CHAPTER 3

KEY ISSUES

Introduction

3.1 The overwhelming majority of evidence received by the committee applauded Senator Bartlett's initiative in introducing the Bill, and expressed broad support for the provision of monetary compensation to the stolen generation. Many of those who supported the Bill recognised its symbolism as an acknowledgement of the harm incurred by members of the stolen generation and the importance of providing appropriate redress for that harm.

3.2 Some submissions and witnesses pointed to particular flaws in the compensation model proposed in the Bill, and suggested ways in which the model might be improved. However, notwithstanding those perceived flaws, there was a general consensus that it would be preferable that the Bill proceed in its current form than not proceed at all. Many felt that the Bill offers a real and immediate opportunity to provide compensation to the stolen generation – particularly significant given that many members of the stolen generation are now elderly – and that such an opportunity might be lost indefinitely if the Bill does not go ahead.[1]

3.3 The committee received one submission noting that the Bill raises 'false hopes' for compensation among those Indigenous people who feel they are eligible to make a claim, given that the Rudd Government has expressly ruled out payment of compensation to the stolen generation.[2] Some others expressed the view that, while the Bill is a possible starting point, it lacks substance, in a legal, social and moral sense, to adequately resolve the issue of compensation for the stolen generation.[3] Another stated that 'the Bill is so poorly drafted that it would require substantial

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1 For example, see Edmund Rice Institute for Social Justice, *Submission 68*, p. 4; Ms Helen Moran and Mr Rodney Dillon, National Sorry Day Committee, *Committee Hansard*, 15 April 2008, p. 16; Mr Philip Elsegood, Stolen Generations Alliance: Australians for Healing, Truth and Justice, *Committee Hansard*, 15 April 2008, p. 18.

2 Council for the National Interest, Western Australian Committee, *Submission 8*, p. 1.

3 Croker Island Stolen Generation People, *Submission 37*, p. 2; NSW National Sorry Day Committee, *Submission 46*, pp 2 & 6. Only one submission suggested, albeit indirectly, that focus on compensation for the Indigenous stolen generation is misguided given that there were other non-Indigenous members of the Australian population who suffered similar plights (such as those children who were sent to Australia from the United Kingdom in the nineteenth century). This submission argued that the scope of the Bill's compensation scheme should be extended to include all such 'stolen generations': Mr Peter Gerry, *Submission 9*.

amendment before it could be enacted, so as to remove inaccuracies, inconsistencies and unnecessary confusion as to its intended operation'.[4]

3.4 This chapter will consider some of the main issues raised during the course of the committee's inquiry with respect to the payment of compensation to the stolen generation, including:

- underlying legal and moral rationales for compensation;
- implications of the Federal Government's apology;
- compensation as a preferable alternative to litigation;
- appropriate method and amount of compensation payment;
- appropriate recipients of compensation;
- importance of holistic reparations measures for the stolen generation;
- relevant domestic and international models of reparation; and
- jurisdictional issues relating to payment of compensation.

Legal and moral rationales for compensation

3.5 The committee received evidence arguing that there are legal, social and moral obligations to provide compensation to the stolen generation. Some of these arguments are set out below.

Obligations under international law

3.6 Some submissions and witnesses pointed to the relevance of Australia's obligations under international law in relation to reparation for human rights infringements.

3.7 As the Australian Lawyers Alliance explained:

> The right to reparation for abuses of human rights is a recognised principle in international law. Reparations include restitution, monetary compensation, recognition, rehabilitation and guarantees that abuses will not occur again.
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> Articles within the International Covenant on Civil and Political Rights (ICCPR), the International [Convention on the Elimination] of All Forms of Racial Discrimination (ICERD), the Convention on the Rights of the Child (CROC) and the Convention Against All Forms of Torture (CAT) all hold that where an individual's human rights have been violated, they are entitled to an adequate and effective remedy.[5]

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4 Mr Alan N Hall AM, retired former Deputy President of the Administrative Appeals Tribunal (Cth), *Submission 85*, p. 1.

5 *Submission 67*, pp 4-5.

3.8 The Sydney Centre for International Law (SCIL) articulated specific well-established international rights which may be relevant in the context of the stolen generation and, if violated, would require effective remedy by Australia. Such rights include infringements of rights to family life (Article 23, ICCPR), culture/minority rights (Article 27, ICCPR), liberty and security of person (Article 9, ICCPR), equal protection before the law (Article 26, ICCPR), a fair hearing (Article 14, ICCPR), and education (Article 18, ICCPR); as well as infringements of the prohibition on racial discrimination (Article 26, ICCPR; ICERD), children's rights (CROC), freedom from arbitrary interference with privacy, family and the home (Article 17, ICCPR), and freedom from cruel, inhuman or degrading treatment (Article 7, ICCPR; CAT).[6] At the Sydney hearing, Dr Ben Saul from the SCIL also drew the committee's attention to the United Nations Convention on the Prevention and Punishment of the Crime of Genocide of 1948 in this context.[7]

3.9 The SCIL noted further the role of international best practice:

> (T)he emergent international law regime on the rights of indigenous people (2007 UN Declaration on the Rights of Indigenous Peoples) and on the reconceptualization of indigenous peoples as legal "peoples" entitled to (internal) self-determination should also influence the measure of compensation (although such emergent regimes were likely not applicable, at law, at the time of child removals). In particular, the Declaration on the Rights of Indigenous Peoples recognises a duty to make reparations to indigenous peoples whose individual *and collective* rights have been infringed.[8]

3.10 In a similar vein, the Australian Lawyers Alliance pointed out that reparation for human rights abuses has consistently been affirmed within international courts and tribunals, arguably making it part of international customary law. Moreover, the United Nations has supported reparation for human rights abuses and in 1989 commissioned a report on the right to restitution.[9]

3.11 According to the SCIL, the Federal Government's apology, despite being welcome, is not sufficient to discharge the obligation to make full reparation at international law and does not take the place of the 'pressing need' to also provide monetary compensation to members of the stolen generation.[10] Dr Saul acknowledged that sometimes an apology is enough on its own – 'if, for example, the material harm done is very slight or insignificant, [but] that is plainly not the case here'.[11]

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6 *Submission 57*, p. 1.

7 *Committee Hansard*, 16 April 2008, pp 11 and 15.

8 *Submission 57*, p. 1.

9 *Submission 67*, p. 5.

10 *Submission 57*, p. 2.

11 *Committee Hansard*, 16 April 2008, p. 11.

3.12 Dr Saul made a further pertinent argument at the Sydney hearing:

> (C)ompensation is routinely paid elsewhere for human rights violations under national bills of rights but also under, for example, the European Convention on Human Rights and the inter-American system, so it is an experience which is par for the course elsewhere, not only in this context but also in terms of working out the quantum of damages and so forth.[12]

Social and moral obligations

3.13 Many submissions and witnesses argued that governments are under social and moral obligations to provide reparation and compensation to the stolen generation.

3.14 For example, at the Darwin hearing, Mrs Kathleen Mills from the Northern Territory Stolen Generations Aboriginal Corporation argued that reparation and compensation is 'a humanitarian and moral obligation' which 'should be measured not by speculative value but by careful deliberation, based on compassionate grounds' and recognising 'the seriousness of the hurt and harm as a common experience'.[13]

3.15 Ms Jacqueline Katona, representing the Danila Dilba Health Service, emphasised the unique nature of the circumstances of the stolen generation. She also argued that the policies of forced removal are a serious blight on Australia's history and have had enduring social implications:

> [There is] the need to address the loss and damages of Aboriginal people under those specific policies. There were no other pieces of legislation that brought about this type of harm and loss either to other Aboriginal people or to non-Aboriginal people. Where non-Aboriginal people were harmed as a result of state care, there are now compensation schemes which are available. There needs to be a recognition that the intent of the legislation was to remove cultural identity. This has been the source of a different set of damages and losses experienced by Aboriginal people. It established social constructs and a discourse in this country which are still prevalent…
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> I do not want to be cliched, but this is a stain on Australia's history. It is a stain which is still very obvious. We all have to come to terms with Australia's history. This cannot be simply Aboriginal history. This is a history which has affected us all.[14]

3.16 In a similar vein, Dr Ian Robinson from the Bringing Them Home Committee (WA) stressed that compensation payments must be sufficiently commensurate with the immense trauma suffered by the stolen generation which is still evident today:

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12 *Committee Hansard*, 16 April 2008, p. 11.

13 *Committee Hansard*, 15 April 2008, p. 10.

14 *Committee Hansard*, 15 April 2008, p. 31.

