DISSENTING REPORT OF GOVERNMENT SENATORS TO THE

INQUIRY INTO THE STOLEN GENERATION

Senate Legal and Constitutional References Committee

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1. INTRODUCTION

1.1 Our purpose in submitting this report is to present a different perspective on some of the key issues raised before the Legal and Constitutional References Committee in its inquiry into the Stolen Generation.

1.2 The Terms of Reference of this inquiry focus primarily on the adequacy, effectiveness and appropriateness of the Commonwealth and other government responses to the recommendations of the Human Rights and Equal Opportunity Commission's *Bringing Them Home* report.

1.3 We agree with the view expressed in the majority report[1] that its Terms of Reference required it to consider the adequacy of the recommendations of *Bringing Them Home*, at least in relation to those recommendations that were not accepted or were varied in implementation by governments or other parties.

1.4 However, we believe that the majority has failed to identify and reflect in its findings the deficiencies in the *Bringing Them Home* report. Our criticisms of the methodology and soundness of *Bringing Them Home* are meant to be constructive and forward-looking. It is now three years since *Bringing Them Home* was published and in the light of several court cases that have rigorously tested many of the assumptions underlying the report and of the Commonwealth's $63 million response, it is time to evaluate, in a dispassionate way, where the debate is heading.

1.5 We believe also that the majority report has erred in failing to acknowledge the effective operation and broad acceptance of the Commonwealth's response to the *Bringing Them Home*. Although there may be room for disagreement as to some parts of implementation and targeting, the Commonwealth's $63 million package is widely regarded as an appropriate response to the most urgent and significant need identified in the *Bringing Them Home* and that is assisting family reunions.

1.6 The Commonwealth programmes and other initiatives formulated in response to *Bringing Them Home* are being implemented successfully across a broad front. They are making a real difference to the lives of those indigenous Australians who were affected by past separation practices. Their primary focus on assisting family reunions is consistent with the *Bringing Them Home* findings that this is the most important requirement of those affected by child separation practices.

1.7 The Committee faced a significant barrier in ascertaining a more comprehensive picture of past practices and current need because of the failure of most of the State governments to appear before the Committee or to provide submissions.

1.8 It must also be said that although most States, and many non-government bodies, have apologised for past actions, these gestures have not been followed up with concrete activities or financial assistance.

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[1] Senate Legal and Constitutional References Committee, "Inquiry Into the Stolen Generation", (November 2000), paras 1.61-1.62

2. DEVELOPMENTS SINCE BRINGING THEM HOME

2.1 The *Bringing Them Home* report has been criticised on a number of grounds that if established undermine the validity of its findings and call into question its conclusions as a sound basis upon which to ask any government to respond to matters concerning separated children.

2.2 During the course of the Senate inquiry, the Federal Court's judgment in *Cubillo & Gunner,*[2] and later the Court of Appeal of the Supreme Court of New South Wales in *Williams*[3], were delivered.

2.3 Both decisions were decided against the plaintiffs. In both cases allegations of the plaintiffs being stolen were raised. In *Cubillo & Gunner*, O'Loughlin J also conducted a lengthy analysis of the history and practice of child separation in the Northern Territory under Commonwealth administration prior to self-government in 1978.[4]

2.4 Although this is not the place for an exhaustive review of *Bringing Them Home*, some brief observations are pertinent.

2.5 O'Loughlin J concluded that there was no evidence that supported the claim that in the Northern Territory there was a general policy of removal of part-Aboriginal children.

2.6 He further concluded that the evidence failed to establish that in the Northern Territory there was ever activity on such a scale that a general policy of removal was being enforced.

2.7 His Honour also found that selection of children for removal was based on the personal circumstances of the individual children.

2.8 The case of Mrs Joy Williams was cited in *Bringing Them Home* as an example of a forcible removal as a child. However, the Court rejected her claim as untrue because her mother had placed her in an institution and had consented to her being moved between institutions.

2.9 The relevance of these findings to the current inquiry is that it cannot simply be assumed or asserted that Aboriginal children separated from their parents were forcibly removed by compulsion, duress or undue influence.

2.10 In essence, all cases of removal would require a case by case assessment to distinguish those cases where a parent voluntarily sent their child away to a school or foster home for education or health reasons or consented to an adoption.

2.11 In involuntary cases, involving the exercise of a statutory power, it would require an examination of whether the decision was justified in the interests of that child.

