the track to go back to that individual adoption decision and to sort out whether, say, the mother's name on the form was completely voluntarily given, whether she was inordinately influenced by social pressures of the time, by an official, a missionary or someone like that, or, if she sent a child away to boarding school, whether that was a completely voluntary decision or whether that was the subject of some undue influence or duress.[144]

Defining 'Indigenous'

8.104 PIAC stated that under the *Aboriginal and Torres Strait Islander Act 1989* (Cth), the definition of an Aboriginal person and Torres Strait Islander is to be interpreted in accordance with the following principles:[145]

- A person who is of full or substantial Aboriginal descent is an Aboriginal person notwithstanding the absence of recognition of that fact by himself or his community;
- A person who has no Aboriginal descent cannot be an Aboriginal person notwithstanding that he may recognise himself or herself to be Aboriginal and notwithstanding that his or her community may recognise him or her to be Aboriginal; and

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Children who were 'surrendered' following the use of improper pressure on their family, were removed by undue influence. Presumably, reparation would only be made to those Indigenous people removed under past policies. However, the Public Interest Advocacy Centre submitted that reparations should be available to all Indigenous people affected by forcible removal policies and practices, both past and present. On page 1501, the Public Interest Advocacy Centre stated that the National Inquiry did not specify any time limitation on which removals should be the subject of reparations and that 'forcible removals' should not be limited to those that took place under Aboriginal specific legislation or prior to an arbitrary cut-off date. The Public Interest Advocacy Centre proposed that Indigenous people affected by contemporary removals must be recognised as within the proposed Tribunal's jurisdiction so that it can give recognition to ongoing discrimination, contribute to change, and guarantee against repetition

144 *Transcript of evidence*, Mr Vaughan, p. 665

145 *Submission 68*, Public Interest Advocacy Centre, pp. 1499-1500

- A person who has some Aboriginal descent but less than substantial Aboriginal descent may be Aboriginal if he or she genuinely recognises himself or herself to be Aboriginal or if his or her community recognises him or her to be Aboriginal.

8.105 As this definition includes the provision of being recognised by 'his or her community', which is difficult in the case of some removed people who have not been recognised or accepted by their community, PIAC submitted that, for the purposes of establishing a Reparations Tribunal or similar mechanism, a broader working definition of 'Indigenous' would therefore need to be developed.[146]

Inadequate records a hindrance?

8.106 The government stated that it had expressed concerns in its submission to HREOC (in the *Bringing Them Home* inquiry) relating to the 'gaps in records' which would make identifying, with reasonable certainty, the class of persons who have suffered 'loss' difficult. The Commonwealth noted HREOC's response, that governments should bear the burden of proof that a removal did not occur in any cases where records were missing. It believes that this approach leaves open the potential for claims by persons who were not in 'government care' but who the government cannot prove to be ineligible due to a lack of records, particularly given the *Bringing Them Home* recommendation for a "balance of probabilities" test of eligibility (recommendation 19).[147]

8.107 In contrast, PIAC submitted that people making claims would be the ones who would need to provide sufficient evidence of being affected by forcible removal and of particular harm suffered. Therefore, the onus would be on the applicant to establish these facts on the 'balance of probabilities', rather than on the government to refute them.[148]

'Best interests of the child' defence

8.108 The Government argued that HREOC itself acknowledged the issue of the need for justification by recommending, in the *Bringing Them Home* Report (recommendation 18) that in a claim for compensation, the relevant government may establish a defence that the removal was in the 'best interests of the child'.[149]

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146 *Submission 68*, Public Interest Advocacy Centre, p. 1499; See also, *Transcript of evidence*, Senator Crossin, Public Interest Advocacy Centre, p. 123

147 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 617

148 *Submission 68*, Public Interest Advocacy Centre, p. 1506

149 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 616

8.109 In terms of practicality in any national compensation tribunal scheme, the government asked the question 'who would actually defend the claims to the scheme' as to date, litigation has been bought against individual jurisdictions.[150]

> If you have a national compensation tribunal, the Commonwealth would not be in a position to defend claims from New South Wales children or South Australian children; it would not have the records and access to the witnesses or who were the witnesses. That would be up to the individual states to defend.
>
> An alternative, I suppose, hypothetically speaking, would be for each state to set up its own process.[151]

8.110 PIAC stated that where this defence were used, it should be applied in accordance with contemporary values rather than the 'racist and paternalistic values of the past'.[152]

How much compensation per individual is appropriate?

8.111 In evidence to the Committee, Sir Ronald Wilson stated that the recommendation of *Bringing Them Home* that related to a minimum lump sum payment of compensation was to acknowledge 'the gross human rights violation of being forcibly removed'.[153] Sir Ronald stated that the nominal sum would be no more than 'a few thousand dollars', it would be a 'token'. In addition, Sir Ronald suggested that individual claimants would accept such a 'token' as recognition that 'they have been harmed and Australia wants to make reparation'.[154]

> … a token amount in recognition of their suffering.[155]

8.112 The Committee sought to gather from witnesses any views as to what might be an appropriate amount of compensation to those individuals identified as forcibly removed, as a minimum lump sum. While most witnesses agreed with the need for payment of compensation,[156] none could specify an amount. When the amount suggested by Sir Ronald was discussed at the Committee's hearing in Darwin, the Croker Island Association stated:[157]

> Are you talking about $2,000 for being removed and denied your family, your culture, your law, access to land and your heritage –

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150 *Transcript of evidence*, Mr Vaughan, p. 665

151 *Transcript of evidence*, Mr Vaughan, p. 665

152 *Submission 68*, Public Interest Advocacy Centre, p. 1506

153 *Transcript of evidence*, Sir Ronald Wilson, p. 748

154 *Transcript of evidence*, Sir Ronald Wilson, p. 748

155 *Transcript of evidence*, Sir Ronald Wilson, p. 750

156 See above, paragraphs 8.77-8.89

157 *Transcript of evidence*, Senator Ridgeway, Croker Island Association, pp. 513-515

> …
>
> To me, $2,000 is nothing. … how much is a mother worth?
>
> …
>
> Often we have had discussions but we have never really come up with a figure, I suppose because it is so difficult working out what we have lost and how we can be compensated for that.