> We are not talking just about disadvantage; we are talking about a traumatised population. They display enormous resilience, but the sensitivity and nature of it are often obscured.[15]

3.17 Ms Helen Moran from the National Sorry Day Committee also spoke of the deep and lasting effect of the removal policies:

> To have an apology and to implement the obligatory closing of the gap in life expectancy, health, employment and education between Indigenous and non-Indigenous people is well and good. They are both a necessity and the outstanding responsibility of the Australian government, as is the requirement to make reparations and then install monetary compensation.
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> …Saying sorry gives back something, but there is something bigger, incomprehensible, that runs so deep in, to the very core of, individuals who were taken away from their families. Words do not adequately respond to the need for this to be attended to: the filling of the seemingly bottomless ravine existing in each stolen generation member's soul. The healing of these people as individuals and as a group needs something more tangible to compensate for their inability to ever replace or fully repair the loss, the damage and the pain. This is why there has to be restitution, why there has to be compensation, why there needs to be an audit and monitoring of the *Bringing them home* report, recommendation by recommendation—why there has to be a monetary compensation.[16]

3.18 Anglicare Australia focussed on the ethical obligation to provide reparation, arguing that, for the Anglican Church, 'operative principles are as much moral as they are jurisprudential; and…the relevant moral imperative over-rides any purely legalistic considerations'. Further, '(t)here is…a broader state responsibility than that limited by the notion of strict liability or unhelpfully adumbrated by that of intergenerational guilt'.[17]

3.19 The Edmund Rice Institute for Social Justice put forward its argument for action in a slightly different way:

> However platitudinous the observation, this is a country of remarkable wealth, with significant annual Governmental surpluses for more than a decade. In this setting, it is not flamboyant to rhetorically inquire: *if not now, when?* Australia's current wealth is substantially built upon Aboriginal land and labour – yet this wealth eludes Aboriginal people themselves.[18]

3.20 Reconciliation Victoria emphasised the inconsistency between, on the one hand, the treatment of the stolen generation and, on the other, those affected by past government policies to whom compensation has been awarded:

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15 *Committee Hansard*, 15 April 2008, p. 21.

16 *Committee Hansard*, 15 April 2008, p. 15.

17 *Submission 65*, p. 2.

18 *Submission 68*, p. 4.

> Compensation is routinely paid by Governments when a wrong has been committed or where unjust policies inflict unnecessary trauma. (Ie, the case of Cornelia Rau, victims of crime, returned solders etc.) The attempted destruction of Indigenous peoples was far more systematic, long lasting and cruel than any other committed against people in Australia's history, and these acts were committed against Indigenous people by the authority of government.[19]

3.21 Australians for Native Title and Reconciliation (ANTaR) noted specifically that, in 2000, the Federal Government committed ex gratia payments of $25,000 to each Australian Defence Force prisoner of war held by the Japanese, civilian internees and detainees, or their surviving spouses. Therefore, '(i)t seems incongruous that a similar payment not be made available to Australian citizens for their suffering as a result of policies introduced by the governments of this country'.[20]

Implications of the Federal Government's apology

3.22 During the course of the inquiry, the committee questioned various witnesses about the implications of the Federal Government's apology, in particular the likelihood that it would trigger a floodgate of compensation claims. Overall, witnesses did not consider that the Federal Government's apology would, in and of itself, result in an increased number of legal claims.

3.23 Mr Darren Dick from the Human Rights and Equal Opportunity Commission (HREOC) offered the following view about the legal implications of the apology:

> There is a useful passage in the decision of Cubillo and Gunner that I would refer you to. This was one of the stolen generation cases. Justice O'Loughlin addressed this point specifically: if there had been a federal apology, what would the implications of it be? …(I)n essence what he said is that because of the principles of parliamentary privilege and so forth any apology in the parliament is of no legal effect…
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> The other thing with an apology is that it is a general acknowledgement of an overall practice. It is not a specific acknowledgement of a particular act. It is not like someone has got up and admitted that they murdered somebody, which might be a little bit of a different category in terms of the level of evidence in that sense. So it does not have a direct implication in terms of being able to substantiate any sort of legal implication. As people have said, it may well inspire people or generate their interest in pursuing some sort of action, but if such actions were to be sustained, they would be found to be entitled to that based on the circumstances of their case, not based on the fact that there was an apology.[21]

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19 *Submission 6*, p. 2.

20 *Submission 73*, p. 5.

21 *Committee Hansard*, 16 April 2008, p. 21.

3.24 Drs Saul and Anthony from the SCIL expressed similar views. Dr Saul stated that the apology 'is plainly not an admission of specific legal liability in particular cases'; he also noted that he was not aware of any common law cases where an apology has been a basis for grounding liability.[22]

3.25 Dr Anthony distinguished between the apology, on the one hand, and the potential for legal recourse, on the other:

> (W)hat the apology did was recognise that the policy was wrong or unjust. It did not say that those administering the policy were acting unlawfully. The apology was not about the legal implementation. So I think, very rightly, this bill addresses what the apology raised, which was that the policy was wrong and that there should now be some type of compensation for the wrong policy. The legal avenues are a completely different matter. For instance, in the Bruce Trevorrow case, those who were implementing the policy acted unlawfully and therefore he was liable for compensation.[23]

3.26 Associate Professor Andrea Durbach from the Australian Human Rights Centre (AHRC) told the committee that the Public Interest Advocacy Centre (PIAC) had previously sought legal advice from senior counsel about the impact of an apology to the stolen generation, and whether any apology might assume liability on behalf of the government in relation to potential claims. While unable to divulge its contents, Associate Professor Durbach informed the committee that:

> The advice from very significant senior counsel in Australia and from one of the biggest law firms was that no liability would attach to that apology and that it would certainly not be relied on by the courts other than just an indication of a government approach at a particular time, but nothing more than that. It would not be an indication of taking responsibility or accepting responsibility for past acts.[24]

3.27 Associate Professor Durbach also told the committee that, in her opinion, the apology would not necessarily open the floodgate to litigation:

> I do not think the apology is going to trigger a floodgate of litigation at all. In fact, the Trevorrow decision came prior to the apology and that case demonstrated very much that you have to have very substantial evidence in order to get through the threshold criteria in order to establish a claim. When I was at PIAC we had many, many members of the stolen generation approach us to litigate but they actually did not do so for a number of reasons.[25]

3.28 However, Associate Professor Durbach conceded that some members of the stolen generation may still view litigation as their only feasible option:

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22 *Committee Hansard*, 16 April 2008, p. 16.

23 *Committee Hansard*, 16 April 2008, p. 16.

24 *Committee Hansard*, 16 April 2008, p. 6.

25 *Committee Hansard*, 16 April 2008, p. 4.

> People still feel that they have not been heard, they still have not been acknowledged, and ultimately, in the absence of anything else, litigation becomes the last resort option. I think there is a push from within the community to keep pursuing these [options], difficult as they are.[26]

3.29 Ms Laura Thomas from PIAC acquiesced:

> I do not think there is any legal reason why the apology would open the floodgates, but it has energised the Aboriginal community and perhaps the legal community to a certain extent as well. But the Trevorrow decision has been far more important in energising a lot of Indigenous people to want to follow that litigation path. We certainly get inquiries about it all the time and we know that in other states—Victoria, South Australia and Western Australia—there are a lot of people who would like to pursue litigation in spite of all the difficulties that are involved.[27]

3.30 Ms Anna Cody from the Kingsford Legal Centre argued that the apology 'does not impact legally on people's capacity to bring claims'; that is, 'it does not add to the strength of their claim'. Rather, the apology serves as 'a symbol, and it is an encouragement on a symbolic level rather than on the legal level'.[28] Ms Cody pointed out that the apologies given by each of the state and territory parliaments have had no impact on the way subsequent cases have been run.[29]

Compensation as a preferable alternative to litigation

3.31 A large number of submissions and witnesses supported the notion of a non-adversarial compensation scheme, such as that proposed in the Bill, as a far preferable alternative to litigation.

3.32 In Anglicare Australia's view, a compensation scheme would obviate the need for further individual common law claims:

> [It] would have several benefits, not least removing the awkward prospect of governments being forced to defend the policies of its predecessors *after* it has issued a formal apology for those very policies. It would also, of course, save money that would otherwise be spent on legal process and lawyers' fees.[30]

3.33 The Australian Lawyers Alliance noted the difficulty for members of the stolen generation to receive just compensation based on common law actions:

> Bringing a common law action requires significant evidence to be gathered, is likely to incur substantial legal costs and is frequently characterised by a

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26 *Committee Hansard*, 16 April 2008, p. 4.

27 *Committee Hansard*, 16 April 2008, pp 4-5.

28 *Committee Hansard*, 16 April 2008, p. 16.

29 *Committee Hansard*, 16 April 2008, p. 16.

30 *Submission 65*, p. 2.