2.12 As stated in the majority report, we consider that the purpose, objective and number of removals to be relevant only insofar as these matters may affect current need, help identify the value of new or proposed services and identify those whom may have been excluded.

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[2] Cubillo v The Commonwealth of Australia [FCA 1084] (hereafter referred to as the "Cubillo case")
[3] Williams v The Minister and Anor [1999] NSWSC 843 (hereafter referred to as the "Williams case")
[4] The Age, 2 September 2000

3. "BRINGING THEM HOME" AS A BASIS FOR FUTURE ACTION

3.1 In our view, *Bringing Them Home* fails to provide clear guidance to policy makers both in terms of the problems to be addressed and the policy responses it considers would be appropriate.

3.2 *Bringing Them Home* makes broad generalisations at the expense of precision, conveying an impression of uniformly intentional actions, the solution to which was a series of reparations.

3.3 So unclear is the information in the report that the reader is uncertain who, if anyone, would not be entitled to reparation. *Bringing Them Home* does suggest various categories of entitlement without suggesting how access to this would be facilitated, how many people might be claiming on specific grounds, and how many in fact would not have an entitlement at all. This approach probably facilitated rejection of much of the report by the Government, and also excluded from consideration the different situations of many separated people.

3.4 However, while the methodology used in *Bringing Them Home* report can be questioned, that is not to say that the effects of the separation practices were in all cases benign. This was demonstrably not the case.

3.5 This was recognised by the Minister in his submission to the inquiry: *"The Government accepts that there have been traumatic consequences for some people stemming from indigenous child separation policies and practices, whether undertaken with or without consent, with or without good reason. Because it acknowledges the effects of separation, the Government has developed a programmatic response to the needs of the Aboriginal Australians affected."*[5]

4. COMMONWEALTH RESPONSE TO "BRINGING THEM HOME"

4.1 In terms of responses to *Bringing Them Home*, it is our view that the Commonwealth Government's approach of practical reconciliation through its $63 million package has and will continue to be of lasting benefit.

4.2 The Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, outlined the Commonwealth Government's response to the *Bringing Them Home* report on 16 December 1997. The package totalled $63 million in total. Key measures were:

- $2 million for Australian Archives to index, copy and preserve thousands of files so that they are more readily accessible;
- Nearly $6 million for further development of indigenous family support and parenting programmes;
- $1.6 million to the National Library for an Oral History Project in recognition of the importance of indigenous people and others telling their stories of family separation;
- a $9 million boost in funding for culture and language maintenance programmes;
- $11.25 million to establish a national network of family Link-Up services to assist individuals;

[5] Submission 36, p 4

- $16 million for 50 new counsellors to assist those affected by past policies and for those going through the reunion process; and

- $17 million to expand the network of regional centres for emotional and social well being, giving counsellors professional support and assistance.

4.3 In announcing the Government's response, Senator Herron said that the specific measures referred to complemented the Federal Government's major policy direction in indigenous affairs. This was to address directly the effects of severe socio-economic disadvantage suffered by indigenous people through improved outcomes in health, housing, education and employment. In 2000/2001 total identifiable Federal spending on indigenous programmes will amount to $2.3 billion, the highest amount on record.

4.4 Further details of the Commonwealth response, including progress to date, can be found in the Minister's submission to the Committee.[6]

(i) <u>Adoption of Recommendations</u>

4.5 We believe it is unreasonable to criticise the Commonwealth, as argued in some submissions and evidence to the Committee, for its decision not to accept all 54 recommendations in the *Bringing Them Home* report. There were indeed specific reasons for not accepting certain recommendations:

- Many of the recommendations were in fact addressed to State and Territory governments and to non-government parties, including the churches;

- Several recommendations were based on the false premise that previous policies amounted to genocide;

- Some recommendations would have required Commonwealth legislative intrusion into areas that historically and constitutionally are the prerogative of the States, for example, adoption, child welfare and juvenile justice; and

- In some cases it was judged that there were better ways of giving effect to the intent of the recommendation (for example, that the National Library undertake the oral history project and that Ministerial Council on Aboriginal and Torres Strait Islander Affairs rather than HREOC be responsible for ongoing monitoring).

