CHAPTER 3

A REPARATIONS TRIBUNAL

Introduction

3.1 **The Australian Democrats support** Recommendations 7 and 8 of the Majority Report on the Stolen Generations, which recommend:

> … the establishment of a 'Reparations Tribunal' to address the need for an effective process of reparation, including the provision of individual monetary compensation (Recommendations 7); and
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> … that the Tribunal model put forward by the Public Interest Advocacy Centre of NSW [hereafter PIAC] 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 8).

3.2 This chapter is intended to provide additional information to the submissions made, and evidence provided to the Stolen Generations Inquiry. The Australian Democrats would like to acknowledge the considerable assistance provided by the Information and Research Services of the Parliamentary Library in the preparation of this chapter.

3.3 This chapter elaborates on the following issues, many of which were raised during the Stolen Generations inquiry:

a) analysis of issues raised by the PIAC submission to the Senate Legal and Constitutional References Committee's *Inquiry into the Stolen Generation*;

b) description of arrangements for compensation for the victims of criminal violence under State and Territory legislation;

c) the statutory compensation arrangements for veterans under the *Veterans' Entitlement Act* 1986;

d) experience with mediation – compensation for the survivors of the Voyager disaster,

e) class actions - Kraft peanut butter contamination;

f) alternative dispute resolution (ADR) models; and

g) the Administrative Review Council (ARC) – its role, and its views on tribunals.

Political Judgement versus Community Values

> What is, or is not, compensable at law is more a matter of political judgement and government policy than it is a matter of any inherent legal understanding of compensability.[1]

3.4 The question of whether to award compensation, and if so, what amount, is dealt with in the Australian legal system every day. Judges are required to determine what level of compensation to award accident victims, based on the pain and suffering they have experienced, the extent of their injuries, the victim's future job prospects and earning capacity and so on. These are all essentially speculative and subjective tasks. Yet Australians have grown accustomed to trained experts performing these 'legal acrobatics', just as we have learnt to respect their decisions and accept them as final.

3.5 Australian courts are also gaining experience in assessing the loss to an Indigenous accident victim of their ability to participate fully in cultural life:[2]

> In *Napaluma v Baker*, Zelling J found that as a result of the plaintiff sustaining a head injury in an accident, his ability to participate in the cultural life of the community had been impaired: though he had been "through the ceremonies of the Aboriginal community up to date", he would not be able to go further in that respect. Justice Zelling commented:
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> "It is extremely difficult to put a monetary value on this special loss of amenity of position within the tribe … Doing the best I can on this head, and conscious that I look at the problem with European eyes and not with the eyes of those in the community, I allow $10,000 for loss of amenities on this head alone."

3.6 The need to compensate accident victims and others who have suffered harm, including cultural harm, is widely accepted by all Australians. Yet there are sections of the community that appear unable to support the need to compensate another group for the pain and suffering they have experienced as a result of government practices of child removal which were implemented over a sixty year period.

3.7 When it comes to the question of reparations and/or compensation for the stolen generations, many Australians and indeed some of the country's most respected media outlets, have accepted the Commonwealth's rationalisation that:[3]

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1 Graycar, Regina (1998) 'Compensation for the Stolen Children: Political Judgements and Community Values', in *UNSW Law Journal Forum*, 4(3), p.25.

2 Ibid, p. 25.

3 *Submission* 36, p.48. An editorial in *The Australian* (21 May, 1997) made the point that "there is a sense in which no amount of money can make up for the pain of the past". The editorial went on to support the establishment of a national charitable trust to provide educational scholarships for Aboriginal children, as this would "have more national meaning than arguments over compensation."

> … [t]here is no comparable area of 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 … but there would be enormous difficulties applying them in cases such as these.

3.8 **The Australian Democrats strongly disagree** with the Government's conclusion. We disagree because there are precedents in Australian jurisprudence that provide guidance on how to humanely and sensitively address the ongoing pain and suffering of the stolen generations, their families and communities.

3.9 We are not suggesting that legal measures alone will provide a complete solution, but they can be creatively adapted to assist in the healing process that is so long overdue. We also believe that by identifying the legal difficulties, the Government could respond with effective policy approaches to overcome any limitations inherent in the available legal remedies. Ultimately this is a question of political will and basic compassion.