8.113 Similarly, another witness stated:

> No government can ever make up to me or my mother for removing me from my mother and my country. No amount of money will make up for that, but money talks in your culture. Maybe if the government was really sorry they would offer compensation. I try to visit my country once a year. I try to go to funerals. The last visit cost me $1,000 … Compensation will help people who still pay the price of separation and institutional irresponsibilities. I do not want to spend the rest on my life fighting in the courts.[158]

8.114 Alternatively, the Victorian Aboriginal Legal Service stated that awards of up to $40,000 should be available 'depending on the facts in each case'.[159] The Victorian Aboriginal Legal Service stated that this amount was based on other sorts of tribunals and victims' compensation. However, when asked how a tribunal might go about ascertaining proportions of $40,000 in each case after examining the evidence, the Victorian Aboriginal Legal Service stated that its organisation had not gone into detail on such issues.[160] Nevertheless, this figure is markedly less than (A$100,000) estimated by the government.[161]

Civil Claims

8.115 In relation to civil claims, *Bringing Them Home* recommended (recommendation 20) that a claimant successful in one forum should not be entitled to proceed in the other.

8.116 PIAC agreed with the *Bringing Them Home* recommendation.[162] That is, should a claimant choose to proceed in the proposed alternative dispute resolution tribunal, and be successful although not satisfied with the outcome, that claimant has forgone the right to claim through the courts.

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158 *Transcript of evidence*, Mrs Rene Powell, pp. 387-388

159 *Submission 56*, Victorian Aboriginal Legal Service, p. 1101

160 *Transcript of evidence*, Senator Payne, Victorian Aboriginal Legal Service, p. 231

161 See above paragraphs 8.30-8.31

162 *Submission 68*, Public Interest Advocacy Centre, p. 1513

8.117 In contrast, the Retta Dixon Corporation submitted that the citizenship rights of people to have recourse to the courts should they choose, should be upheld.[163]

Other Benefits of an alternative tribunal

Consultation: Towards self-determination

8.118 PIAC submitted that its model of a reparations tribunal would provide a forum where Indigenous people affected by removal policies could come before that tribunal and, with the parties, be involved in the shaping and delivery of the reparations.[164] Indeed, PIAC quoted support from ATSIC in relation to the proposed tribunal:[165]

> The [PIAC model for a] Tribunal emphasises that lasting outcomes are achieved when Indigenous people are integrally involved in all aspects of the delivery of services to the community.

8.119 PIAC stated that one of the features of the proposed reparations tribunal is that the applicants are able to identify for themselves the type of reparation measure they require. Therefore, PIAC recommends that there needs to be flexibility to allow for the people affected by forcible removal to identify the type of reparation for themselves.[166]

Healing through 'telling the story'

The Multi-Purpose Tribunal

8.120 Regardless of Commonwealth and state/territory attitudes, there is a strong belief in many indigenous and non-indigenous organisations, that there is a need for some form of settlement process. The objective of some alternative dispute resolution processes therefore, is broader than financial settlement and includes a 'truth and reconciliation' approach. This would necessarily make any such tribunal extremely complex, having to deal not only with 'facts' but also with perceptions of 'justice' and 'settlement'.

> Compared to a classical form of mediation (with two central parties and a mediator) the disputes arising from Stolen Generation's experiences impact a wider range of individuals, families, institutions and cultures. This assigns these processes to the area of "multi-party" disputes, more appropriately addressed using a conference format.[167]

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163 *Submission 11*, Retta Dixon Home Aboriginal Corporation, p. 186

164 *Transcript of evidence*, Public Interest Advocacy Centre, p. 121

165 *Transcript of evidence*, Public Interest Advocacy Centre, p. 121

166 *Transcript of evidence*, Public Interest Advocacy Centre, p. 124

167 *Submission 30*, Conflict Resolution Network Mediation Services, p. 486

8.121 Similar comments were made in other submissions[168] concerning the need for a process which enabled people to 'tell their story', address their pain, and seek some form of reparation.

8.122 Sir Ronald Wilson stated that he prefers the term 'healing commission' for any alternative dispute resolution tribunal.[169] According to Sir Ronald, the term 'healing commission' would be to remind all concerned in the process, what it is all about, and that the primary focus is on 'healing the divisions occasioned by this chapter in our past history'.[170]

Expensive

8.123 A complex process which can meet all of the above is also likely to be expensive.[171] In order to meet the multiple needs, the service has to be provided in a manner:

> That is culturally acceptable to all participants – timing, location and personnel participating. Interpreters may be needed. Sensitivity to the needs of the people involved, willingness to shift to culturally appropriate practi[c]e, [is] paramount. The final choice of mediators needs to be agreed by all. [172]

8.124 Another 'Truth and Reconciliation' model suggested required involvement of the 'guilty' parties,[173] as well as offering 'victims' a chance to tell their stories. This closely follows the South African model where amnesty was offered, and some of those involved in perpetrating apartheid were able to talk of the past.