4.6 In this context we agree with the observation in the majority report that there is no obligation on governments to implement any recommendations made in reports by government agencies or by Parliamentary Committees.[7] Further, *"it is noted that a government may develop policies and programs which differ from those recommended, as it is free to interpret recommendations or alter them to meet other priorities. The fact that not all recommendations have been met, or may not have been met in certain ways, is not necessarily evidence that government has rejected the essence of a report"*.[8]

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[6] Submission 36, Appendix 1
[7] Majority report, para 1.31
[8] Ibid, para 1.34

(ii) Apology

4.7 Much of the criticism of the Government's response to the *Bringing Them Home* report has concentrated on issues surrounding an official apology. This ignores the fact that it was family reunion, not an apology or compensation, that the report itself said is *"the most significant and urgent need of separated families"*. And indeed the focus of the Government's $63 million package comprises family reunion and associated counselling and support services for those affected by past policies.

4.8 On 26 August 1999, both Houses of Federal Parliament endorsed the Government's historic *Motion of Reconciliation*. Through this motion, the National Parliament expressed its deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations, and for the hurt and trauma that many indigenous people continue to feel as a consequence of these practices. The motion also reaffirmed a whole-hearted commitment to the cause of reconciliation between indigenous and non-indigenous Australians as an important national priority.

4.9 The Prime Minister and Senator Herron also expressed their personal feelings of deep sorrow in relation to the injustices suffered by indigenous people as a result of the practices of past generations.

4.10 In its report, the majority based its recommendation for a further Commonwealth apology on its finding that the wording of the Motion of Reconciliation is not acceptable as a national apology to members of the "stolen generation" who gave evidence to the committee.[9]

4.11 Whether or not this represents the views of those affected by separation as a whole, an apology in the terms sought is not supported by the majority of Australians. According to research undertaken by the Council for Aboriginal Reconciliation in late 1999, a significant majority of Australians do not support a formal government apology to indigenous people regarding past events. Sixty-three per cent agreed, and 31 per cent disagreed with the proposition that *"Australians today were not responsible for what happened to Aboriginal people in the past, so today's governments should not have to apologise for it"*.[10]

4.12 The Council's qualitative research revealed that *"people's reasons for not wanting an apology were threefold. First they said 'We did not do it' and second, that the past was past and that reconciliation was about the present and the future. The further concern is that such an apology might lead to further substantial claims for compensation in one form or another"*.[11]

4.13 We endorse the Government's view that the cornerstone of the reconciliation process continues to be providing practical and effective measures to address the legacy of profound economic and social disadvantage of many indigenous Australians.

(iii) Consultation

4.14 The majority report concludes that a National Summit be held to address several issues of concern relating to implementation of the *Bringing Them Home* recommendations. It was argued that this included the need to overcome insufficient consultation on a range of issues, such as implementation of the *Bringing Them Home* recommendations by the various jurisdictions and non-government organisations.

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[9] Majority report, para 4.72
[10] Submission 36, p 28
[11] Ibid, p 28

4.15 We do not support such a summit. We wish to point out that in developing its response to *Bringing Them Home*, the Commonwealth consulted a range of relevant government and non-government organisations.

4.16 The Commonwealth initiatives developed in response to *Bringing Them Home* are addressing the objectives they were set and we see little purpose in further consultation, as recommended by the majority, on programmes about the development of which there has already been comprehensive discussion and interaction with representative indigenous groups and other relevant organisations.

4.17 The Minister wrote to relevant federal Ministers asking them to examine the *Bringing Them Home* report, and to his State and Territory counterparts asking them to give careful consideration to the recommendations in the report for which the States and Territories had responsibility.

4.18 An inter-departmental committee was established, comprising officers of the Departments of Prime Minister and Cabinet, Foreign Affairs and Trade, Immigration and Multicultural Affairs, Communication and the Arts, Health and Family Services, Finance and Administration, Employment, Education, Training and Youth Affairs, Attorney-General's Department, and ATSIC. Members of the Committee met, often on a bilateral or trilateral basis, on a number of occasions. Government agencies responsible for implementing the Government's $63 million package of initiatives in response to *Bringing Them Home* then proceeded to consult with relevant organisations.

4.19 For example, an independent evaluation of existing Link-Up services, commissioned by ATSIC, was completed in April 1999, before new funds from the Government's $63 million package were allocated. As part of this evaluation process, there was broad consultation with stakeholders, including the National Aboriginal Community Controlled Health Organisation (NACCHO), the National Secretariat of Aboriginal and Islander Child Care agencies (SNAICC), existing Link-Up services, and "stolen generation" representative groups including groups in the Northern Territory and Western Australia.