> drawn out and traumatic experience for the claimant, with no guarantee of success. A federal compensation scheme would allow those parties who suffered as a result of child removal policies to receive compensation quickly, easily and without unnecessary legal complication.[31]

3.34 Dr Thalia Anthony from the SCIL noted the enormous costs involved in the Trevorrow case and the flow-on effects of the case itself:

> We saw last year in the Trevorrow case against the South Australian government enormous legal costs accrue for both the plaintiff and the South Australian government. Millions of dollars were spent on legal costs alone in litigation that took over 10 years to prepare. This case is now the subject of an appeal to the full court in South Australia.
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> In the end, Bruce Trevorrow was awarded $700,000, including interest, but this amount of money came after he had endured enormous psychological and emotional trauma in the process. It took into account his financial loss, his psychological loss and his cultural loss as a result of the removal policies. In the wake of this case, hundreds of claims have been lodged in South Australia, so the case has given rise to litigation that is going to increase the costs of litigation indefinitely.[32]

3.35 HREOC's position was that a reparations tribunal would provide the stolen generation with a 'welcome alternative' to seeking compensation through the courts. While redress for some members of the stolen generation may be possible through the court system (as demonstrated by the Trevorrow case), such experiences can be protracted, expensive and traumatic for the individuals concerned. HREOC also identified other potential problems:

> As Justice O'Loughlin noted in the case of *Cubillo* [*and Another*] *v Commonwealth* [(No. 2) [2000] FCA 1084,] litigation brought by members of the Stolen Generations will also often have a number of inbuilt barriers to success, including lack of availability of critical evidence; difficulties in establishing the required onus of proof with the passage of time; the prejudice to the defendant given the frailty, illness and death of key witnesses; and the loss and or destruction of records and material documents. In jurisdictions such as the Northern Territory, for which the Commonwealth has a specific responsibility, the High Court has also found that the scope of government's power to enact legislation permitting the removal of children makes it extremely difficult to establish that any removal was unlawful [*Kruger v Commonwealth* (1997) 190 CLR 1].[33]

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31 *Submission 67*, p. 6.

32 *Committee Hansard*, 16 April 2008, p. 11.

33 *Submission 70*, p. 4.

3.36 Accordingly, in HREOC's view, the Bill's proposed compensation scheme would provide a 'swifter, more appropriate and less damaging alternative to court processes'.[34]

3.37 Many witnesses agreed that the loss and destruction of relevant records and supporting documentation imposes a real barrier to seeking justice through the courts. For example, Ms Jacqueline Katona from the Danila Dilba Health Service told the committee that members of the stolen generation are at a distinct legal disadvantage:

> The legal system can provide no solution to their problems. It is an unjust process, because without adequate documentation—documentation which one would expect had to be kept by the state—it is impossible to bring a successful litigation to recompense for their experiences.[35]

3.38 Dr Thalia Anthony noted some other barriers to success in litigation which would make the Bill's proposed compensation scheme a far preferable alternative:

> Aside from the compensatory aspect, there are many claims that do not have a legal basis or clear causation. There are many cases that will not be able to prove a breach of statutory duty, breach of duties of care, fiduciary duties, trespass to the body or trespass to land. For these victims, the ex gratia payments that the bill recommends are highly appropriate. The reparations fund should therefore seek to address through its ex gratia payments the wrongfulness of the policies, but it should also consider a compensatory mechanism that looks at the loss accrued by individual victims. It should also consider how it would compensate the unlawful nature of some of these policies.[36]

3.39 At the Sydney hearing, Dr Saul noted that by incorporating this individualised assessment process in the Bill's proposed compensation model, it would also provide 'an incentive for claimants to opt out of continuing on the common-law route' and proceed through a more conciliatory process. This is because 'effectively you are duplicating common-law bases of liability in a tribunal but subject to much less stringent legal standards and procedures'.[37]

3.40 Some witnesses pointed out that, if a compensation scheme were established (and despite the clear obstacles in pursuing litigation), stolen generation claims through the courts would continue, but only in exceptional circumstances. As Dr Anthony explained:

> I would like to say that litigation occurs only in the most exceptional circumstances, where the loss is far greater than what a statutory scheme could accommodate. We have seen that most recently with the Trevorrow

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34 *Submission 70*, pp 4-5.

35 *Committee Hansard*, 15 April 2008, p. 29.

36 *Committee Hansard*, 16 April 2008, p. 11.

37 *Committee Hansard* , 16 April 2008, p. 13.

> case. In the end it was a case of $520,000 damages being awarded, and it shows the exceptional nature. I would think that the overwhelming majority of cases would be far better served by a tribunal…I would see the overwhelming majority taking the tribunal option but, where that is simply not sufficient to compensate for their overwhelming loss, that avenue being made available to them.[38]

3.41 Ms Anna Cody from the Kingsford Legal Centre supported this view:

> (I)t is an exceedingly difficult route to follow to go down the litigation path, and even to find out whether or not there is sufficient evidence implies quite a lot of work in terms of lawyer work and client work. I think it would be quite limited in terms of those who would continue to seek redress in the courts. The other advantage is that many people may choose to go via the tribunal because it allows them to appear before Indigenous decision makers rather than other decision makers, and it would perhaps be a less formal mechanism and allow them to tell their story in their own words rather than in a more legally-constructed way, which is required in a court proceeding.[39]

Appropriate method and amount of compensation payment

3.42 Many submissions and witnesses provided specific comments on the ex gratia payment mechanism and amount proposed by the Bill.

In-principle support for ex gratia payments

3.43 The SCIL expressed the following general view about ex gratia payments:

> On the one hand, an ex gratia payment is not the most appropriate response to forced removals, since it carries no admission or acceptance of legal liability for past wrongs. On the other hand, it is a convenient device for circumventing the evidentiary and legal difficulties involved in establishing specific legal liabilities in individual cases, which would hinder compensation in many cases.[40]

3.44 Broadly speaking, the SCIL contended that compensation payments should be commensurate to the harm suffered:

> (A)ny scheme to compensate members of the stolen generation must, at a minimum, provide for compensation to be awarded which responds to the legal harm(s) suffered in individual cases of removal. This in turn requires an individualised claims assessment process.[41]

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38 *Committee Hansard*, 16 April 2008, p. 12.

39 *Committee Hansard*, 16 April 2008, p. 12.

40 *Submission 57*, p. 3.

41 *Submission 57*, p. 2.

3.45 Dr Saul from the SCIL expressed support for 'a lump-sum payment to recognise the underlying legal and social wrongs which were done as a result of child removals'. However, Dr Saul stressed that:

> …any lump-sum payment should be supplemented by an individualised assessment process to take the remedy beyond the mere fact of recognising the taking of children to addressing the specific harms done in particular cases, whether it be sexual abuse or other particular violations of human rights.[42]

3.46 The Shoalcoast Community Legal Centre 'tentatively' supported the application of a global common experience sum, 'as this may be preferable to the complicated and inevitably subjective task of individually assessing the appropriate quantum of payment that each applicant's particular life-story is "worth"'. The common experience payment could be supplemented by an additional sum for people who experienced physical or sexual assault as a result of removal from their families.[43]

3.47 Reconciliation Victoria supported ex gratia payments and an additional amount for each year of institutionalisation, providing these amounts are negotiated with a wide range of Indigenous people.[44]

3.48 PIAC/AHRC argued that the amount of any individual monetary compensation to the stolen generation should be nominal in order to maximise available resources for broader reparations measures. As Associate Professor Andrea Durbach explained:

> What we argue is that there is a very specific experience endemic to the stolen generations that impacts the Indigenous community overall that needs to be addressed. Through the reparations tribunal model, on the one hand we are saying you do need to serve, as Senator Bartlett's bill calls for, compensation in a notional way, but what is more important is to serve the collective harm of that community through allowing people to come before the reparations tribunal to shape and design measures of reparation that go beyond individual monetary compensation and actually address the collective and long-term needs of that community. Whether it is through commemorative projects or education or healing centres, that is for the community to design with that tribunal. We see that as an opportunity to try to redress the bigger questions.[45]

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42 *Committee Hansard*, 16 April 2008, p. 11.

43 *Submission 15*, p. 4.

44 *Submission 6*, p. 3.

45 *Committee Hansard*, 16 April 2008, p. 5.

Preference for 'no fault' compensation scheme

3.49 Presenting a contrary position on the issue of ex gratia payments, the Castan Centre for Human Rights Law endorsed the establishment of a 'no fault' compensation scheme for the stolen generation (along the lines of other 'no fault' schemes, such as Victoria's Transport Accident Scheme):

> Obliging those who have suffered harm at the hands of past governments to seek recompense through a court system that requires extensive resources, patience, a mosaic of often unattainable evidence and immense personal integrity for a *chance* of compensation is at odds with the content of the sincere national apology by Parliament in February 2008. A 'no fault' compensation scheme will help provide justice and a measure of recognition more effectively than any other means possible and avoids the further humiliation of Indigenous claimants trying and failing to obtain justice through an adversarial legal process.
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> A 'no fault' compensation scheme, in contrast to a system of 'ex gratia' payments, by necessity creates an obligation for the government to compensate when an applicant meets the requisite criteria. 'Ex gratia' payments are not satisfactory because they create no ongoing obligation to meet the needs of the applicant.[46]

Adequacy of compensation amounts

3.50 While some submissions and witnesses considered that the Bill's proposed compensation amounts are reasonable and appropriate to recognise the wrongfulness of removal of Indigenous children from their families,[47] the majority of submissions and witnesses who commented on this issue argued that the compensation amounts in the Bill are vastly inadequate.[48]

Trevorrow case – a benchmark?