3.10 As the New South Wales Law Reform Commissioner, Professor Regina Graycar, has stated:[4]

> To argue, as the Commonwealth Government has, that this [compensation] is not possible as there is no framework by which to assess damages, is disingenuous and ignores the many political choices that are routinely made in deciding which interests, and whose interests, we value in our community.

3.11 In the spirit of justice and equity, Australia must try to find a better way of addressing the legacy of the policies and practices of child removal than we have done to date. Delegating the responsibility to an ill-suited and wholly inappropriate court system will only continue to compound the injury and the injustice.

PIAC Tribunal Model

An Overview of PIAC's Submission

3.12 The thrust of the PIAC submission is that, in response to Term of Reference (2) of the Senate Inquiry, a Stolen Generations Reparation Tribunal should be established to award compensation and to recommend other forms of reparations. The rationale for reparations in respect of the members of the Stolen Generations includes breaches of international human rights law, breaches of common law rights and moral responsibility, and the promotion of social justice and self-determination.

3.13 PIAC notes the considerable difficulties in seeking redress through litigation. Theses difficulties have been highlighted by the recent Federal Court decision in *Lorna Cubillo and Peter Gunner v the Commonwealth.*[5]

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4 Graycar (1998), p.27.

3.14 PIAC proposes that the government should establish a statutory-based scheme for compensation for the Stolen Generations with strict liability for the harm suffered as a result of forcible removal.[6] The proposed Reparations Tribunal would have the power to award compensation and to recommend other forms of reparation.

3.15 In developing a scheme of reparations, including monetary compensation, PIAC notes the *van Boven principles.*[7] Van Boven found that under international law the violation of human rights gives rise to a right of reparation for the victim. Van Boven notes that States have a duty to adopt special measures, where necessary, to permit expeditious and fully effective reparations. Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.

3.16 PIAC also notes the existence of legislative arrangements for compensation of victims of crime and for illness or injury caused by war service. The victims do not have to establish a duty of care or its breach by the state. *These schemes reflect public policy decisions* by government to provide statutory schemes for people who have suffered loss as a result of violent crime, and as a consequence of war service.

Funding for a Tribunal

3.17 PIAC recommends that State and Federal Governments be responsible for funding the Tribunal, and that contributions should also be sought from Churches and other organisations involved in removals. However, PIAC recommends that the Federal Government take primary responsibility for establishing and financing the Fund. Contributions from State and Territory Governments should be proportionate to removals in their respective jurisdictions.

Forms of Reparations

3.18 PIAC recommends that the forms of reparation ordered or recommended by the proposed Reparations Tribunal should include acknowledgment and apology, guarantees against repetition, measures of restitution and measures of rehabilitation, and monetary compensation.

Compensation – a two-tiered approach

3.19 PIAC proposes that reparations for Indigenous people forcibly removed should consist of:

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5 *Lorna Cubillo and Peter Gunner v The Commonwealth of Australia,* Federal Court of Australia, August 2000.

6 Liability without fault. Where a person is responsible for harm, independently of either wrongful intent or negligence. There are certain, though limited defences, to strict liability – but having taken reasonable care is not among them.

7 Van Boven, T.(1993), UN Doc E/CN. 4/Sub. 2/ 1993/8 at p.4.

a) a minimum lump sum payment where the applicant can establish that he or she is an Aboriginal or Torres Strait Islander person who was forcibly removed;[8] and

b) reparations, including where appropriate monetary compensation, where the person can establish that, in addition, they suffered particular types of harm or loss resulting from forcible removal, under a number of heads of damage.

3.20 The proposed heads are racial discrimination; arbitrary deprivation of liberty; pain and suffering; abuse, including physical, sexual and emotional abuse; disruption of family life; loss of cultural rights and fulfilment; loss of native title rights; labour exploitation; economic loss; and loss of opportunities.

3.21 Claims could be made on an individual basis or as grouped claims.

3.22 Claims for harm will also be able to be made by families, communities and descendants as well as the primary victim, where they can demonstrate the harm under the listed heads eg disruption of family life, loss of cultural rights and fulfilment.