4.20 ATSIC continues to consult with stakeholders regarding Link-Up services through annual Link-Up workshops, and National Stolen Generations Conferences which are attended by representative "stolen generation" groups.

4.21 All of the health initiatives under the $63 million package are being implemented by the Office of Aboriginal and Torres Strait Islander Health (OATSIH) in consultation with NACCHO, SNAICC, ATSIC and State and Territory health agencies. In originally developing the Government's response, discussions took place between OATSIH, NACCHO, SNAICC and the Social Health Working Party and there was general support for the proposed initiatives.

4.22 The National Archives, which has responsibility for facilitating access to Commonwealth records for people wishing to trace their families, continues to consult regarding access issues through Aboriginal Advisory Groups in the Northern Territory and Victoria which include indigenous community representatives, including members of "stolen generations" representative groups.

4.23 In addition the Partnership Forums (NACCHO, the Commonwealth, respective State/Territory representatives, ATSIC were asked to provide advice on locating the 50 *Bringing Them Home* counsellor positions that were funded. All these stakeholders agreed to the placements as they now are.

4.24 The National Library, which is responsible for the Oral History Project, has established a reference group to guide its work.

(iv) Monitoring and Coordination

4.25 The majority recommends that an independent coordination and monitoring process be established. We do not believe that arrangements additional to those already in operation and identified in the majority report are either necessary or appropriate.

4.26 The *Bringing Them Home* report recommended that the Council of Australian Governments (COAG) undertake the role of monitoring and coordinating implementation of the *Bringing Them Home* recommendations. However, at the August 1997 meeting of MCATSIA the Commonwealth asked the States and Territories to give an initial response to the *Bringing Them Home* report. It was agreed at that meeting that MCATSIA would take on the role of coordinating and monitoring responses. We consider it entirely appropriate that governments identify the means by which recommendations of reports are implemented, and in this case all jurisdictions identified MCATSIA as the appropriate forum.

4.27 ATSIC is to prepare the 1999-2000 monitoring report. This report is due to be published by December 2000, incorporating responses from church organisations, as well as States and Territories.

4.28 Given these existing arrangements, there would seem little point in some suggestions that have been made for a "national summit" to discuss such matters. Similarly, we disagree with the majority recommendations in favour of revised monitoring and coordination arrangements.

4.29 The information required to make such a summit focus on the different needs of different groups, eluded the *Bringing Them Home* report and this committee. On the available information it would even be difficult to know who to invite to such a summit, let alone to secure the participation of the States and Territories responsible for relevant service delivery. There is no guarantee the States and Territories would make available to the summit records and materials which they were unwilling or unable to provide to the committee.

5. STATE, TERRITORY AND CHURCH RESPONSES

51. With the exception of the Northern Territory, the practice of child separation was administered by the States. The recommendations of the *Bringing Them Home* report involved all levels of government, and indeed many non-government organisations. All State and Territory governments have responded to the *Bringing Them Home* report.

5.2 We note and endorse the findings of the majority that it is not possible to comment in detail on the nature of State responses to certain recommendations, due to a lack of complete information about current actions.[12]

[12] Majority report, para 1.11

5.3 Although half of the recommendations in the *Bringing Them Home* report were addressed to State and Territory governments and church groups (because they were largely responsible for past practices), their responses to the report have been less specific than that of the Federal Government. Whilst they have warmly embraced the symbol of an apology, in varying forms, and (like the Commonwealth) have emphasised family reunion through facilitating records access, they have generally sidestepped those recommendations involving a substantial commitment of resources.

5.4 For example, the *Bringing Them Home* recommendation that the churches hand over land to Aboriginal people, as a form of compensation, has not been widely implemented. Like the Commonwealth, most of the States did not support the *Bringing Them Home* recommendation for monetary compensation. They also rejected proposals for national framework legislation to regulate contemporary child separation practices.

5.5 In this context we note, as has the majority report, that only South Australia and the Territories responded to its invitation to make a submission or provide material to the Committee's inquiry. The Committee has also noted the markedly different levels of responses from the various churches to the recommendations addressed to them.