8.125 Similarly, the Central and Northern Land Councils in the Northern Territory suggested the need for a 'truth commission' like that in South Africa.[174] According to the Central and Northern Land Councils, a 'truth commission' would be necessary to achieve reconciliation:

> … a truth commission, where people from all walks of life, all political persuasions and all colours and shades, can stand up and say what it is that they think about this country of Australia. That will go part of the way. We are talking about the healing process of the stolen generation. There has to be a healing process for the rest of Australia because they are bleeding at having to accept that we were here for 40,000 years, so they need a healing

168 See *Submission 25*, National Sorry Day Committee, p. 429; *Submission 30*, Conflict Resolution Network Mediation Services, p. 487

169 *Transcript of evidence*, Sir Ronald Wilson, p. 736

170 *Transcript of evidence*, Sir Ronald Wilson, p. 736

171 However, see paragraphs 8.32-8.36 for cost of litigation to date

172 *Submission 30*, Conflict Resolution Network Mediation Services, p. 486

173 *Submission 31*, Anyinginyi Congress Aboriginal Corporation, p. 496

174 *Transcript of evidence*, Central and Northern Land Councils, p. 487

> process. The way to do that is to follow the line of South Africa and have a truth commission where people are able to sit down and discuss what is the truth about the past, what is the truth of where we are today and how we address the truth for the future.[175]

8.126 In addition, the Anglican Social Responsibilities Commission (WA) also supported the idea of a 'truth and reconciliation tribunal' again, similar to that in South Africa. The Anglican Social Responsibilities Commission stated:

> A truth and reconciliation tribunal would allow people to face people who are in positions of power or influence or have been in any way connected with the removal of children. It would allow stories to be heard in full for as long as it takes. There would be no legalistic objections. At the moment Aboriginal people can only go to legal venues to have their story told. They do not have the money to do that, and the legal implications are always difficult anyway. There is no place for them to go and say, 'This is my story. Please listen to it.' And the impartiality of the Truth and Reconciliation Tribunal in South Africa I think is to be tremendously recommended in terms of the healing that it brought about for people on both sides of the issues. I think there is a great deal of pain among people who were involved in the removal process.[176]

Emotional benefit, including 'justice' and acknowledgment

8.127 It is apparent that there are numerous benefits in such a model, given that there is a substantial level of grief, anger and depression felt by separated people. For example, the Retta Dixon Corporation stated that there must be a process where members of the stolen generation can express their anger and frustrations and demand some sort of reparation.[177]

8.128 However, with respect to the enforcement of the 'truth' aspect of such a commission, is not clear who is deemed to be a guilty party and how many 'perpetrators' are still alive. To a degree, there has been recognition by many governments, church groups, and others of the past, but it is not clear that any individuals within these organisations would identify as having been directly involved. The extent to which it would be possible to determine in advance that individuals were 'guilty' is also problematic.

The role and response of the churches

8.129 As previously mentioned, the response of the churches to this inquiry was minimal. Of the churches that did submit to this inquiry, most did not give any detailed account of actions taken to implement the recommendations of *Bringing Them Home*. Although many churches appeared willing to apologise, to make some

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175 *Transcript of evidence*, Central and Northern Land Councils, p. 487

176 *Transcript of evidence*, Anglican Social Responsibilities Commission, p. 319

177 *Transcript of evidence*, Retta Dixon Home Aboriginal Corporation, p. 534

restitution of property, to be involved in improving access to records, the extent to which the churches will be involved in making payments into a compensation fund is not known.

8.130 The Committee heard evidence relating to a letter that was purported to be addressed to the Prime Minister in which 'the churches' had offered to contribute to a compensation fund, should the government decide to implement recommendations 14-20 of *Bringing Them Home*.[178] Both the National Assembly of the Uniting Church and the National Sorry Day Committee accused the government of not responding to this offer.[179]

8.131 Investigation by the Committee failed to produce this letter. However, the Committee was provided with a copy of a letter from the Leaders of the Uniting Church in Australia to the Prime Minister.[180] This letter applauded the government's commitment to reparation, although it appealed to the government to reconsider its decision not to make a formal national apology, or to pay specific compensation to groups or individuals. The Committee also received a copy of the response from the Office of the Prime Minister dated 1 March 1998.

8.132 In a supplementary submission to the Committee, the Uniting Church outlined a resolution from the 1997 Eighth Assembly of the Uniting Church in Australia. This resolution stated that the Uniting Church would be open to making a contribution to a national compensation fund and offered to contribute to the fund through special offerings made on a national 'Sorry Day'.[181] In addition, the Uniting Church stated that $15,000 had been raised in relation to Sorry Day offerings, and that the Church recognises that if the government were to establish a compensation fund, the Church would be likely to contribute a 'much larger sum than this'.[182] However, the Uniting Church stated that it believes that it remains a question for government as to whether a fund will be established.[183]

8.133 Similarly, the Committee received copies of a letter from the Australian Catholic Social Welfare Commission to the Attorney-General. In this letter, the Australian Catholic Social Welfare Commission sought clarification of the government's intentions in relation to the establishment by the Council for Australian