3.51 The Aboriginal and Torres Strait Islander Legal Service (Qld South) recognised that it is difficult to determine fair amounts of compensation:

> While it is true that no amount of money can compensate for the injury these people have suffered, the law does attempt to determine a fair and realistic amount. The Courts do this when determining "common law" claims and legislatures do this in setting a scale of compensation in workers compensation legislation. For this reason the 2007 South Australian Supreme Court decision of Trevorrow is instructive. While we do not

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46 *Submission 22*, p. 1.

47 For example, see Mr Julian Burnside QC, *Submission 28*, p. 2; Sydney Centre for International Law, *Submission 57*, p. 3.

48 For example, see Reconciliation for Western Sydney, *Submission 3*, p. 1; Castan Centre for Human Rights Law, *Submission 22*, p. 2.

> suggest that that quantum is to be the level of compensation in the Bill, it sets a benchmark.[49]

3.52 Others also drew comparisons with the Trevorrow case in South Australia:

> There has been legal recognition that the circumstances that Bruce Trevorrow had lived through were compensable and in fact compensable to the value that they were, so to now consider the amount reflected in the current draft bill would in fact cause more pain, I think. It would be a dismissal.[50]

3.53 The Victorian Aboriginal Child Care Agency also made a salient point in this regard, noting that the proposed compensation amounts in the Bill fall far short of the amount awarded to Mr Trevorrow:

> The Senate or the architects of the Bill need to make clear their rationale for arriving at the sum being proposed, particularly how the amount referred to in the Bill can be reconciled with the level of compensation offered by a Court that is likely to have stricter and higher standards of proof and evidence.[51]

Challenges in determining appropriate compensation amounts

3.54 HREOC's submission noted the difficulty in attempting to place a monetary value on the grief and suffering experienced by members of the stolen generation. It provided no view on the appropriateness of the amount proposed in the Bill 'on the basis that this amount should be determined in consultation with Stolen Generations members and their organisations'.[52] However, HREOC noted that the common experience amount of $20,000 proposed in the Bill is 'modest' compared to existing redress schemes in various states relating to, for example, individuals who were abused while in state care.[53]

3.55 At the Sydney hearing, Mr Darren Dick from HREOC reiterated that payments of $20,000 under a national compensation scheme would not represent a 'substantial' financial undertaking by government[54] but that such payments would serve an important purpose:

> A minimum payment gives people access to justice at the end of the day. It ensures that people will receive some sort of recompense for and acknowledgement of their experience. That enables them to do something. It does not necessarily change their life, because it is not a windfall as such.

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49 *Submission 66*, p. 1.

50 Ms Jacqueline Katona, Danila Dilba Health Service, *Committee Hansard*, 15 April 2008, p. 31.

51 *Submission 33*, p. 3.

52 *Submission 70*, p. 6.

53 *Submission 70*, p. 6.

54 *Committee Hansard*, 16 April 2008, p. 20.

> In this bill, you are talking about $20,000. That is the sort of amount with which a family that has been reunited can go on a holiday together or a range of other things, so it can make a practical difference in people's lives. Otherwise, you enter into a very difficult evidentiary situation where there are a range of different criteria as to why someone is entitled to this or that. Part of the bill talks about how many years you were institutionalised for and so on. We think that a much simpler model is to say: 'We acknowledge that what happened was wrong. It wasn't fair what happened to you. Here's a payment that basically acknowledges that experience.'[55]

3.56 The Danila Dilba Health Service put forward compensation amounts based on the value of a family home in today's market as it considered that this 'fairly represents the economic legacy that people are struggling to achieve these days'.[56]

3.57 Mrs Kathleen Mills from Northern Territory Stolen Generations Aboriginal Corporation cautioned against establishing speculative amounts of compensation:

> I am asking that no less is considered than our entitlement because of the harm and crimes against humanity. I think that has to be the measure, not anybody speculating about a figure. It has to be based on common experience, which is a thread from the apology day…There is no doubt that it happened, and I think we have to move on. If there are more serious allegations, they should go to the tribunal, but let us stand up and recognise the harm, hurt and trauma that these people have suffered all their years. We are talking about people in their nineties, not their eighties, still waiting for some sort of justice and some recognition—and we have only just got recognition through the apology.
>
> It has to be looked at properly, with nothing less than the requirements, because compensation is a legal requirement of any nation in the world. It is legal, but it has to be proper and researched. You have to look at all the victims' files—at the harm and the hurt—and whatever it takes to deliberate and make an appropriate submission to the people. It has to be done properly, not just with people plucking out a figure they think might suffice.[57]

3.58 However, Mrs Mills recognised the difficulties in determining appropriate amounts of compensation:

> How do you pay for people's loss? How can you put a figure to it? I cannot, but I think we have to be compassionate and we have to really research it and make proper amends to these people. It will never replace the hurt and the harm. All this today is regenerating the trauma that has been oppressed for years and years, but let us try and come together as a nation, realise what has happened and be kinder to one another. I do not like the fact that we have to prove once more without the evidence that we need to prove.

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55 *Committee Hansard*, 16 April 2008, p. 21.

56 Ms Jacqueline Katona, *Committee Hansard*, 15 April 2008, p. 31.

57 *Committee Hansard*, 15 April 2008, p. 11.

> There is nothing. People got new names when they came here. How do they look back on their files when they are not there?[58]

3.59 The ACT Chief Minister also raised a pertinent point regarding the basis on which the compensation amounts in the Bill were developed. While noting that the amounts are consistent with the levels of payments under the Tasmanian scheme, he submitted that:

> It would be helpful to understand on what basis the compensation figure was developed (noting for example similar schemes in other states relating to compensation for abuse in care). This monetary compensation evaluation may be problematic given that it is limited to one component which will account for racial discrimination, pain and suffering, abuse, disruption of family life, labour exploitation, economic loss, etc and payment of each year of institutionalisation. The ex gratia compensation is at the discretion of the Government (subject to parliamentary authorisation of appropriations) and presumably once this scheme is accessed, no further claims can be maintained, eg via the legal system. Some people are likely to feel they could achieve a better result via the court system, especially given the SA case, and it is assumed this avenue would remain an option.[59]

Appropriate recipients of compensation

3.60 Several witnesses informed the committee that the forced removal policies have had an impact on multiple generations of Indigenous people.

3.61 At the Darwin hearing, Ms Cynthia Sariago from the Northern Territory Stolen Generations Aboriginal Corporation explained that there are stolen generation 'tiers':

> You have, firstly, the mothers of those removed. Then you have the children who were removed. Compensation is very important to these people because they are elders. No service that you can give to them today is going to be adequate, because they are old. For them to enjoy themselves and to do what they would like, I think the monetary compensation is very important. Then you come to the institutionalised children, who were placed in institutions after parents gave up their children under duress. There should be some sort of monetary compensation for them. Then you have children like me, who were placed into the foster care system of homes, which has had intergenerational effects which have been handed down to our children.[60]

3.62 Ms Sariago argued that elderly members of the stolen generation must be given priority in any payment of compensation:

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58 *Committee Hansard*, 15 April 2008, p. 11.

59 *Submission 78*, p. 3.

60 *Committee Hansard*, 15 April 2008, p. 4.

> I think we should be giving them some sort of comfort in their later years—whether it be…$1 million per head or $450,000 per head. It all depends. I think there should be a fund set up where we are giving priority to our elders and then looking at the other issues that we need to deal with.[61]

3.63 Ms Sariago told the committee that all of these generations should be compensated:

> I have children who are now suffering the intergenerational effects of the stolen generations. Drug abuse is rife. Who is going to help them? We have children in jail who should not be there. Why? Because they are part of the stolen generation and they are Aboriginal. Look at the problem and solve it in realistic ways, but compensation must be prioritised to our first generation—and to the deceased as well.[62]

3.64 At the Sydney hearing, Ms Sandra Newham from the New South Wales Sorry Day Committee also drew the committee's attention to the intergenerational effects of the removal policies:

> It is not as though we can deal with one generation by offering some sort of compensation without looking at the ongoing effects for the generations thereafter. Those of us who have been fortunate enough to have families, to have parents and siblings, understand that much of what we have been taught and learnt has come from having that background. But, if we are talking about stolen generation members, who were institutionalised or in foster or adoptive homes, where did they learn to be parents? Where did they learn to interact with siblings, if they were separated from their siblings? That is important. As mentioned in the *Bringing them home* report, the transgenerational effects of the removal policies must be recognised and addressed.[63]

3.65 Ms Helen Moran from the National Sorry Day Committee spoke about the special needs of the stolen generations, as distinct from the needs of the broader Indigenous population:

> Children have been taken away under the forced removal policy for 100 years. We are looking at some eight generations. The transgenerational or intergenerational effect of this on the whole of Indigenous Australia needs to go to the beginning of this whole thing. It has brought about a degree of the dysfunction that we are dealing with in Aboriginal Australia. The stolen generation has a specific need that is separate from the additional needs that need to be addressed for the wider Aboriginal population. The stolen generation can be embraced by closing the gap and attending to some of

61 *Committee Hansard*, 15 April 2008, p. 7.