5.6 In our view, the Commonwealth's $63 million package of measures was more substantive and far-reaching than that of any State or Territory government's response to the *Bringing Them Home* recommendations. This was acknowledged in evidence to the Committee[13] from the consultant HREOC commissioned to evaluate government responses to the *Bringing Them Home* report.

6. COMPENSATION AND REPARATIONS

6.1 The terms of reference of this inquiry require us to consider, inter alia, appropriate ways for governments to implement measures which will address restitution matters through an alternative dispute resolution tribunal and, where appropriate and agreed to, alternative forms of restitution.

6.2 The *Bringing Them Home* report had recommended that *"monetary compensation be provided to people affected by forcible removal"*, including the individuals removed, their families, community members and descendants.

6.3 Similarly, the Committee majority recommends the establishment of a Reparations Tribunal to address the need for an effective process of reparation, including the provision of individual monetary compensation.

6.4 The *Bringing Them Home* recommendations in this regard were based on the so-called van Boven principles, a 1993 United Nations consultant's report concerning *"the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms"*. Such violations include torture, genocide, slavery and summary or arbitrary executions. Many Australians would not agree that there are direct parallels between the separated children experience and the sort of "gross violations" of human rights elsewhere in the world for which the van Boven principles were intended. As noted in the Government's submission[14] and in HREOC's evidence,[15] van Boven's proposals have no official status.

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[13] Legal and Constitutional References Committee, Hansard , p 270, 13 July 2000
[14] Submission 36, p 39
[15] Legal and Constitutional References Committee, Hansard, p 100, 12 July 2000

6.5 Although it took up much forensic time, the *Bringing Them Home* recommendation that the Commonwealth legislate to implement the Genocide Convention with full domestic effect has not been addressed in the majority report. It is the subject of a separate report of this committee.[16]

6.6 Suffice to say that the evidence before the committee even if accepted at face value would be incapable of amounting to genocide within the Genocide convention.

6.7 Significantly no individual responsible for having the requisite intent could be identified.

6.8 The majority recommended that the model suggested by the Public Interest Advocacy Centre (PIAC) be used as a "foundation" on which to build a system of reparations. PIAC proposed that compensation be administered through a Reparations Tribunal empowered to award financial compensation and other forms of reparations (eg to direct that those responsible apologise to those affected); and that the Tribunal adopt informal procedures, including *"relaxed rules of evidence"*.

6.9 Even if we were to support the concept of a reparation tribunal, which as explained below we do not, we would reject the PIAC model as an in principle abdication of government responsibility. PIAC suggests that "Reparations Tribunal" should have the power to order or recommend all forms of reparation, including monetary compensation, acknowledgment and apology, guarantee against repetition, measures of restitution and measures of rehabilitation.

6.10 Such a broad set of powers would be without precedent in Australian administrative and legal history and would set an uncertain course, even were the issues of combining Federal, State and Territory powers in one body able to be resolved.

6.11 Further, the Committee majority itself does not appear to have full confidence in the PIAC model: *"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."*[17]

6.12 The issue of compensation was also covered in detail in the Minister's submission to the Senate inquiry.[18] We agree with the Commonwealth argument there were three fundamental objections to such a proposal:

- first, monetary compensation is not the most appropriate way of dealing with the issue: as the *Bringing Them Home* report said, *"assisting family reunion is the most significant and urgent need of separated families"*. Sir Ronald Wilson has also since said that "*healing is about much more than money*";

- second, given the varied and largely undocumented circumstances of the historical events in question, it would be impossible to devise and apply any such scheme in a practical and equitable manner; and,

- third, as experience in the field of immigration tribunals and elsewhere has shown, an alternative tribunal process neither avoids the trauma of revisiting past events nor reduces the costs of keeping matters out of the hands of lawyers and courts and an exhaustive appellate process.

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[16] Inquiry into the Anti-Genocide Bill 1999, 29 June 2000
[17] Majority report, paras 8.62
[18] Submission 36, pp 40-51

6.13 There are other reasons why a Commonwealth scheme of monetary compensation is inappropriate. With the exception of the Northern Territory, the practice of child separation was administered by the States, not the Commonwealth. And, as indicated below, the potential cost of any other approach could be prohibitive, ranging, depending on the various estimates available from several hundred million to several billion dollars.