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178 *Submission 13*, National Assembly of the Uniting Church, p. 357; *Transcript of evidence*, National Sorry Day Committee, p. 74; and *Transcript of evidence*, National Assembly of the Uniting Church, p. 291; See also, *Transcript of evidence*, Anglican Diocese of Sydney, pp. 198-199

179 *Submission 13*, National Assembly of the Uniting Church, p. 357; *Transcript of evidence*, National Sorry Day Committee, p. 74; and *Transcript of evidence*, National Assembly of the Uniting Church, p. 291; See also, *Transcript of evidence*, Anglican Diocese of Sydney, pp. 198-199

180 Open Letter to the Prime Minister, The Hon. Mr Howard From Leaders of the Uniting Church in Australia, 19 December 1997

181 *Submission 13A*, National Assembly of the Uniting Church, p. 2649

182 *Submission 13A*, National Assembly of the Uniting Church, p. 2649

183 *Submission 13A*, National Assembly of the Uniting Church, p. 2650

Governments of a National Compensation Fund.[184] This letter did not offer to make a financial contribution to any such fund and the Committee also received a copy of the response from the Attorney, dated 8 October 1998.

8.134 It would appear that the churches had taken the first step in a planned several-step process. However, it would seem that the additional steps required, including the possible contribution to a national compensation fund by the churches, did not eventuate.

8.135 Indeed, Sir Ronald Wilson, in evidence to the Committee stated that the churches that he had a personal knowledge of were 'very strong' in believing that they ought to be involved in the 'total responsibility for the healing process', which included the provision of money.[185]

Conclusions

8.136 The Commonwealth government does not consider that a tribunal is necessary, primarily because it does not accept that there have been *gross* violations of human rights, and because the van Boven principles – which refer to gross violations – are draft and not confirmed international instruments.[186]

8.137 Insofar as the Government considers there may be a case for some form of 'compensation' in respect of past events, it believes it has met this by the provision of programs.

8.138 There are some apparent contradictions in the government's position, which suggests that it both considers it has not breached conventions, but, if it has, then it has made general reparation. Regardless of possible inconsistency, the key point remains that for the government the objective of a tribunal would be to assess individual claims. This would not be either appropriate, or necessary because of the services and programs designed to address all groups – both those removed and those affected by the removal. Thus, even if the van Boven principles did apply, the government would have met their requirements.[187]

8.139 Organisations and individuals have argued otherwise, because of their belief that there have been violations of human rights sufficient to warrant individual compensation under the van Boven principles. They do not consider that the programs and services provided by the government have been sufficient to address individual needs. The nature of genuine reparation is such that it requires acknowledgment, and acknowledgment must take into account individual factors.

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184 Letter from the Australian Catholic Social Welfare Commission to the Attorney-General, The Hon. Daryl Williams, 19 June 1997

185 *Transcript of evidence*, Sir Ronald Wilson, pp. 750-751

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

187 *Submission 36*, Minister for Aboriginal and Torres Strait Islander Affairs, p. 612

8.140 The van Boven principles are therefore seen as the most effective way of dealing with past and present harm. While certain of the principles have been met through general programs, a tribunal is still required to assess individual claims.

Recommendation

Recommendation 7

The Committee **recommends** the establishment of a 'Reparations Tribunal' to address the need for an effective process of reparation, including the provision of individual monetary compensation.

Recommendation 8

The Committee **recommends** that the tribunal model put forward by the Public Interest Advocacy Centre of NSW be used as a general template for the recommended tribunal. The model should consider the most effective ways to deal with issues of reparation.

Recommendation 9

The Committee **recommends** that details of the form and operations of the tribunal be finalised following consultation at the proposed National Summit.

SECTION 3

The international experience

8.141 Several submissions to the inquiry made statements relating to the need for Australia to consider how the international community has dealt with 'similar' alleged breaches of human rights.[188] The majority of references were made to the experiences of Canada, South Africa and New Zealand. The Committee received very little clarification of the international experiences in terms of determining how comparable these situations are with those in Australia. It is instructive to compare recent leading court cases in Canada (Mowatt) and Australia (Cubillo).

Canada

8.142 Further to the discussion in Chapter 4,[189] it would appear that the current situation in Canada is focussed on the treatment of Aboriginals or the abuse suffered in the residential school system, not on whether or not the placement of Aboriginal children in residential schools under the *Indian Act 1876* was a breach of human rights.

Aboriginal Healing Foundation

8.143 As part of *Gathering Strength*, the federal government committed $350 million in support of a community-based healing strategy to specifically address 'the healing needs of individuals, families and communities arising from the legacy of physical and sexual abuse at residential schools.[190] On 4 May 1998, the Aboriginal Healing Foundation was formally launched and was created to design, implement and manage the healing strategy, including providing financial support to eligible community-based healing initiatives that 'complement existing Aboriginal and government programs'.[191]

8.144 In addition, the Aboriginal Healing Foundation is an 'Aboriginally-run', non-profit organisation which operates 'at arm's length from the Government'.[192] According to the Canadian Department of Indian and Northern Affairs, the Foundation will assess and fund eligible community-based healing initiatives to

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188 See *Submission 93*, Human Rights and Equal Opportunity Commission, pp. 2241-2253; *Submission 68*, Public Interest Advocacy Centre, pp. 1488-1492; *Submission 46*, University of New South Wales Kingsford Legal Centre, pp. 928-930; *Submission 51*, Mr Shaun Ewen, pp. 983-984; and *Submission 25*, National Sorry Day Committee, p. 425