62 *Committee Hansard*, 15 April 2008, p. 7.

63 *Committee Hansard*, 16 April 2008, p. 28.

> their needs—closing the gap and embracing what is necessary for the healing of the stolen generation.[64]

3.66 With particular reference to the Bill, some submissions raised a pertinent point about its focus on 'institutionalisation' as a condition precedent to payment of additional compensation. They argued that the term 'institutionalisation' is too narrow and could exclude consideration of those who were adopted or fostered out (or otherwise removed).[65]

Importance of holistic reparations measures

3.67 Many submissions and witnesses stressed the importance of a holistic approach to reparation for the stolen generation, over and above any payment of compensation. However, these submissions and witnesses were adamant that practical initiatives aimed at the wider Indigenous community do not adequately address the specific needs of members of the stolen generation.

Non-monetary reparations

3.68 At the Sydney hearing, Associate Processor Andrea Durbach from the AHRC told the committee that the Bill only addresses one component of the measures of reparation and, in doing so:

> …retreats significantly from the commitment clearly articulated by the Senate committee in its 2000 report…(W)e argue that a failure to implement that commitment by way of establishing a stolen generations reparations tribunal ignores Australia's obligations to repair the enduring social, cultural and economic damage particularly endemic to the stolen generations experience. In failing to honour that commitment, it also suspends and accordingly prolongs the critical healing of stolen generations communities and undermines any real prospect of effective reconciliation. It would also continue to ignore key recommendations of the *Bringing them home* report and, instead, potentially would create a piecemeal, sporadic and short-term administrative mechanism of redress, as opposed to a more comprehensive and considered long-term strategy of reparations based on principles of rehabilitation, restitution and guarantees against repetition. It would also fail, in our view, to target the range of expressed and distinctive needs of the stolen generations both structurally, in terms of process, and substantively, in terms of its content.[66]

3.69 Ms Helen Moran from the National Sorry Day Committee stressed the importance of non-monetary reparation:

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64 *Committee Hansard*, 16 April 2008, p. 16.

65 See, for example, Ms Helen Moran, *Submission 19*, p. 1; Victorian Aboriginal Child Care Agency, *Submission 33*, p. 3; Stolen Generations Victoria, *Submission 34*, p. 3.

66 *Committee Hansard*, 16 April 2008, p. 1.

> It is our view that those aspects of the bill involving non-monetary compensation must be given attention prior to the consideration of monetary compensation, as the former will enhance the latter. Taking the name of the bill, for example, the term 'compensation' is, for many people, about money first when in fact the rehabilitative and restitutional aspects of reparations are key, and we would encourage this inquiry to consider this point and include 'reparations' in the name of the bill.[67]

3.70 The committee also heard that there are members of the stolen generation who consider that wider services are of greater importance than any payment of compensation. For example, Mr Jim Morrison from the Bringing Them Home Committee (WA) told the committee that:

> We have had members of the stolen generations say to us, 'The apology is enough for me; I can get on with my life.' So there are people out there who are not interested in the dollars, but there are people out there who are interested in services working closer together to provide better services for Aboriginal people who are disadvantaged. We welcome the bipartisanship. We also think that service providers and governments should be working closer together. So compensation is not a No. 1 priority for a lot of Aboriginal people who were removed, but certainly better services are.[68]

3.71 PIAC stressed the importance of a holistic approach in the development of reparations strategies for the stolen generation. While acknowledging that an award of appropriate monetary redress would offer recognition of the gravity of harm suffered by members of the stolen generation (as well as some immediate and possibly future financial support), PIAC also asserted that:

> …it is critical that a mechanism distinctly shaped by the needs of the Stolen Generations is put in place to service the dual objectives of redressing past harm and creating measures of reparation that offer enduring social, cultural and economic benefits to those affected.[69]

3.72 Associate Professor Durbach from the AHRC elaborated on the importance of a holistic approach:

> Certainly in the national consultations with members of the stolen generations, which are encapsulated in a lot of the reports, particularly the PIAC report called *Moving forward—achieving reparations*, there was exactly that consensus that monetary compensation was a significant and important contribution to make. But I think people felt that overall what they were seeking was an acknowledgment of the long-term harm of this experience and that that should be recognised beyond just money. Some members of the stolen generations felt that the provision of money would be divisive, that you can never compensate that kind of harm, which is why

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67 *Committee Hansard*, 15 April 2008, p. 14.

68 *Committee Hansard*, 15 April 2008, p. 22.

69 *Submission 69*, p. 1.

> we shifted our approach to a more collective and enduring strategy which would allow for people to come before a tribunal to create measures of reparation which they felt really addressed their specific needs.
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> …I think there was a desire absolutely that monetary compensation, as the van Boven principle suggests, is one important and significant aspect of reparations, but it does not deal with the whole picture and in fact it falls quite short of dealing with what Indigenous concerns were, certainly through our consultation process.[70]

3.73 Reconciliation Victoria also noted that monetary compensation is not sufficient on its own:

> Monetary compensation is a necessary step towards acknowledging and redressing past injustice. It is not the only step. Systemic injustices require systemic solutions, and while individuals have a right to compensation for individual wrongs, as a society we must find ways to heal the social problems created by these injustices. The recommendations of the 1997 Bringing Them Home report provide a good framework for such healing and Reconciliation Victoria urges the committee to look at ways that all 54 of these recommendations can be implemented as a matter of urgency.[71]

3.74 The National Sorry Day Committee agreed that compensation, while vital, is only one aspect of reparations. It argued that all components of reparations, as set out in the *Bringing them home* report, are 'inextricably linked, and all are required if there is to be an effective model of healing' for those affected by the forcible separation policies. Further, all the recommendations in the *Bringing them home* report, 'need to be implemented, fully and holistically and with attention to additional needs identified over the past decade'.[72]

3.75 The SCIL also asserted that there is a need for wider reparations initiatives and suggested a number of possible measures that might be considered, including:

- a national body to implement 'healing' initiatives, perhaps modelled on the Aboriginal Healing Foundation established by the Canadian Government;
- funded programs to support family reunions in each state and territory; and
- a mechanism that empowers Indigenous people to air their grievances and helps play a role in moving forward, possibly based on the Truth and Reconciliation Commissions in South Africa.[73]

3.76 The Ngarrindjeri Regional Authority submitted a similar idea for an Aboriginal healing body:

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70 *Committee Hansard*, 16 April 2008, p. 3.

71 *Submission 6*, p. 4.

72 *Submission 43a*, p. 2.

73 *Submission 57*, p. 4.

> The Commonwealth [should] create a not for profit institution called the 'Stolen Generations of Aboriginal Children Healing Foundation'…to support the objective of addressing the healing needs of Aboriginal People affected by the Stolen Generations of Aboriginal Children, including the intergenerational impacts, by supporting holistic and community-based healing to address needs of individuals, families and communities.[74]

3.77 The Telethon Institute for Child Health Research (TICHR) also strongly supported the formation of a healing foundation, possibly based on the Canadian model:

> We believe this Inquiry should closely examine the Government of Canada's "Aboriginal Healing Foundation" (AHF) model. A significant investment in the creation and on-going support of Indigenous healing centres and other community initiated activities to promote wellness, could create a restorative vision for the Aboriginal peoples in Australia. As such, we strongly recommend establishing a Healing Foundation for Indigenous Australians. It would strengthen the Australian and State Government's existing commitments to working in partnership with Aboriginal people and communities in overcoming Indigenous disadvantage.[75]

3.78 According to the TICHR, a healing foundation should support an extensive range of community healing and wellness activities, including:

- men's and women's support and healing groups;
- youth-elder community workshops and conferences;
- practical support of traditional ceremony and cultural business;
- traditional healing;
- individual counselling;
- youth leadership programs;
- family counselling;
- parenting and nutrition education; and
- supported residential options for young people.[76]

3.79 The TICHR provided the committee with a helpful explanation of the Canadian Aboriginal Healing Foundation:

> The AHF [Aboriginal Healing Foundation] was established in 1998 with an allocation of $350 million to be expended within a 10 year time frame. This was established as a result of "Gathering Strength – Canada's Aboriginal

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74 *Submission 14*, p. 4. The Aboriginal Legal Rights Movement and the Telethon Institute for Child Health Research also expressed strong support for a healing foundation: *Submission 53*, p. 6; *Submission 42*, p. 5.

75 *Submission 42*, p. 5.

76 *Submission 42*, pp 5-6.

> Action Plan", a federal strategy to renew the relationship between Aboriginal people and the Government of Canada. The Foundation is an Aboriginal-run, not-for-profit organisation funding community healing projects. Its mission is "…to encourage and support Aboriginal people in building and reinforcing sustainable healing processes that address the legacy of physical and sexual abuse in the residential school system, including inter-generational impacts"…The Foundation was given a year to set-up; 4 years to disburse the $350 million healing fund on a multi-year basis, and 5 years to monitor and evaluate the projects.[77]

3.80 Further, TICHR suggested that the findings from evaluations of the Canadian Aboriginal community healing initiatives are particularly instructive:

> The experience from Canada has shown that an average of ten years is required for a community to reach out, dismantle denial, create safety and engage participants in therapeutic healing. The Australian evidence confirms that a long term commitment is required to address the intergeneration effects of forced separation and relocation. Therefore, it is imperative that a Healing Foundation create a long term vision and establish short, medium and long term objectives.[78]

Broad initiatives no substitute for specific reparations for the stolen generation

3.81 Some witnesses were critical of the Federal Government's continued emphasis on providing practical initiatives to overcome Indigenous disadvantage in a general sense, rather than treating the issue of reparation for the stolen generation separately and specifically.