6.14 We note that the Commonwealth Government is not alone in its rejection of individual monetary compensation. The previous federal government defended the *Kruger and Bray*[19] constitutional challenge to the NT Aboriginals Ordinance (under which Lorna Cubillo and, with his mother's consent, Peter Gunner were separated).

6.15 The recently adopted ALP National Platform contains an explicit commitment to an apology but stops short of a similar commitment to financial compensation. No State government offered compensation in their response to the *Bringing Them Home* report. The NSW Government defended the *Williams* case, following which the NSW Premier said "*I think we've got to move beyond the idea that we can do it by making a cash payment to compensate for things that happened in our past*".[20]

6.16 The New South Wales Premier recently repeated this view, saying that "*I don't think we'll ever solve the problems left behind by adoption practices, enforced on Aboriginal families in the past, by setting up a system of compensation. If such a system were set up, anti-discrimination law would mean that non-Aborigines wronged by past adoption practices could not be excluded*".

6.17 It should also be noted that the concept of a statutory compensation scheme is not seen by its proponents as completely replacing common law litigation, notwithstanding the latter's alleged limitations. This is explicit in *Bringing Them Home,*[21] the stated rationale for which is that *"Some people may wish to pursue civil claims to maximise the damages payable to them".*[22]

(i) Eligibility for Compensation

6.18 In devising a compensation scheme, a fundamental question is that of who would be eligible for monetary compensation. This is not just a question of distinguishing those individuals who were forcibly and wrongfully removed, but more generally a question of determining who else would also be entitled to compensation, ie which other family and community members and descendants.

6.19 The *Bringing Them Home* report recommended that reparation be made to all who suffered because of forcible removal, including family members, communities affected, and descendants of those forcibly removed. For example, two-thirds of the 2,100 writs against the Commonwealth in the Northern Territory are by the children of alleged separated children. If compensation were payable to such a broad range of affected individuals, then it could be that there would be few Aboriginal people not entitled to compensation. Sir Ronald Wilson has written, for example, that "t*here was probably not one Aboriginal family in Australia today which did not bear the scars of the forced removal policies*".[23]

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[19] Kruger v Commonwealth of Australia (1997) 190 CLR 1
[20] ABC TV News, 26 August 1999
[21] Bringing them Home, Recommendation 20
[22] Ibid, p 313
[23] The Australian, 4 April 2000

6.20 If this is the case, then the real question confronting any compensation authority could be that of deciding "who should not be compensated?".

6.21 Any such authority would have to make awkward distinctions, for example, as to who constituted a family member of a removed child, a particularly problematic judgment in a culture of extended kinship networks. PIAC observed in its submission to the Senate inquiry, for example, that "f*or indigenous children, 'families' were constituted by their entire community. There must therefore be recognition that there will often be no distinction between families and communities for the purposes of the Tribunal*". Similar problematic distinctions would have to be made in relation to the inter-generational effects on children and grandchildren. Delimiting the extent of affected "community members" could be even more problematic, especially in non-traditional and urban communities and settings. PIAC urged in its submission that the definition of family, community and descendant "*should be broadly defined, so as not to exclude any persons who suffered harm*".

6.22 The issue of whether individuals (and their families and communities) separated under *contemporary* child protection policies would also be eligible to seek compensation (as proposed by PIAC) would also need to be considered, bearing in mind that Aboriginal children today are at least five times more likely to be subject to care and protection orders. If not, what would be the cut-off point?

(ii) <u>Determining Wrongful Separation</u>

6.23 We do not believe there is any fair or equitable way, given the lapse of time and range of circumstances involved, of determining who should and should not be eligible for personal compensation.

6.24 The basic difficulty would be that of determining who was and who was not a separated child for the purposes of compensation. The difficulty arises from the *Bringing Them Home* report's definition of a separated child as one separated from his or her family as a result of "compulsion", "duress" or "undue influence". In <u>*Cubillo & Gunner*</u> , for example, eight alleged "stolen children" gave evidence but four admitted that their mothers had consented.

6.25 The problem confronted by a compensation authority would be that of reconstructing such distant and often unrecorded events in order to distinguish those characterised by "duress" or "undue influence" from those where this was not the case. These would be more problematic than instances of "compulsion", because relevant evidence and witnesses on either side would be hard to find, if available at all. In other words, it would be necessary to distinguish between voluntary separations and involuntary separations and then to examine whether the latter were carried out in the interests of the child.