189 See paras 4.41-4.45

190 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , pp. 1-2

191 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

192 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

address issues such as cycles of physical and sexual abuse, family violence, drug and alcohol abuse, and the level of parenting skills.[193]

Eligibility for funding

8.145 The Funding Agreement between the government of Canada and the Aboriginal Healing Foundation includes a number of mandatory criteria that must be adhered to:[194]

- Address the healing needs of Aboriginal people affected by the legacy of physical and sexual abuse in Residential Schools;
- Establish complementary linkages, where possible in the opinion of the Board, with other health/social programs and services (federal, provincial, territorial, Aboriginal); and
- Designed and administered in a manner consistent with Canadian Charter of Human Rights and Freedoms, and applicable Human Rights legislation.

8.146 Eligible recipients include any organisation or individual located/residing in Canada that carries on or is capable of carrying on, in the opinion of the Board, *projects* to 'address the healing needs' of Aboriginal people affected by 'the legacy of abuse'.[195] For a person to take part in a healing program, a personal declaration of abuse is not required as a precondition to access funding.[196]

No payment of individual monetary compensation

8.147 The Funding Agreement between the Canadian government and the Aboriginal Healing Foundation states a number of 'ineligible costs', including:

- Purchase, directly or indirectly, of real property or replacement or repair of real property owned by recipient except in exceptional cases where costs necessary and ancillary to effective implementation of the project;
- Compensation to individuals, litigation or public inquiry (note: does not preclude locally based public inquiries for healing purposes); and
- Costs of project that duplicate other programs, activities or services from federal, provincial or territorial governments. [197]

193 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

194 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 2

195 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 2

196 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 3

197 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 2

Accountability and communication

8.148 The Board of the Aboriginal Healing Foundation addresses accountability and communication through Annual Reports which are published in at least French and English, and distributed to the general public, Aboriginal people and organisations, the Minsters for Health and Indian Affairs and Northern Development and the Federal Interlocutor for Metis and Non-Status Indians.[198] The Annual Reports include annual financial statements, review and assessment of criteria, objectives and results, and other information and statements as required by the Funding Agreement.[199]

8.149 In addition, annual audit is required and communication includes newsletters, the use of existing fora to speak about the Foundation and the programs, the Foundation's web page, print media and local radio programs.[200]

Projects of the Aboriginal Healing Foundation

8.150 An example of a project funded by the Aboriginal Healing Foundation is the *St Mary's Gathering Project*. The project had two goals:[201]

- To provide community-based training aimed at enhancing aboriginal capacity to develop, design and implement healing strategies and programs that will adequately address the impact of residential school experience on survivors and their descendants; and
- To reunite lost survivors, their families and community, to assess specific individual and family needs, and to evaluate/report results and prepare for the next phase of the healing strategy.

Canada's Aboriginal policy

8.151 The Canadian government, through *Gathering Strength*, in addition to setting aside $350 million for the Aboriginal Healing Foundation, sought to address inequality and poverty in the Indigenous population. Programs have included education through the *Elder Visitation Program* and all schools in Canada have received public education information materials.[202] Other programs address language, heritage and culture, the strengthening of Aboriginal governance, professional

198 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 4; See also Footnote 1.

199 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 4

200 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 4

201 Aboriginal Healing Foundation, *Healing Words*, Vol. 2, No. 1, Fall 2000, p.1

202 Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan, A Progress Report*, July 2000, p. 4

development, income security reform, economic development, Aboriginal business development and access to land resources, to name a few.[203]

National expenditure

8.152 In 1997-98, federal expenditure on Indigenous matters was estimated at C$6 billion (0.7 per cent of GDP). The majority of expenditure appears in the Department of Indian Affairs and Northern Development's budget which devolves the administration of 82 per cent to Indigenous organisations. Eleven other federal departments offer programs for Aboriginal people.[204] The 'main estimates' for 2000-2001 for the Department of Indian and Northern Development totalled approximately $4.8 billion.[205]

Civil claims

8.153 Under the Aboriginal Healing Foundation, anyone who participates in a healing project does not forego his/her right to common law remedies:

> While the Foundation can not compensate individuals for any abuses suffered as a result of the Residential Schools[,] taking part in a Healing Project does not inhibit anybody's ability to pursue civil action against an abuser or the persons responsible for the Residential Schools.[206]

8.154 According to the Department of Indian and Northern Affairs, for those individuals who have chosen litigation, the government is exploring on a 'case-by-case' basis, 'the most appropriate and sensitive ways to deal with their needs'.[207] In addition, the Government seeks to ensure that claims of physical and sexual abuse are investigated thoroughly and handled fairly':[208]

> … the Government encourages individuals to bring their allegations to the attention of the appropriate law enforcement agency. With respect to civil suits which allege physical and sexual abuse, the Government of Canada's preference is to pursue resolution of these lawsuits in a non-confrontational

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203 Minister of Indian Affairs and Northern Development, *Gathering Strength: Canada's Aboriginal Action Plan, A Progress Report*, July 2000

204 Department of the Parliamentary Library, *Indigenous Affairs in Australia, New Zealand, Canada, United States of America, Norway and Sweden*, 6 April 1998, p. 6

205 Report on Main Estimates, February 2000, p. 195 (www.inac.gc.ca/pr/est/index_e.html)

206 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 3

207 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

208 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

> manner outside the court system. As much as possible, this protects the privacy of individuals and avoids the stress of a courtroom setting.[209]

8.155 The Department of Indian and Northern Affairs stated that the government is ready to accept its responsibility in those cases 'where allegations are substantiated and the relative liabilities of all parties (eg. Religious organisations and the Federal Government) are clear'.[210] In such cases, the Canadian government is moving to settle out of court if all parties can reach agreement.[211] It is not clear whether the government accepts liability regardless of its failure to exercise a duty of care and even of its assumption of responsibility for the residential schools system.