Standard of proof and onus

3.23 People making claims that they were affected by forcible removal ((b) above), rather than seeking compensation simply for being forcibly removed, would need to provide sufficient evidence that they were affected by the forcible removal and of the particular harm suffered. The onus of proof would be on the applicant to establish these facts on the balance of probabilities, rather than on the government to refute them.

3.24 PIAC endorses the position that a government would have a defence in respect of a claim for a lump sum compensation if it can demonstrate that the removal was in the best interests of the child. PIAC notes that this defence should be applied in accordance with current values rather than outdated notions of the past.

Level of compensation

3.25 PIAC suggests, noting that in fact a statutory compensation scheme does provide advantages to people forcibly removed (strict liability, relaxed rules of evidence), that an amount less than probable common law damages may be appropriate. They note that the Victims Claims Tribunal in NSW (see below) provides claimants with up to $50,000 for harm caused by an act of violence.

3.26 PIAC provides suggested guidelines for determining what the lump sum maximum might be, including reference to common law damages principles;

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8 The definition of 'forcible removal' is wide viz "*all* (emphasis added) 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." (BTH Report, p. 5).

examples from statutory schemes both in Australia and overseas; recognition of the devastating consequences of forcible removal; and budgetary constraints.

3.27 For those claiming additional compensation upon proof of particular types of harm, PIAC proposes a statutory schedule of damages to guide the Tribunal and to ensure consistency, certainty and equitable apportionment of available funds.

Procedure

3.28 PIAC considers that the Tribunal should adopt procedures that involve a minimum of formality. Hearings should be inquisitorial rather than adversarial (ie the tribunal's inquiries would not be limited to the evidence put before it, rather it could make its own inquiries). A Reparations Tribunal should adopt relaxed rules of evidence eg claimants and witnesses should be able to give evidence by sworn statements or affidavits. PIAC points out that such procedures have been adopted successfully by many tribunals at state and territory level. The Administrative Review Council has also discussed evidence and procedure in its Report, *Better Decisions: Review of Commonwealth Merits Review Tribunals*[9] (see below).

Appeals and maintenance of common law rights

3.29 Under the PIAC model, appeals to the Federal Court from the Tribunal on questions of law would be provided. Common law rights to seek compensation through the courts should be maintained, but a successful claimant in one forum should not be entitled to proceed in the other.

Sunset clause

3.30 PIAC proposes that claims could not be lodged after ten years from the date of commencement of the Tribunal.

Statutory Victims Claims Tribunals

3.31 As noted above, the PIAC model draws on the example of the NSW Victims Claims Tribunal. Each State has a similar regime for such purposes. A typical example is Victoria. The following information sets out some of the main features of the *Victims of Crime Assistance Act* 1996 (Vic) as a guide to the operations of such tribunals.

Heads of Damages

a) Injury:

i) Actual physical bodily harm; or

ii) Mental illness or disorder, whether or not flowing from nervous shock; or

9 Administrative Review Council, Report No 39, AGPS 1995.

iii) Pregnancy; or

iv) Any combination of matters of the above arising from an act of violence.

b) Medical expenses (broadly defined to include dental, psychological, ambulance and other services).

c) Loss of earnings.

d) Expenses reasonably incurred as a result of a criminal act of violence eg security devices.

e) Funeral expenses (for relatives of the victim).

Procedure

3.32 Applications must be in writing and be accompanied by documentary evidence such as medical certificates or statements of earnings. An application must be made within two years of the occurrence of the act of violence (however the Tribunal can accept applications over the time limit if the circumstances justify this). Applications are made on an individual basis, even where there is more than one victim.

3.33 The application must be verified by a statutory declaration and must provide full details including the amount and type of compensation sought. An application must also contain an authorisation for the Tribunal to obtain any other evidence or documentation that it requires. An application must state whether the applicant wishes the Tribunal to conduct a hearing or to determine the application without a hearing.