3.82 For example, at the Sydney hearing, Mr Darren Dick conveyed HREOC's regret at the Federal Government's position on the issue of compensation for the stolen generation – namely that, 'rather than establishing a compensation tribunal for the stolen generations, it should divert funds to what it has called more practical measures of wellbeing, such as improving access to health [services] and education'.[79] In HREOC's view, since the Federal Government has an obligation to ensure basic services and opportunities for all of its citizens (whether Indigenous or not), the provision of such services should not be regarded as an alternative option to compensation.[80]

3.83 Mr Dick articulated the importance of establishing particular reparations measures for the stolen generation:

> Reparations for the stolen generations are not meant to redress a lack of services in Indigenous communities. Their purpose is to meaningfully

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77 *Submission 42*, p. 4.

78 *Submission 42*, p. 5.

79 *Committee Hansard*, 16 April 2008, p. 17.

80 *Committee Hansard*, 16 April 2008, p. 17.

> acknowledge that the removal of children from their families and communities was an abuse of human rights and to provide a range of redress options, including financial compensation. HREOC believes that the framework proposed by the bill before the committee today represents an opportunity for the government to address the unfinished business of the *Bringing them home* report. For that reason, the commission's written submission supports the bill. In particular, HREOC welcomes the recognition of culturally appropriate mechanisms within the working of the proposed tribunal and the mandated involvement of Indigenous people in service delivery. However, on issues regarding the specific quantum of damages to be awarded, HREOC in its submission has urged that there be consultations with stolen generations organisations to determine the appropriateness of that.[81]

3.84 Ms Laura Thomas from PIAC concurred with this view:

> (T)he stolen generations have to be seen separately and the experience that they have had has to be seen separately from Indigenous disadvantage broadly. So this is about justice—providing reparation for the harm that they suffered—and also, because reparation packages are designed to fulfil people's needs, which could be health and counselling, there is an element to which that might satisfy the provisions of services which we would otherwise be wanting to provide to all Australians, including Indigenous Australians. Beyond that, we would say that the Closing the Gap initiative and those types of initiatives to do with health and education go to Indigenous people's human rights. That is completely separate to the stolen generations' issue, in my view. I would add that I think that it is a false assumption to say, 'If we provide compensation or reparations to the stolen generations, that money has to be taken away from providing services to Indigenous people more broadly.'[82]

3.85 At the Darwin hearing, Ms Cynthia Sariago from the Northern Territory Stolen Generations Aboriginal Corporation emphasised the importance of providing services specifically for the stolen generation:

> Services that are badly needed on the ground can be run by stolen generation organisations for the healing of stolen generation people. We have just acquired the Link-Up program in the Top End, but we are still stuck with guidelines. We need to have more funding put into our organisations, which will deal with stolen generation people on a day-to-day basis. But, because we have to follow the criteria of the government, we need to have a healing house; we need to have a resource centre; we need to have these programs all set up and in place to help with what is happening today: suicides, drug abuse and everything. Eighty per cent of

81 *Committee Hansard*, 16 April 2008, p. 17.

82 *Committee Hansard*, 16 April 2008, p. 5.

> the Indigenous population in the Darwin urban area is made up of stolen generation families, and 80 per cent of them need the help.[83]

3.86 Ms Jacqueline Baxter and Mrs Zita Wallace from the Central Australian Stolen Generations and Families Aboriginal Corporation shared this view. They explained that, while government funding is provided for stolen generation programs, the funding is not directed specifically to members of the stolen generation themselves:

> There are organisations that are funded for stolen generation programs. They are grossly underfunded and, because they come under the health system and the money was allocated 10 years ago through the health system, we need to account for the health guidelines, and we do not fit into criteria. For the last six years I have been attending Link-Up meetings, and I am the only person who is not in the health field. When I present questions nobody understands what I am talking about, and they are legitimate questions. They have to deal with me separately on the side. So we are clearly not in the right source of funding to start with.
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> …
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> ...Of all the money that has been allocated over the years—$63 million et cetera—none has come directly to the stolen generation people or to any of our corporations or anything. All of it has gone into Link-Up and health. So we have not benefited in any way from that funding.[84]

3.87 However, Mrs Wallace made a significant point regarding the appropriateness and usefulness of services for elderly members of the stolen generation. She argued that 'monetary compensation would benefit them because it would assist them personally and it would assist them to help their children, grandchildren and great-grandchildren'. She also noted the importance of giving Indigenous elders 'some kind of comfort in their old age' and stressed that the elders should be 'dealt with first' before then turning attention to services and compensation for others 'who have more time'.[85]

Relevant international and domestic models

3.88 The committee received evidence regarding certain compensation scheme models and proposals which might be usefully considered in the development of any federal compensation scheme for the stolen generation.

Canadian Indian Residential Schools compensation scheme

3.89 Some submissions and witnesses pointed to the Canadian Indian Residential Schools compensation scheme as an example of an international model which

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83 *Committee Hansard*, 15 April 2008, p. 4.

84 *Committee Hansard*, 15 April 2008, p. 4.

85 *Committee Hansard*, 15 April 2008, pp 5 & 6.

Australia might look to for guidance in establishing compensation for the stolen generation.[86] The Canadian model is a negotiated settlement that provides reparations for former residents of the 'Indian Residential Schools' system, who were forcibly removed from their homes by church and government officials and, in many cases, were subjected to severe neglect or abuse.

3.90 Under the 2006 Indian Residential Schools Settlement Agreement, approximately 6,000 former residential school students will receive, on average, $28,000 each in compensation, including $8,000 as an advance payment.[87] A total of over three billion Canadian dollars has been made available under this agreement for a variety of reparations measures.[88]

3.91 In its submission to the committee, FaHCSIA suggested that the Canadian experience of making lump sum payments to Aboriginal communities may inform consideration of any compensation payment to the stolen generation in Australia.[89]

3.92 FaHCSIA noted that a project undertaken by the Canadian Aboriginal Healing Foundation to assess the impact of compensation payments made under the settlement agreement found that many recipients used the payments to help out family, purchase needed items, clear up debts and to invest. However, on the negative side, payments in a number of cases led to increases in drug and alcohol abuse, pressure from family for money and encroachment by financial predators. The project also found that payments triggered negative residential school memories for survivors.[90]

3.93 FaHCSIA also noted that the Canadian study determined that the failure to implement other measures to reform healing, reframe health, reinforce safety and security, reverse crises, and realign capacity had contributed to compensation payments aggravating the personal circumstances of some people.[91]

3.94 However, not all the evidence received by the committee supported utilising the Canadian system as a model. The Shoalcoast Community Legal Centre warned that the Canadian compensation system may not be the most appropriate model upon which Australia should base its own system. Despite many similar factors, Australia's history differs substantially from the situation in Canada because, in Australia,

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86 For example, see Dr Susan Greer, *Submission 51*, pp 1-2; Public Interest Advocacy Centre/Australian Human Rights Centre, *Submission 69*, pp 14-15; Dr Ben Saul, Sydney Centre for International Law, *Committee Hansard*, 16 April 2008, p. 11; Ms Anna Cody, Kingsford Legal Centre, *Committee Hansard*, 16 April 2008, p. 16.

87 *Submission 83*, p. 3.

88 The Law Society of New South Wales, *Submission 79*, p. 4.

89 *Submission 83*, p. 3.

90 *Submission 83*, p. 3.

91 *Submission 83*, p. 3.

Indigenous children were subject to many different removals policies which differed in time and between jurisdictions.[92]

PIAC's proposal for a stolen generations reparations tribunal

3.95 Since 1997, PIAC has put forward a model for a stolen generations reparations tribunal.[93] At the Sydney hearing, Associate Professor Anna Durbach from the AHRC explained to the committee how the PIAC model was developed:

> [The] model tribunal was developed by reference to two significant and authoritative sources: firstly, international guidelines and principles on the right to reparations for victims of gross violations of human rights—the so-called van Boven principles—which declared that every state has a duty to adopt special measures to permit expeditious and fully effective reparations, particularly where the violation of human rights includes systematic discrimination and forcible transfer of populations; and secondly, the tribunal model was shaped via a national consultation process, which PIAC undertook over several months, consulting with over 150 members of the stolen generations, representatives from Indigenous communities and every stolen generations organisation across the country. PIAC also received 40 written submissions.[94]

3.96 In its joint submission, PIAC/AHRC informed the committee that PIAC's proposal for a stolen generation reparations tribunal sought to achieve 'the implementation of a holistic and enduring resolution…designed in accordance with the needs of potential claimants and the principles of participation and self-determination'.[95] A key aspect of the formulation of the proposal was to ensure that members of the stolen generation have an active role in shaping the nature and content of reparations processes and outcomes.[96]

3.97 In addition to the potential benefits for members of the stolen generation, PIAC/AHRC advised that the PIAC model also offered significant benefits for governments, including:

- access by those harmed by removal policies to an agreed form of compensation;
- the existence of a scheme for financing a range of reparations measures;
- the possible containment of litigation, creating finality and certainty for governments and those affected by forcible removal policies; and

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92 *Submission 15*, p. 4.