8.156 In addition, there are programs funded through Health Canada that provide funding for 'Crisis Intervention and Mental Health Services' for individuals who are experiencing difficulty in dealing with the 'trauma and emotional effects' resulting from their participation in court proceedings.[212]

Causes of action

8.157 Of significance to the civil actions pursued in Canada is the fact that those individual seeking damages are doing so for the abuse they suffered at residential schools (as opposed to wrongful/illegal removal).[213] Such lawsuits name the federal government among others.

How many people involved?

8.158 The Department of Indian and Northern Affairs stated that it is estimated that approximately 100,000 children attended the schools over the years in which they were in operation (approximately 1874-1996).[214] Given that this figure is estimated over a period of more than 100 years, the numbers of people involved appear to be significantly smaller than estimated for Australia.

Mowatt

8.159 A recent case of significance is the decision of the Supreme Court of British Columbia in *Mowatt, Sr v Clarke, The Anglican Church of Canada, The General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod*

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209 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

210 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

211 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

212 Aboriginal Healing Foundation, *Frequently Asked Questions*, (www.ahf.ca/english/faq.html), p. 3

213 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 2

214 Department of Indian and Northern Affairs Canada, *Backgrounder: The Residential School System*, (www.inac.gc.ca/gs/schl_e.html) , p. 1

of the Diocese of Cariboo, and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern Affairs, dated August 1999.[215]

8.160 Floyd Mowatt Sr was a residential school student from 1969 to 1976 and alleged that his dormitory supervisor, Derek Clarke, repeatedly sexually assaulted him between 1970 and 1973. Clarke pleaded guilty to the sexual assault of Mowatt, among other boys at the residence, and was imprisoned.[216]

8.161 The plaintiff's claim was against the defendants for negligence, breach of fiduciary duty and vicarious liability arising from the parental role accepted for his care. The defendants denied responsibility for the actions of Clarke.[217] Dillon J stated that damages have been agreed, this case was about 'liability of the Anglican Church and the Government of Canada'.[218]

8.162 Dillon J held that the employer was vicariously liable for the abusive conduct of Clarke (the employee):

> The duties of care to provide a safe, healthy or moral environment for Floyd Mowatt included the responsibility for both the Crown and the Anglican Church to take reasonable steps to ascertain that the parental and pastoral power given to their joint employee was exercised properly. This necessarily required adequate and reasonable supervision. To place someone in the position of dormitory supervisor and then assume that he would fulfil the role reasonably is not enough.[219]

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215 Dillon J, *Mowatt, Sr v Clarke, The Anglican Church of Canada, The General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese of Cariboo, and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern* Affairs, 30 August 1999; See also, *Submission No. 93*, Human Rights and Equal Opportunity Commission, Vol. 7, p. 2246

216 Dillon J, *Mowatt, Sr v Clarke, The Anglican Church of Canada, The General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese of Cariboo, and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern* Affairs, 30 August 1999, para 2

217 Dillon J, *Mowatt, Sr v Clarke, The Anglican Church of Canada, The General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese of Cariboo, and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern* Affairs, 30 August 1999, para 2

218 Dillon J, *Mowatt, Sr v Clarke, The Anglican Church of Canada, The General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese of Cariboo, and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern* Affairs, 30 August 1999, para 2

219 Dillon J, *Mowatt, Sr v Clarke, The Anglican Church of Canada, The General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese of Cariboo, and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern* Affairs, 30 August 1999, para 174

8.163 In its submission, HREOC summarised elements of the decision in this case, stating:[220]

> In determining which of the defendants was liable, the Court rejected an argument for limiting liability on the basis that Clarke's employer was the Church. It stated that the Crown had a statutory obligation to educate Indian children and had chosen the Church as its instrument to fulfil at least part of its statutory obligations. However, the Court found that the arrangement at the school also served to advance the interests of the Church. Accordingly, the Anglican Church and the Crown were held to be jointly vicariously liable for the acts of Derek Clarke.

8.164 In relation to negligence, the Court found both the Crown and the Anglican Church owed a duty of care to Mowatt and that both had breached that duty.[221] However, in relation to apportionment of fault in negligence, the court held the greater fault attributed to the Anglican Church is sixty percent.[222]

Cubillo v Commonwealth

Judgement

8.165 On 11 August 2000, O'Loughlin J found that each of the claims that have been made by Mrs Cubillo and Mr Gunner 'must be dismissed'.[223] The causes of action in this case were as follows:

Causes of action

8.166 O'Loughlin J stated that the causes of action of Mr Gunner 'virtually mirror' those of Mrs Cubillo. Therefore, O'Loughlin J limited his comments to the causes of action pleaded by Mrs Cubillo.[224] The causes of action in *Cubillo v Commonwealth* were as follows:[225]

- Removal and detention by the Director of Native Affairs constituted wrongful imprisonment and deprivation of liberty;
- The Commonwealth and the Director of Native Affairs, in removing and detaining, acted in breach of fiduciary duties that they owed;

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220 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2247

221 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2247

222 Dillon J, *Mowatt, Sr v Clarke, The Anglican Church of Canada, The General Synod of the Anglican Church of Canada, the Anglican Diocese of Cariboo, the Synod of the Diocese of Cariboo, and Her Majesty the Queen in Right of Canada as Represented by the Minister of Indian and Northern* Affairs, 30 August 1999, para 184

223 See summary of judgement in O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084

224 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1176

225 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, paras 1077-1082

- Removal and detention were in breach of a statutory duty that the Director of Native Affairs owed, as a consequence of the Director of Native Affairs being statutory guardian; and
- Removal and detention were a breach of duty of care that the Commonwealth owed.