3.34 The standard of proof in relation to questions of fact is on the balance of probabilities, subject to the reasonable satisfaction of the Tribunal. The Tribunal is not required to conduct itself in a formal manner. It is not bound by rules or practice as to evidence but may inform itself in relation to the matter before it in any manner it thinks fit. The Tribunal is mandated to act fairly, according to the substantial merits of the case and with as much expedition as the requirements of the legislation and a proper determination of the matter permit.

Costs

3.35 The costs of legal assistance with applications are provided. For a straightforward case, the Tribunal allows between $300 and $450 for preparation of an application and for an appearance before the Tribunal in a hearing between $250 and $350. Where a case is distinguished by its complexity, significantly greater amounts have been permitted.

Assessment

3.36 In determining whether or not to make an award of assistance, or when determining the amount of assistance, the Tribunal is directed to have regard to a series of factors including the character, behaviour or attitude of the applicant; provocation of the act of violence; and any condition or disposition of the applicant which directly or indirectly contributed to his or her injury or death.

3.37 Damages are provided for three categories of victim:

a) Primary victims

b) Secondary victims (present at the scene and injured as a result, or parents or guardians of a primary victim under 18)

c) Related victims (close family members)

3.38 Whilst compensation is provided on an individual basis, more than one person can be compensated for an act of violence. Compensation is only provided in a monetary form. Caps are imposed on the amount of damages that can be awarded, as follows:

a) For **primary victims:** up to $60 000 (with loss of earnings capped at $20 000 within that total).

b) For **secondary victims:** $50 000.

c) For **related victims:** $50 000 (Note: The total maximum cumulative amount that may be awarded to all the related victims of any primary victim is $100,000).

The Tribunal

3.39 The Tribunal is established by legislation (the *Victims of Crime Assistance Act* 1996 (Vic)). The Tribunal consists of the Chief Magistrate and all other persons holding the office of magistrate or of acting magistrate under the *Magistrates Court Act* 1989. The Tribunal is constituted by a single member for the purposes of the Tribunal.

3.40 Some general features of the Tribunals are:

a) The purpose of no-fault compensation is, without need of proof of negligence, to provide benefits for economic and non-economic hurt to the extent that their payment can be responsibly funded.

b) In all Australian jurisdictions, the award of pecuniary compensation is allowed even if for technical defect or absence of sufficient proof no person is found guilty of a criminal act.

c) Any compensation payable is not punitive, vindictive or exemplary in character and is a form of compensation that is *sui generis*.

d) Proceedings for compensation are to be distinguished significantly from criminal proceedings.

e) Crimes compensation legislation is construed beneficially.

f) A criminal act must have been committed for a victim of the act to have a legitimate claim for compensation.

g) The definition of “victim” has been liberally construed in the criminal injuries context.

h) Courts have taken a broad view of causation in relation to criminal injuries compensation.

i) There must be proof of the connection between a subsequent injury and the criminal act (expert evidence is generally important).

j) The importance of psychological injury has been accepted.

k) Proof of assertions advanced by applicants is on the balance of probabilities subject to the "reasonable satisfaction” of the tribunal.

Compensation for War Service

3.41 As with victims of violent crime compensation, claims for compensation for injury or illness caused by war service are also dealt with as part of a statutory scheme. The relevant legislation is the *Veterans’ Entitlement Act* 1986.

3.42 Claimants must show that they were in war service and that they suffered injury while in war service. *There is no issue of establishing a duty of care. As well, the difficulty in obtaining evidence, because of the loss of records in wartime, is not a barrier to compensation.*

3.43 In particular, s.119 merits close attention, because of **the analogous situation to that of Indigenous children forcibly removed**, in terms of the passage of time and of the consequent difficulty with documentary evidence and the availability of witnesses.

3.44 In respect of the Repatriation Commission (the relevant tribunal) considering, hearing or determining a claim or application, s. 119 provides that the Commission:

a) is not bound to act in a formal manner and *is not bound by the rules of evidence, but may inform itself on any matter in such manner as it thinks just;*

b) shall act according to substantial justice and the substantial merits of the case, *without regard to legal form and technicalities*; and

> c) without limiting the generality of the foregoing, *shall take into account any difficulties that, for any reason, lie in the way of ascertaining the existence of any fact, matter, cause or circumstance*, including any reason attributable to:
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> > i) the effects of the passage of time, including the effect of the passage of time on the availability of witnesses; and
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> > ii) the absence of, or the deficiency in, relevant official records, including an absence or deficiency resulting from the fact that an occurrence that happened during the service of a veteran, or of a member of the Defence Force or of a Peacekeeping Force, as defined by subsection 68(1), was not reported to the appropriate authorities.