(iii) <u>Determining Damages</u>

6.26 Identifying a legitimate case of wrongful separation would only be the first stage in the compensation process. The compensation authority would then have to assign individual damages. The *Bringing Them Home* report contemplates ten heads of injury and loss,[24] many of which have never been assayed by the courts before. (The idea of a "lump sum" payment, as proposed in *Bringing Them Home*, refers only to the "once and for all" nature of such a payment, not to a specific quantum which would have to be determined according to the circumstances of each case).

[24] Recommendation 14

6.27 In arriving at an appropriate sum it would be necessary to distinguish those effects arising from separation as opposed to injury and loss sustained as a result of other life experiences, for instance during adulthood. This problem arose in the *Williams* case, and is acknowledged in PIAC's submission to the Committee, namely, "*it would be difficult to separate out damage caused by particular conduct while 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*".

(iv) Evidentiary Issues

6.28 The *Williams* and *Cubillo & Gunner* "test cases" have, if anything, emphasised the importance of properly testing and verifying claims of wrongful removal. The difficulties associated with the lack of documentary evidence or verifiable witness accounts would still apply to a compensation authority. Nor would a statutory compensation process obviate the trauma of revisiting such personal experiences. This will still be unavoidable, even if it only takes the form of an affidavit instead of oral evidence in chief and possible cross-examination.

6.29 A tribunal would also have to be alert to the risk of mistaken and possibly even fraudulent claims (including from non-Aboriginals claiming to be "stolen" at birth). In the *Williams* case the original claim of forcible removal was eventually dropped.

6.30 Cases involving involuntary removals and particularly cases of alleged "duress" or "undue influence" are likely to be the most problematic, because of the absence of relevant records. In those cases a tribunal could not rely solely upon the claimant's version of events. As noted previously, in the *Cubillo & Gunner* judgment the judge noted a phenomenon he described as "subconscious reconstruction" (as well as deliberate deception) in evidence from the claimants.

6.31. It has been suggested that the $10 million cost of the *Cubillo & Gunner* case demonstrates the need for a less costly alternative. Although much of the cost of those cases was attributable to their precedent value (not only in legal terms but also in terms of researching and documenting the entire history of this aspect of Aboriginal administration in the Northern Territory), a significant part of the cost was also associated with documenting and verifying the history of the two particular claimants. Any alternative tribunal would confront similar problems and costs for each claimant, if it were properly to test the validity of such claims.

(v) The Burden and Onus of Proof

6.32 Other important procedural issues are those relating to the burden and onus of proof under a statutory compensation model. The *Bringing Them Home* report proposed that the burden of proof should be the balance of probabilities (the civil standard), not the criminal test of beyond a reasonable doubt. It also proposed that the rules of evidence should not apply.

6.33 The onus of proof as between claimant and respondent would be more problematic in circumstances such as these where both sides would be constrained by lack of records and witnesses to support their argument. *Bringing Them Home* assumes that the onus of proof would rest with the claimant – subject to flexible procedural principles,[25] including suspension of the rules of evidence – and that the respondent would be able to argue in defence that "removal was in the best interests of the child".[26]

[25] Recommendation 17
[26] Recommendation 18

6.34 In their joint submission to the Senate inquiry, the North Australian Stolen Generation and Central Australian Stolen Generation and Families Aboriginal Corporation argued that the onus of proof should rest with the respondent government (or church). This would be very difficult for the defence given the lapse of time and the lack of documentary evidence. But even the *Bringing Them Home* approach is highly problematic because it would only require a claimant to establish that they were removed, not that they were wrongfully removed. The onus would be on the respondent to prove that the removal was justified in the interests of the child and otherwise produce evidence as to the individual circumstances of that child. Realistically this would not be possible in most cases of alleged "duress" or "undue influence" where, by definition, the parent themselves had formally consented to removal, whether in the form of adoption or fostering or for educational or health reasons.

6.35 As noted in the *Cubillo & Gunner* decision[27] the extreme delay in initiating such cases prejudices the defence even where the onus of proof is on the claimant – because many records have been lost and many witnesses have died. To reverse the onus of proof in such circumstances – and to relax the rules of evidence simultaneously – could be fatal for the defence. The presumption of wrongdoing could prevail by default in most cases.

6.36 In arguing the best interests of the child there is also a question of judging the past by today's values, that is, whether the child's interests should be defined by contemporary standards (which assign priority to maintaining the family unit) or by earlier standards (where external intervention and institutionalisation of children were more common) and responded as a hallmark of a responsible society.