93 See Chapter 1 of this report for further details about the history of the model.

94 *Committee Hansard*, 16 April 2008, p. 1.

95 *Submission 69*, p. 8.

96 *Submission 69*, p. 8.

- an effective mechanism for providing social justice for Indigenous people.[97]

3.98 PIAC/AHRC submitted its own proposed bill for the committee's consideration, as an alternative to Senator Bartlett's Bill.[98] This bill embodied PIAC's reparations tribunal model in legislative form.[99] In a supplementary submission, PIAC/AHRC also presented its bill in the form of amendments to Senator Bartlett's Bill which would have the effect of 'converting' the Bill to the bill proposed by PIAC/AHRC.[100] The committee thanks PIAC/AHRC for its comprehensive work in developing a reparations tribunal model and an associated legal framework.

Tasmanian stolen generation compensation scheme

3.99 Reconciliation Australia noted that the Tasmanian Government's compensation scheme would provide a useful framework for other states to consider.[101]

3.100 The Stolen Generations Alliance submitted that the Tasmanian scheme appears to have worked well and could be adapted for use in other states. Importantly, the Stolen Generations Alliance also noted that 'for many of those who have received compensation under the Tasmanian scheme the formal acknowledgement of harm and of a failure of a duty of care by the government and other authorities was as powerful and as healing as the money itself'.[102]

3.101 Mr Rodney Dillon from the National Sorry Day Committee also pointed to the Tasmanian scheme as an example that might be looked at by other states. However, in his view, it is the Federal Government which has ultimate responsibility in this area:

> It would be good if other states looked at [the Tasmanian scheme], but I think this is a national thing and it needs to go back to being a Commonwealth government matter rather than a state matter. I think it needs to have a national line of consistency across all states, rather than one state offering $20,000 and the other offering $30,000. There needs to be a level playing field here for everyone. We can learn from some of the things that happened in Tasmania. In Tasmania, some of the people who missed out on it were some of the people who were most in need of it—for example, people who were in institutions. The state government has picked up on that. So, although it was a negative to start with, I think it has become a positive and it has been seen that there are other people who have missed out. They are things that we need to learn from.

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97 *Submission 69*, p. 8.

98 Stolen Generations Reparations Tribunal Bill 2008.

99 *Submission 69*, Appendix A; *Submission 69a*, Annexure A.

100 *Submission 69a*, Annexure B.

101 *Submission 76*, p. 2.

102 *Submission 25*, p. 2.

> We need to look at how to include all the people who have been involved. We need a national line that the Commonwealth has set up and the states should abide by. I have a worry in that, once the states pay the compensation, will they wipe their hands and say, 'That's the end of it,' or will there be more back-up in trying to get people back home to their country? Is the compensation there to cover everything, or is it there just to cover the wrong that was done and then we will have to look at how we address the people who have all the problems that come from the stolen generation? They are the points that are important to me and that I think should be important to the Commonwealth government and state governments to look at to go forward.[103]

Jurisdictional issues

3.102 Submissions and witnesses generally agreed that a nationally consistent and holistic approach to reparation measures for the stolen generation is preferable, and that it is appropriate for the Federal Government to take the lead on this issue.

Nationally consistent approach

3.103 The Shoalcoast Community Legal Centre submitted that '(i)f it is possible and practicable to establish a single nationwide system for reparations for the Stolen Generations, eradicating the need to lobby and convince the States and Territories to separately establish parallel schemes, then this is obviously a desirable route to take'.[104]

3.104 Reconciliation Australia submitted that the Federal Government should work with state governments to reach agreement on compensation being made available by them, with the Commonwealth taking responsibility for the Northern Territory.[105]

3.105 HREOC stressed the importance of a nationally consistent approach to the issue of compensation:

> At present, there are variations between States and Territories as to whether ex gratia payments are available, in what circumstances, and as to the level of payments. Some Stolen Generations members will be able to claim under existing schemes, but others can not. The limits of existing approaches mean that access to schemes can appear arbitrary for Stolen Generations members, with some aspects of their life experiences being recognised as compensable and other experiences not.[106]

3.106 Dr Ian Robinson from the Bringing Them Home Committee (WA) stated that his organisation 'would be very keen to see the Commonwealth apply their powers to

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103 *Committee Hansard*, 15 April 2008, pp 16-17.

104 *Submission 15*, p. 2.

105 *Submission 76*, p. 2.

106 *Submission 70*, p. 6.

standardising, regularising and bringing [the states] up to speed' on the compensation issue.[107]

3.107 HREOC suggested that the Commonwealth should engage with state and territory governments through the Council of Australian Governments (COAG) in order to develop a consistent approach:

> (A) cooperative, whole of government approach should be taken in implementing any future reparation measures; existing compensation schemes for both Indigenous and non-Indigenous people who have been subject to abuse in care, control on wages, or forcible removal have so far been initiated in some states. In HREOC's view, it is essential that any future scheme should be cooperatively funded through COAG, through different governments, to ensure consistency across state and territory jurisdictions. Such an approach would also recognise the responsibility of state governments for the past removal of children in their jurisdictions.[108]

3.108 More broadly, HREOC noted that:

> (T)he fact that you are entitled to compensation or you are not really should not depend on your residence; it should not depend on the particular state where you reside. There should be some overriding principle of justice such as the fact that you are removed provides you with an equal entitlement no matter where you live. It is about a cooperative arrangement to ensure that that happens, otherwise you will end up with injustice happening.[109]

3.109 HREOC was supportive of the Bill as a whole. In HREOC's view, the Bill provides an appropriate framework for taking forward the issue of compensation:

> What we are ultimately suggesting is that the bill pass and a secretariat be established, funded by the Commonwealth. States would then be asked or would agree to fund any liability that comes up in their jurisdictions as a result of application of their laws. In terms of the Commonwealth's responsibility in the Northern Territory, it is worth noting that there are some Commonwealth responsibilities in the ACT as well. Picking up the Northern Territory would not cover all the former federal responsibilities.
>
> …
>
> You could take legal advice as to what the best way to do it is and on whether establishing a federal scheme through federal legislation would require mirror legislation at the state level or whether it could be done on some cooperative arrangement under which the states contribute funding on the basis of the findings of the panel that is established under the federal scheme.[110]

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107 *Committee Hansard*, 15 April 2008, p. 20.

108 Mr Darren Dick, *Committee Hansard*, 16 April 2008, p. 17.

109 Mr Darren Dick, *Committee Hansard*, 16 April 2008, p. 20.

110 Mr Darren Dick, *Committee Hansard*, 16 April 2008, p. 18.

3.110 HREOC also emphasised the importance of immediate action:

> Our major concern—and this has been expressed by others as well—is that the people who this affects are on the whole quite elderly now. The lack of resolution continues to have quite a significant impact on them. The necessity is there for there to be a speedy resolution. Our position is very much a pragmatic one. We have long supported the PIAC model, but we do not want to lose the opportunity presented by this bill, which has very positive features to it and is before the parliament now.[111]

3.111 The SCIL agreed that a national and holistic approach is necessary:

> A Federal-State reparations system that is funded by all levels of government and covers all Indigenous children forcibly removed would be the most effective model for addressing the broad loss to the Stolen Generations in a holistic and well-resourced manner. The consistency of the Stolen Generations policies and ramifications across Australian jurisdictions warrants a grand response to this national tragedy.
>
> In addition, churches should be required (or encouraged) to contribute to this Fund to recognise their joint-wrongfulness in many cases.[112]

Relevance of other existing state compensation schemes

3.112 Several submissions raised concerns that the Bill does not acknowledge differing provisions in state-based compensation schemes. For example, the Bringing Them Home Committee (WA) and the Uniting Church in Australia, Synod of Western Australia submitted that Redress WA (relating to incidents of abuse while in state care) should not prevent eligible people from also applying for compensation under the Bill for removal from their families.[113]

3.113 The Premier of Western Australia submitted that members of the Western Australian stolen generation who have been compensated for child abuse in state care under the Redress WA should remain eligible for consideration and compensation under any Commonwealth scheme:

> It would be unfair for a person who has already received a payment under a State regime such as the Redress WA scheme (because it was the only scheme existing at the time) to be ineligible for a payment under the Commonwealth regime where that payment was higher, because the Commonwealth scheme was not available at the time the State application was lodged or paid. It is suggested that the legislation be amended to give people who have already received a payment from State/Territory

111 Mr Darren Dick, *Committee Hansard*, 16 April 2008, pp 18-19.

112 *Submission 57*, pp 3-4.