3.45 The relaxation of normal requirements for establishing liability has its risks in terms of the validity of claims. However, this has not been allowed to defeat the public policy purposes of such schemes. This was made clear in comments made by the late Justice Murphy in the High Court concerning the Veterans' compensation legislation:

> It is obvious that this remedial section [ie s.119] would result and has resulted in many claims being allowed which in truth were not well-founded. This was the price of ensuring that no valid claim was rejected because of insufficiency of proof.[10]

3.46 Given the difficulties identified in *Cubillo and Gunner* with the significant lack of documentation and problems with the availability of witnesses (some of whom were either dead or too old and unwell to testify), the provisions of the *Veterans' Entitlement Act* may provide a helpful model.

Recommendation

3.1 The Australian Democrats recommend that all parties involved in negotiations for the establishment of a Stolen Generations Tribunal examine the *Veterans' Entitlement Act* 1986 as a successful legal precedent for the relaxation of the normal requirements for establishing liability.

Mediated Outcomes – the Voyager Compensation Case

3.47 In 1964 the Australian navy's worst peacetime disaster occurred with the collision of the carrier HMAS Melbourne and the destroyer HMAS Voyager during night exercises off Jervis Bay. As a result the Voyager sank. Of the 314 personnel on board the Voyager, 232 were rescued and 82 were killed. For the next of kin of those killed, compensation was provided under the provisions of the *Commonwealth Employees' Compensation Act* 1930-1962 (the Act).

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10 High Court *Reparation Commission v Law* (1981) 147 CLR 635.

3.48 However, compensation for survivors of the collision was not so easily dealt with. Compensation under the Act was available for physical injuries and also for loss of kit and effects. The main problems that arose were over common law claims on the Commonwealth for the long-term effects of injuries received, especially where those injuries were largely of a psychiatric nature.

3.49 In the light of a High Court decision in 1964,[11] it was accepted for many years that none of the navy personnel killed or injured in the Voyager collision, or dependents of those killed, could succeed against the Commonwealth for any negligent acts or omissions which caused the collision. However, this position changed after a further High Court decision in 1982 which held that an action in negligence against the Commonwealth was possible.

3.50 Despite problems with the Statute of Limitations, proceedings were commenced by victims, with damages of over $200 000 being awarded in two cases. Faced with a queue of around 90 claims the Commonwealth endeavoured to rely on the Statute of Limitations. Eventually this was unsuccessful, and in a further successful case in 1992 a victim was awarded $650 000.

3.51 Faced with the prospect of another 89 cases, the then Attorney General, Mr Lavarch, initiated a mediation process conducted through the Victorian Supreme Court principal registrar, Mr Bruce McLean. The mediation was highly successful. It resulted in the claims being settled, with an average compensation figure of $350 000 and with substantial savings to overall costs. Nearly all Voyager survivors have now settled their claims against the Commonwealth.

Comment on the Outcome

3.52 In commenting on proceedings in respect of other Voyager survivors, Mr Justice Beach of the Victorian Supreme Court made a number of comments to the press on the mediation process which had been followed.[12] These appear relevant to consideration of the Voyager model in the context of compensation for the Stolen Generations.

3.53 Mr Justice Beach noted the fears when the early Voyager claims were brought in the 1980s that some survivors may "jump on the bandwagon". He told reporters:

> I have followed these cases as they have been mediated and that [fear] proved to be far from the truth. These people were really severely disturbed psychiatrically and psychologically and they were fully justified in receiving the fairly substantial awards that were made to them.

3.54 Mr Justice Beach also noted that this had been an unprecedented mediation process, that the outcome had been what he called a "magnificent result" that had

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11 *Parker v The Commonwealth* (1964) CLR 295, 301-302.