8.167 In addition, O'Loughlin J stated that there was a general plea of vicarious liability.

Vicarious liability

8.168 O'Loughlin J stated:

> I have come to the conclusion that no vicarious liability would have attached to the Commonwealth as a result of Lorna Nelson being removed from Phillip Creek and taken to the Retta Dixon Home if that removal was effected by the Director in accordance with the provisions that were contained in s 6 of the Aboriginals Ordinance. I would have also come to the same conclusion if Peter Gunner had been removed from Utopia Station and taken to St Mary's Hostel in accordance with the provision of s 6.
>
> …
>
> Vicarious liability does not therefore attach to the Commonwealth if the Directors were acting in the exercise of their independent statutory duties.[226]
>
> …
>
> I do not accept that the Superintendents and staff of the Retta Dixon Home and St Mary's Hostel were the servants or agents of the Commonwealth and that the Commonwealth was thereby vicariously liable for the Superintendents and others having allegedly falsely imprisoned the applicants.[227]

False imprisonment

8.169 In relation to false imprisonment, O'Loughlin J stated:

> … I am limited to making findings on that the evidence that was presented to the Court in these proceedings; that evidence does not support a finding that there was any policy of removal of part Aboriginal children such as that alleged by the applicants: and if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of these applicants.[228]

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226 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, paras 1122-1123

227 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1142

228 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1160

> …
>
> … the applicants have each failed to establish that they have a cause of action against the Commonwealth for false imprisonment.[229]

Statutory duty

8.170 In relation to the claim of breach of statutory duty, O'Loughlin J stated:

> It is clear that a common law duty of care may arise in the performance of statutory functions, but it is also clear that a statutory authority cannot be liable in damages for doing that which Parliament has authorised …[230]
>
> …
>
> … I have come to the conclusion that neither applicant has established a breach of statutory duty on the part of any Director.[231]

Duty of care

8.171 O'Loughlin J stated:

> It would be unjust to impose a duty of care on the Commonwealth where it had no statutory power to act nor any power to direct others to act.[232]

Fiduciary duty

8.172 O'Loughlin J stated:

> In short, the applicants have not established to my satisfaction that, if they were in a fiduciary relationship with either the Commonwealth or the Directors, there was any breach of that relationship.[233]

South Africa

Truth and Reconciliation Commission

8.173 In South Africa, the 1994 *Promotion of National Unity and Reconciliation Act* mandated the Truth and Reconciliation Commission (TRC) to investigate "gross violations of human rights" defined as "the killing, abduction, torture or severe ill treatment of any person" between March 1, 1960 (the Sharpeville massacre), and December 5, 1993. The terms of reference were the widest mandate of any truth commission to date, but did not include such actions as detentions without trial, forced

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229 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1167

230 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1184

231 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1192

232 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1198

233 O'Loughlin J, *Cubillo v Commonwealth*, FCA, 1084, para 1307

removals, and "Bantu" education policy, all legal under apartheid, although they are seen by many as human rights violations.

8.174 Human rights issues in South Africa have risen against the backdrop of apartheid. It is argued that the establishment of the TRC was largely a process driven by a limited number of concerned political parties, non-government organisations and individuals, not a process which was instituted through 'grass-roots and collective civil society ground swell or pressure'.[234] Indeed, there was little consultation as to whether an investigation into the past was desired by most people in the country, or what form such an investigation should take.[235]

8.175 The TRC effects its mandate through three committees: the Amnesty Committee, Reparation and Rehabilitation Committee and the Human Rights Committee.

8.176 Many victims in South Africa feel that their suffering has gone unrecognised and therefore, the chance to tell their stories in public has been described as 'tremendously powerful'.[236] The TRC may been seen as the start of a process in which reconciliation is recognised as a process that requires empowerment, confrontation, pain, dialogue, exchange, experimentation, risk-taking, the building of common values and identity transformation.[237] However, it is important to note that cathartic healing is only *assumed* to be intrinsic to the process of truth recovery and story telling by victims and survivors. Indeed, it is also assumed that the telling of such stories entails the acknowledgment of all, which is not always the case.[238]

8.177 The Centre for the Study of Violence and Reconciliation stated that the TRC presented a basic formula for reconciliation: firstly, reconciliation has to be based on full public knowledge and secondly, victims must be compensated:[239]

> While the state has morally taken over this responsibility (as a result of giving perpetrators immunity from civil action by victims) perpetrators are still seen as owing a debt. The need for reparations, both symbolic and

234 Brandon Hamber, Tlhoki Nofokeng & Graeme Simpson, *Evaluating the Role and Function of Civil Society in a Changing South Africa: The Truth and Reconciliation Commission, A Case Study*, (www.wits.ac.za/csvr/paptrcel.htm), pp. 2-3