113 *Submission 13*, p. 1; *Submission 24*, p. 1.

> compensation regimes the opportunity to apply for the difference in amounts from the Commonwealth.[114]

3.114 Similarly, the Shoalcoast Community Legal Centre and the Castan Centre for Human Rights Law stressed the importance of clarifying that successful claims under state compensation schemes in New South Wales and Queensland for 'stolen wages', or under more general state-based schemes (such as the New South Wales victims' compensation scheme), would not preclude people from making claims under a compensation scheme established specifically for the stolen generation.[115]

Commonwealth responsibility for the Northern Territory

3.115 Some witnesses had a different perspective on the issue of jurisdictional responsibility, arguing that the Commonwealth should only have direct responsibility for providing compensation to members of the stolen generation in the Northern Territory.

3.116 For example, Ms Jacqueline Katona from the Danila Dilba Health Service told the committee that the Commonwealth Government 'is the only government which is liable to pay compensation to Aboriginal people removed in the Northern Territory'.[116] In this context, Ms Katona was critical of the Northern Territory Government for not doing enough to assist members of the stolen generation in the territory:

> The Northern Territory government have presented a number of obstacles, in fact, to the stolen generation in the Northern Territory. They are prepared, in some senses, to provide resources for these people as citizens, but the Northern Territory government will pick and choose the types of resources, where they see themselves to be relieved of any liability in relation to the Commonwealth government's actions of removal. In fact, they will not support any programs that are specifically identified for members of the stolen generation.[117]

3.117 The Croker Island Stolen Generation Group also shared this view. Ms Toni Ah-Sam argued that under a federal compensation scheme, compensation would only be payable to stolen generation members in the Northern Territory:

> We are saying that under a federal act of compensation for the stolen generation there is only one clearly identifiable group, aside from the

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114 *Submission 81*, p. 2.

115 *Submission 15*, p. 3; *Submission 22*, p. 2.

116 *Committee Hansard*, 15 April 2008, p. 30. This argument is based on the fact that, from 1911 until 1947, the laws of the Northern Territory were made by the Commonwealth. The first partly-elected Legislative Council of the Northern Territory was appointed in December 1947 and the Legislative Council was replaced by a fully-elected Legislative Assembly in 1974, but it was not until 1978 that the Northern Territory was granted self-government by the *Northern Territory (Self-Government) Act 1978* (Cth).

117 *Committee Hansard*, 15 April 2008, p. 30.

> ACT—the details of which I am unaware—that would come under the federal jurisdiction. This refers to the legal forcible removal of children and the responsibility that these children came under. The clear legal message that we are trying to bring today is that not everybody was under the jurisdiction of the Commonwealth government when these acts were enacted. Other states took on their own versions and enacted their own acts within their individual parliaments to then remove children and establish welfare after that…
>
> What we are focusing on here is that the Northern Territory is such a unique case. We were clearly the responsibility of the Commonwealth government. Hence, the Commonwealth government needs to take that next step, after showing leadership by apologising. We acknowledge that. We also acknowledge that the Howard government allocated $63 million to deal with some of the recommendations of the *Bringing them home* inquiry, but at the end of the day it is about reparations, compensation and bringing closure. We have old people who are dying at such a high rate and to settle this would mean closure for them. It would mean closure for all of us.[118]

3.118 As a result, Ms Ah-Sam noted that compensation would only be payable to a small group of people:

> The amount…is a pure, utter drop in the ocean…We feel that the government can actually pay restitution to this group, whether or not this bill can achieve it. What I am saying…is that there is room for this issue to be resolved. This committee does not need to look at this particular ordinance covering every single state. It only covers the territories, whether it be the ACT or the Northern Territory. You are not paying restitution and compensation to everybody. This is a very select, unique group of people that lived in an area that came under the jurisdiction of the Commonwealth government.[119]

3.119 In its submission, FaHCSIA addressed directly the circumstances of the Northern Territory, referring to the case of *Cubillo and Gunner* in which the High Court found that 'there was no duty of care owed by the Commonwealth'.[120]

3.120 FaHCSIA submitted further that, in the event of any future claims, the Commonwealth would respond in accordance with the *Legal Services Directions 2005*. The Legal Services Directions provide that the Commonwealth should:

- endeavour to avoid, prevent and limit the scope of legal proceedings wherever possible, including by giving consideration in all cases to alternative dispute resolution; and
- seek to settle monetary claims in accordance with legal principle and practice.[121]

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118 *Committee Hansard*, 15 April 2008, p. 26.

119 *Committee Hansard*, 15 April 2008, pp 26-27.

120 *Submission 83*, p. 3.

Committee view

3.121 The committee recognises that the vast majority of evidence received during the inquiry supported the provision of monetary compensation to the stolen generation; the committee is also mindful of strong arguments that monetary compensation is only one component of reparations.

3.122 Accordingly, the committee considers that a holistic, nationally consistent approach is the most appropriate means of addressing the specific needs of members of the stolen generation and of actively promoting an effective model of healing.

3.123 The committee notes the findings and recommendations of key reports, such as the *Bringing them home* report, and urges that they be given proper consideration, with a view to implementation at the earliest opportunity. In this context, the committee acknowledges the Federal Government's recent establishment of a working group consisting of stolen generation representatives from the National Sorry Day Committee and the Stolen Generations Alliance. The committee is of the view that this working group should also be charged with the responsibility of monitoring recommendations of the *Bringing them home* report, and providing advice to government on the implementation of outstanding recommendations in that report by the end of 2008.

3.124 Many submissions and witnesses who expressed support for the Bill during the course of the inquiry commented specifically on the viability of the Bill's proposed compensation scheme. In many instances, those submissions and witnesses provided suggestions as to how individual features of the scheme might be amended in order to improve their practical operation and effect. The committee acknowledges those efforts and expresses its gratitude for the work undertaken.

3.125 Given some of the apparent difficulties in relation to various aspects of the Bill's proposed compensation scheme, the committee is of the view that the Bill, as currently drafted, should not proceed. However, the committee regards the Bill as a useful starting point for future discussion on the issue of reparations for members of the stolen generation, and as one of a number of possible approaches to recognising the enormous trauma and hurt suffered by them. For this reason, the committee does not express a view on the detail, nor the merits, of the proposed compensation model itself. However, in stating this, the committee does not wish to detract from the intent of the Bill in acknowledging the harm endured by members of the stolen generation. The committee commends Senator Bartlett for pursuing the issues of recognition and reparations for the stolen generation, and wishes to expressly acknowledge his initiative in introducing the Bill into Parliament.

3.126 The committee is also of the view that other compensation models, such as the Canadian Indian Residential Schools scheme and PIAC's reparations tribunal model,

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121 *Submission 83*, p. 3.

might provide valuable frameworks for consideration in the development of any reparations scheme. In particular, the committee considers that a national body to implement 'healing' initiatives, such as the Aboriginal Healing Foundation established by the Canadian Government, might be usefully established in the Australian context as part of a broad strategy of providing redress. The committee believes that a National Indigenous Healing Fund should be established as a priority, as an extension of the Federal Government's 'closing the gap' initiative, comprising of services specifically directed to the stolen generation.

3.127 The committee concludes that the issue of reparations for the stolen generation needs to be addressed as a matter of urgency. This is particularly important since, as the committee heard repeatedly during the course of the inquiry, many members of the stolen generation are now elderly – to put it bluntly, time is running out to recompense them. The committee considers that governments are under an obligation to resolve this issue as a priority.

3.128 The committee regards the development of a cooperative, whole-of-government approach to implementing reparation measures as highly persuasive. As a way forward, the committee agrees that the Commonwealth should engage with state and territory governments, through COAG, to establish a cooperatively-funded national scheme that provides specific services and assistance to surviving members of the stolen generation.

Recommendation 1

3.129 The committee recommends that the Bill not proceed in its current form.

Recommendation 2

3.130 The committee recommends that the Federal Government's stolen generation working group (comprising of stolen generation representatives from the National Sorry Day Committee and the Stolen Generations Alliance) be charged with the responsibility of monitoring the implementation of the recommendations of the *Bringing them home* report, and providing advice to government on the implementation of outstanding recommendations of that report by the end of 2008.

Recommendation 3

3.131 The committee recommends that the Federal Government's 'closing the gap' initiative be extended to establish a National Indigenous Healing Fund to provide health, housing, ageing, funding for funerals, and other family support services for members of the stolen generation as a matter of priority. The committee recommends that the National Indigenous Healing Fund be incorporated within the 'closing the gap' initiative as an additional and discrete element of focus and funding.

Recommendation 4

3.132 The committee recommends that the terms and conditions of the National Indigenous Healing Fund be determined through the Council of Australian Governments (COAG), and that its processes and practical application be decided after consultation with the stolen generation working group (comprising of stolen generation representatives from the National Sorry Day Committee and the Stolen Generations Alliance).

Senator Trish Crossin

Committee Chair