12 The Age, *Judge Calls for Extension to Voyager Claims*, 24 December, 1993.

never been attained in a case of such magnitude in Australia or the United Kingdom, and that the mediation should be a model for other jurisdictions. He noted the substantial savings, which he estimated to be as high as $25 million, including legal and other costs and Supreme Court costs. There had also been a substantial saving in time.

3.55 The mediator, Mr Mclean, separately noted the emotional significance of the outcome for the victims. He said the mediation had let the survivors say what they wanted to say without the prospect of being cross-examined and without the trauma of the courtroom witness box.

Recommendation

3.2 The Australian Democrats recommend that all parties involved in negotiations for the establishment of a Stolen Generations Tribunal consider the inclusion of a mediation process in the operation of such a Tribunal.

Class Actions – Kraft Peanut Butter Case

3.56 Following the discovery in June 1996 that peanut butter manufactured by Kraft Foods Ltd was contaminated with salmonella, a class action was launched in the Federal Court of Australia.

3.57 Lengthy negotiations followed which resulted in settlement being reached between the parties. This settlement was approved by the Federal Court in June 1997. It was the first of its kind to be approved in Australia. Over 2,300 people received compensation.

3.58 The settlement is unique and has the following features:

a) The damages payable were assessed by an independent panel of three barristers;

b) It allowed for each claim to be assessed individually;

c) Discount factors take into account deficiencies in the proof of an individual's claims;

d) If the Panel thought that damages may have been worth more than $5000 there was a further opportunity to negotiate with Kraft to determine the amount of compensation;

e) Otherwise, the Panel awarded an amount of compensation up to $5000; and

f) Damages were assessed in accordance with common law principles.

Alternative Dispute Resolution (ADR)

3.59 The term ADR is used broadly to refer to all methods of resolving disputes other than by court-based adjudication. ADR techniques include bringing parties together in a confidential pre-hearing conference setting to explore the possibility of reaching a decision by agreement, and mediation.

3.60 In the conference setting, the tribunal member or officer involved may take a more directive role than does a mediator. Mediation on the other hand is characterised by the neutrality of the mediator, the aim simply being to have the parties explore the possibility of reaching agreement. The mediator plays a facilitating role.

3.61 Common characteristics of ADR processes include an emphasis on flexible processes, leading to collaboration and consensual outcomes, assisted but not imposed by a neutral third party.

3.62 Concerns about the fairness of ADR reflect concerns about the impact of unequal power or unequal experience. Where there is a significant power imbalance between the parties there is a concern that ADR may produce a result which is simply imposed upon the weaker party by the stronger, without the safeguards and protections of the judicial system. There are risks with ADR that some people may use it for cost reasons and that power imbalances may result in disadvantage for particular disadvantaged groups within the Australian community.

3.63 The ARC (see below) has noted that in respect of the experience of the Administrative Appeals Tribunal (AAT) with ADR, the use of conferences and mediation has provided AAT applicants who may not wish to participate in a hearing – for example because they would prefer their case resolved without the formality of a hearing or because of the public nature of some hearings – with a way of proceeding which is cheaper and less formal and complicated. This has produced positive results, provided that skilled mediators are available.

Canada and ADR

3.64 Between 5000 and 8000 former Indigenous residential school students have filed law suits, mainly for physical and sexual abuse, against the federal government, as well as the churches that ran the residential schools. Some cases involve a single individual, some involve many. Whilst the government initially fought these cases in the courts, as the numbers of law suits and the costs of litigation increased, and after the success of some test cases, the government began entering into settlement negotiations.

3.65 To cope with this situation, the Canadian Government is currently piloting ADR schemes to resolve further claims out of court. These schemes are exploring the possibility of negotiating group compensation deals that involve victims who attended the same school or live in the same communities. For the applicants, this approach is seen as an alternative to the rather harsh and adversarial setting of the court room.

Both individual and community-based settlements, or a combination of them, are possible outcomes.

ADR: Potential Advantages

a) Informality, flexibility and the absence of procedural rigidity;

b) Non-legalistic approaches, focussing on decisions about future conduct, not necessarily requiring lawyers or other professionals; Scope for direct participation by affected parties and their control over the outcome;

c) Privacy and confidentiality;

d) Consideration of interests, needs and goals rather than fixed positions; Greater possibility of flexible, win-win outcomes;

e) The speed with which they can be set up, conducted and completed; and

f) Possible savings in financial costs and other resources.