(vi) Who Would Defend Compensation Claims?

6.37 Another key question is that of who would "defend" the claim. The common law actions to date have been brought against the responsible government, with the Commonwealth being the respondent only in the case of the Northern Territory. In the event of a national compensation tribunal, as proposed in *Bringing Them Home*, it would be unrealistic to expect the Commonwealth to respond to claims involving the past actions of the States and indeed of churches and other non-government welfare organisations of that era. The Commonwealth would not have the personnel or available records to respond to such claims. On the other hand, the States and the responsible non-government organisations are unlikely to actively contest such claims unless they are likely to be held liable for the outcome and the question of apportionment of damages between defendant governments would become a legal quagmire.

6.38 The only two options for addressing this issue would be either for each State to establish its own statutory compensation authority, or for any national authority to be able to award damages against the responsible State or non-government party. This may also involve notions of contribution and apportionment of liability.

(vii) Rights of Appeal

6.39 A further consideration would be what rights of appeal should be available against a tribunal's decisions. Should both the claimant and the respondent be eligible to appeal? To whom? On what basis eg on the merits/facts or just questions of law? Would it require a hearing de novo? Even this would give rise to the demand for legal representation with attendant pressures for legal and or contingency representations based on outcomes. The experience of the refugee and immigration review tribunals is relevant in this regard.

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[27] Cubillo case, op cit, paras 505-506

(viii) Overseas Experience

6.40 The HREOC and PIAC submissions to the Senate inquiry both held up examples in Canada, South Africa and New Zealand as models for Australia to follow in setting up a reparations scheme for past practices of indigenous child separation. In fact, none of these international examples involve an existing government commitment to individual monetary compensation and the majority recommendation would push the parameters for individual claims based compensation into unchartered waters.

7. CONCLUSIONS AND RECOMMENDATIONS

7.1 Although we do not agree with the thrust of the recommendations in the majority report we believe that this should be an opportunity to consider constructive ways to address the pain of past separations.

7.2 We believe that the response to the problems experienced by those affected by the practices of child separation should be part of a broader charter of reconciliation.

7.3 The starting point is an acknowledgment that the level of disadvantage experienced by the Indigenous population of Australia, as a group, is the legacy of colonial history, as with most other indigenous populations.

7.4 The response of successive governments – past and present, State and Commonwealth – since the 1970s in particular, has been to address the extent of Aboriginal disadvantage with a range of special programmes and policies involving significant expenditures.

7.5 Since the 1967 referendum, which gave the Federal Government power to make laws specifically for Indigenous Australians, the Commonwealth Government has spent some $24 billion (1997 prices) on Indigenous specific programs, including $20 billion in the last 15 years.

7.6 This year, the Government will be spending a record $2.3 billion on Indigenous specific measures – more in real terms than in any previous Budget of any Federal Government. Almost three-quarters of this funding is now targeted to the priority areas of housing, health, education and employment.

7.7 Significantly, the Indigenous controlled ATSIC, through the auspices of 35 regional councils, is independently responsible for administering approximately half of the Federal Government's annual spending on Indigenous-specific programmes.

7.8 And yet on almost every indicator, while there is real improvement in actual outcomes, Indigenous Australians remain comparatively disadvantaged compared with other Australians.

7.9 While not agreeing with aspects of *Bringing Them Home*, we do acknowledge its finding that family reunion is the most pressing need of those affected by the practices of child separation and we accept that past separation practices have caused pain and loss to many Aboriginal people.

8.0 The question is how can those who find themselves dislocated and dispossessed by these past events be appropriately assisted? The need for family reunion is an issue which lies at the heart of addressing the consequences of past separations. The Commonwealth's $63 million response package includes initiatives that are designed to address these specific needs, but the response of the States, Territories and non-government organisations leaves much to be desired.

8.1 Accordingly, we recommend as follows:

(1) That family reunion and associated support services continue to be the primary focus of government and non-government responses to the separated children experience; that those services be targeted specifically to those separated children.

(2) That State governments and responsible non-government organisations, including the churches, be encouraged to give tangible as well as symbolic recognition to the needs of separated children.

Senator Marise Payne
Deputy Chair
Senator for NSW

Senator Helen Coonan
Senator for NSW