235 Brandon Hamber, Tlhoki Nofokeng & Graeme Simpson, *Evaluating the Role and Function of Civil Society in a Changing South Africa: The Truth and Reconciliation Commission, A Case Study*, (www.wits.ac.za/csvr/paptrcel.htm), p. 3

236 Centre for the Study of Violence and Reconciliation, *The Truth and Reconciliation Commission: A Foundation for Community Reconciliation?*, (www.wits.ac.za/csvr/artrch&1.htm), p. 2

237 Centre for the Study of Violence and Reconciliation, *The Truth and Reconciliation Commission: A Foundation for Community Reconciliation?*, (www.wits.ac.za/csvr/artrch&1.htm), p. 2

238 Centre for the Study of Violence and Reconciliation, *"Tell No Lies, Claim No Easy Victories": A brief evaluation of South Africa's Truth and Reconciliation Commission*, (www.wits.ac.za/csvr/artrcyal1.htm), p. 1

239 Centre for the Study of Violence and Reconciliation, *The Truth and Reconciliation Commission: A Foundation for Community Reconciliation?*, (www.wits.ac.za/csvr/artrch&1.htm), p. 1

> material is recognised. Many people still question the fairness or viability of this formula, and wonder whether the state will fulfil its obligation, for it has in effect indemnified itself. Payment to victims is not a legal obligation, only a moral imperative.[240]

Recommendations of the TRC

8.178 The report of the TRC recommends a five-part approach to reparation, consisting of:

1) Urgent interim reparation in the form of assistance to provide people in urgent need with access to appropriate services and facilities;

2) Individual reparation grants in the form of an individual financial grant scheme;

3) Symbolic reparation encompassing measures to facilitate the communal process of remembering and commemorating the pain and victories of the past (including among other measures, a national day of remembrance and reconciliation, erection of memorials and monuments and the development of museums);

4) Community rehabilitation programs aimed at promoting the healing and recovery of individuals and communities affected by human rights violations; and

5) Institutional reform, including legal, administrative and institutional measures designed to prevent the recurrence of human rights abuses.[241]

8.179 Clearly, the recommendations of the TRC are comparable to those of HREOC in *Bringing Them Home*, albeit for a greater range of human rights violations, not all of which were sanctioned by the government.

Financial grants scheme

8.180 The individual financial grants scheme is based on a benchmark figure of R21,700 per annum (or approximately A$6,000 per annum). This equates to the median annual household income in South Africa in 1997. This was decided as an appropriate amount to achieve the aims of the individual reparation grant, namely, to enable access to services and to assist in establishing a dignified way of life.[242] The TRC recommended that the annual reparation grant be paid in two payments per year. The report recommended that payments be made for a period of six years.[243]

8.181 It is important to note, however, that the recommendations in the report of the TRC are simply that. As commented on earlier, governments are not bound by

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240 Centre for the Study of Violence and Reconciliation, *The Truth and Reconciliation Commission: A Foundation for Community Reconciliation?*, (www.wits.ac.za/csvr/artrch&1.htm), p. 1

241 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2249

242 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2249

243 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2249

recommendations and it is not clear if the State of South Africa will fulfil its 'obligations' in this regard.

8.182 The TRC is currently in suspension while the work of the Amnesty Committee is completed. The current suspension of work has delayed reparations as quoted in the *Guardian and Mail* 10 May 2000:

> Eighteen months after the Truth and Reconciliation Commission recommended that R3-billion be distributed to some 20,000 victims of apartheid, the government appears no closer to finalising its reparations policy.
>
> "We are committed to honouring our commitments," President Thabo Mbeki said on Wednesday but shed little new light on when the government will do so.
>
> Criticism has been mounting against the government's slowness to pay out reparations, with Anglican Archbishop Njogunkulu Ndungane recently accusing it of betraying those who fought apartheid. Answering questions in Parliament, Mbeki said the issue of final reparations could only be dealt with once the TRC's Amnesty Committee completed its work later in the year.
>
> His remarks earned the wrath of opposition political parties, who said the government needs to make a clear commitment. But Mbeki responded: "It is a problematic area. It takes time. The process does not go as fast as all of us would like it to."
>
> Many applicants are not eligible for relief, which they thought they were entitled to simply because they appeared before the TRC as witnesses, he said. Others who participated in the struggle had not applied for reparations, because they felt they had fought for amnesty, not money.

New Zealand

8.183 In its submission, HREOC stated that in the early 1990s the New Zealand government began to implement a policy of negotiated settlement of Maori Treaty claims against the Crown:

> The starting point for the negotiation of a claim is the Crown's acknowledgment that the Maori grievance is well founded and that the Crown's past actions or policies failed to protect Maori land, resources and culture and thereby breached its obligations under the Treaty of Waitangi.[244]

8.184 Settlement terms are implemented through Acts of Parliament and include the Crown's formal apology for 'past abuses and wrongful acts'.[245]

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244 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2250

245 *Submission 93*, Human Rights and Equal Opportunity Commission, p. 2250

8.185 The New Zealand experience is not comparable to the issues faced in Australia in relation to 'forcible removal'. The Committee does not attempt to devalue the issues of land rights and land disputes in Australia, however, the Treaty of Waitangi only serves to illustrate how New Zealand governments have chosen to address that particular issue.

8.186 For a broad outline of other international compensation schemes, see Appendix 11.