ADR: Potential Disadvantages

a) Failure to provide procedural rights and protections that are available to litigants;

b) risk of manipulation and abuse where there is a substantial power imbalance between the parties;

c) additional costs and delay if the ADR process is unsuccessful;

d) the process is not open and there is no public record - lack of consistency in dispute resolution patterns and outcomes;

e) no guarantee of an outcome; and

f) outcomes which do not have the legal status of a court order.

Recommendation

3.3 The Australian Democrats recommend that all parties involved in negotiations for the establishment of a Stolen Generations Tribunal consider the inclusion of an alternative dispute resolution mechanism in the operation of such a Tribunal.

Administrative Review Council (ARC)

3.66 Over the last 20 years, Australia has developed a comprehensive and integrated federal system of administrative law. The Administrative Review Council is part of that system and oversees and monitors the whole system.

3.67 The Council performs a broad range of activities:

a) It provides advice to the Attorney-General in the form of project reports. These projects may be referred to the Council by the Attorney-General or initiated by the Council itself. Project reports are tabled in Parliament by the Attorney-General and then published. Before preparing a report, the Council undertakes extensive research and consultation that may, where appropriate, involve the preparation of an issues paper, discussion paper or exposure draft report.

b) It provides letters of advice to the Attorney-General on administrative law issues arising across a very broad range of government activities (from superannuation to fishing quotas, and from corporations law to quarantine).

c) It continuously monitors administrative law and practice and identifies issues which require inquiry or other action and it provides policy advice on administrative law matters through submissions to inquiries by Parliamentary committees and government bodies.

d) It provides comments on the Government's legislative proposals that have administrative law implications by providing co-ordination comments on recommendations to Cabinet. It also works informally with government agencies and decision makers to assist in policy development and to help improve government decision making generally.

e) It liaises with federal tribunals on matters relating to decision making and overall effectiveness.

ARC and the Role of Tribunals

3.68 The ARC Report *Better Decisions: Review of Commonwealth Merits Review Tribunals*, deals with the process of merits review, whereby a review tribunal can ‘step into the shoes’ of government decision makers and remake administrative decisions according to the merits of individual cases. Whilst such tribunals may not be entirely analogous with the Reparations Tribunal for the Stolen Generations of the type being suggested by PIAC, nevertheless the recommendations of the Review provide potentially useful pointers to relevant considerations in respect of establishing such a Tribunal.

3.69 In the view of the ARC, all review tribunals should have the statutory objective of providing review that is fair, just, economical, informal and quick. For tribunals to be effective, potential applicants must be aware of the existence of review tribunals and must be assisted to take advantage of the services those tribunals provide. The ARC recommends that it should be simple for applicants to apply for review. Review tribunals should give consideration to having a physical presence in more than one location and to taking advantage of alternative forms of communicating with applicants.

3.70 Once an application has been made, it should be dealt with fairly and quickly, and in a way that allows the applicant to participate in the process and understand what is happening. To this end the ARC recommends that:

a) tribunal processes should put applicants at ease and enable them to appear on their own behalf wherever possible;

b) the Government should generally provide applicants with access to all information held by the Government that is relevant to the decision affecting them;

c) consideration should be given to resolving cases through alternative dispute resolution; and

d) the reasons for tribunal decisions should be easily understood by the people for whom they are prepared.

3.71 In terms of the composition of tribunals, the ARC comments that tribunals are only as effective as their membership. To be effective, tribunal members must be capable of performing the review of functions for which they are selected. Tribunal members need a wide range of skills and experience. They must be able to make decisions free from undue influence and must also be perceived as being free from such influence.

Evidence and Procedures

3.72 Review tribunals are expressly relieved from the obligation to comply with the rules of evidence. Review tribunals may, for example, receive hearsay evidence that might be ruled inadmissible in proceedings in a court, in which case it is up to the tribunal to decide what weight should be given to such evidence.

3.73 The Report notes that there is broad agreement that informality contributes to accessibility and is therefore desirable. The Report notes that the degree of informality required will vary with the purposes of the tribunal, and in particular the characteristics of the people for whom the review tribunal is provided. The principle to be applied is that a tribunal should make applicants feel as comfortable within the tribunal environment, including with the tribunal processes, as is consistent with the proper exercise of its functions.

3.74 Tribunals have wide powers to obtain evidence, and the ARC was not aware of any dissatisfaction with the nature or extent of those powers. It considered that tribunals should have the capacity to undertake additional inquiries or otherwise seek additional relevant information at any stage of the review process. Tribunals should be required to disclose to applicants all material that the tribunal intends to rely on in reaching its decision.

3.75 In terms of privacy, the ARC expressed a preference for a presumption of openness but considered that tribunals should be able to protect an individual's privacy as required.

3.76 The question of representation of applicants before tribunals has been controversial. While tribunals encourage and support unrepresented applicants, many applicants do seek advice and assistance, which is available from a variety of sources including legal aid authorities, NGOs and private lawyers. The ARC considered that where applicants do have a representative or adviser, even if that person is simply a relative or friend, the tribunal should be prepared to deal with them, subject to satisfactory proof of identity and authority.

3.77 The problems arise more in the nature of the role to be played by representatives, especially if the representatives are lawyers and take an adversarial role. This can detract from the objectives of the tribunal process and may lead to an undue formalisation of proceedings with too much reliance on legal rules and adversarial techniques. Nevertheless, the ARC did not believe lawyers should necessarily be excluded, but rather that tribunals should have the flexibility to determine the role to be played by representatives before them. Further, they suggest that advocates and advisers who are likely to be regular or occasional users of tribunals should receive training and professional development.

Decisions

3.78 The ARC endorsed the approach of providing timely decisions with oral reasons. However, the ARC considered that all those affected by tribunal decisions should be able to request tribunals to produce written reasons for a decision.

3.79 There are statutory requirements for all tribunals in relation to the content of decisions and reasons for them. In all cases, these include a requirement on the tribunals to give reasons for their decisions. What is generally required is a statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision. The ARC considered that tribunal decisions, like other administrative decisions, should be capable of easy understanding by the people for whom they are primarily written.

3.80 The ARC recommended that all review tribunals should explore the potential use of alternative dispute resolution techniques (ADR) to resolve issues in cases coming before them.

Relevance

3.81 The ARC Review is applicable to tribunals examining administrative decisions (merits review). However, their recommendations suggest principles, criteria and processes which may be important considerations for the effective establishment and operation of a Stolen Generations Reparations Tribunal. Indeed, the ARC itself may be able to play a constructive role in the further development of a model for a Reparations Tribunal.

Conclusions

3.82 Arguments that compensating members of the stolen generations would be too complicated, uncertain or costly need to be assessed against the considerable Australian experience to date in providing compensation and restitution where community priorities have required an equitable outcome.

3.83 Statutory schemes, such as the victims of crimes compensation arrangements at the State and Territory level and the Commonwealth's veterans' legislation, reflect public policy decisions by governments to provide compensation schemes for people who have suffered loss but where there would be difficulties in obtaining compensation through normal court processes.

3.84 Such experience, and the demonstrated potential of techniques such as mediation and alternative dispute resolution provide a basis for the development, by statute, of a tribunal or commission charged with the task of providing reparations, including acknowledgment, compensation, and rehabilitation, for the members of the stolen generations who have been the victims of forcible removal. This approach would avoid the considerable difficulties and unnecessary trauma associated with litigation through the courts.

3.85 The PIAC submission sets out the basis of one such proposal. There also appears to be the potential for the ARC to play a constructive role in developing an appropriate tribunal mechanism.

Recommendations

3.4 The Australian Democrats recommend that the Administrative Review Council (or an equivalent body) prepare a report for tabling in the Australian Parliament on the appropriate model for a Stolen Generations Reparations Tribunal. This report should draw extensively on the views of the stolen generations, their representative organisations, and the outcomes of the National Summit on the Stolen Generations.

Senator Aden Ridgeway