'THE COST OF A WOUNDED SOCIETY': REPARATIONS AND THE ILLUSION OF RECONCILIATION

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I Introduction

The history of reparations for Indigenous Australians removed from their families has been sporadic, piecemeal and devoid of any national conviction. This uneven and divisive approach, which has failed to capture and implement the key features of a comprehensive reparations strategy, has consequently allowed the historical injustice of past practices to permeate the social, economic and cultural lives of contemporary Indigenous communities. By reference to a national reparations tribunal proposal, isolated individual legal proceedings, a small-scale State-based compensation scheme and Senate inquiries into strategies for redress, this paper explores Australia's splintered efforts at remedying the gross human rights violations experienced by the Stolen Generations. It argues that Australia's ongoing failure to address the magnitude of the moral wrong perpetuated against victims of removal policies and the enduring harm and disadvantage borne by successive generations stands out as a significant lost opportunity for a nation to realise its commitment to the prerequisites of reconciliation.

> *It is my belief that when the Aboriginal and Torres Strait Islander story of Australia is heard and understood then there will be a true reconciliation. The abstract language of human rights and justice will settle down on the realities of the lives and aspirations of individual men, women and children who wish simply to have their humanity respected and their distinctive identity recognised.*
>
> – Michael Dodson[1]

> *It was wrong to simply say 'turn the page'. It's right to turn the page but first you have to read it. You have to understand it. You first have to acknowledge it and then you can turn the page.*
>
> – Dr Alex Boraine, Vice-Chairperson, South African Truth and Reconciliation Commission[2]

II Acknowledging Identity and Dignity: The Drawbacks of Litigation

A decade after the *Bringing Them Home* Report[3] recommended that 'for the purposes of responding to the effects of forcible removals … reparation be made in recognition of the history of gross violations of human rights',[4] the Supreme Court of South Australia became the first Australian court to recognise that the removal of an Aboriginal child from his mother was unlawful and amounted to wrongful imprisonment. The late Bruce Allan Trevorrow[5] was awarded $525 000 as compensation for the emotional, physical and cultural consequences of his unlawful removal at the age of 13 months. His award included a provision for exemplary damages, the Court finding that '[i]n the present case the conduct of the State was conscious, voluntary and deliberate. … [and that] [d]espite legal advice to the contrary the State removed the plaintiff from his family'.[6] Five years earlier, Sydney woman Valerie Linow[7] was awarded $35 000 by the New South Wales Victims Compensation Tribunal for the psychological harm arising from the sexual assault and violence she suffered after she had been sent to work as a domestic servant on a rural property at the age of 14.[8] At age two, the Aboriginal Welfare Board had removed Ms Linow from her family, placing her in the Bomaderry Children's Home and, subsequently, at Cootamundra Girls' Home. In *Bringing Them Home*, the Human Rights and Equal Opportunity Commission ('HREOC') stated that one in six witnesses who appeared before its National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('National Inquiry') in 1995–96 reported having been subjected to sexual or physical abuse.[9]

The *Linow* case came after the decision of the Federal Court in 2000 in *Cubillo v Commonwealth*.[10] The Federal Court dismissed

claims by the plaintiffs, Lorna Cubillo and Peter Gunner, for wrongful imprisonment, breach of statutory duty, negligence and breach of fiduciary duty arising from their removal from their families and their detention in mission-run institutions – claims similar to those brought by Bruce Trevorrow. In finding against the plaintiffs, Justice O'Loughlin of the Federal Court referred to the significant absence of evidence to support the causes of action, the plaintiffs' inability 'to recall, accurately, events that occurred … when they were small children',[11] the 'overwhelming' prejudice to the defendant given the effluxion of time since the plaintiffs' removal (25–35 years) and that the responsibility of removal lay with independent officials and missions, not with the named defendant, the Commonwealth. Justice O'Loughlin did, however, assess notional general damages for each applicant in the event that he was overruled on the law, calculating Lorna Cubillo's damages at $126 800 and Peter Gunner's damages at $144 100. In 2001, Lorna Cubillo and Peter Gunner lost their appeal to the Full Federal Court.[12]

While the *Linow* case sought damages for harm incurred whilst 'in care' rather than for the act of removal *per se*, the claim was pursued in an attempt 'to establish an alternative process (to the courts) for members of the stolen generations seeking compensation for harm that occurred to them while in State care'.[13] The claim via the Victims Compensation Tribunal was assessed solely on the papers, determined expeditiously and with comparatively minimal cost.

Despite the 'devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal family and their subsequent upbringing within a white environment',[14] the cases referred to comprise part of a handful of legal proceedings initiated by members of the Stolen Generations since the release of the *Bringing Them Home* Report.[15] Most of the litigation has been unsuccessful for the reasons declared by Justice O'Loughlin in *Cubillo*: the unavailability of critical evidence and the failure to discharge the onus of proof, the prejudice to the defendant given the frailty, illness or death of key witnesses (potential evidence 'clouded by age or time')[16] and/or the loss or destruction of records and material documents.[17] Additionally, the 'protection' and 'welfare' laws[18] and policies between the early 1920s and 1960s, which regulated the removal of Aboriginal and part-Aboriginal children, were primarily assessed in the litigation by reference to the values and behaviour prevailing at the time[19] – the standards of entrenched 'misguided paternalism'.[20] Prompted by an apparent responsibility to serve the best interests of the children removed and their communities, these laws and practices were judged lawful according to the standards of the time. Anthropologist Professor W E H Stanner observed in 1964 that it was perhaps difficult for those well-meaning men and women who implemented the policies and laws to see their misguided intentions as racist and 'fundamentally dictatorial'.[21]

In *Trevorrow*, Justice Gray acknowledged that the proceedings related to events commencing some 50 years earlier but noted that 'extensive contemporaneous documentation relevant to the events was tendered in evidence'.[22] This included parliamentary debates, second reading speeches and academic texts and publications that confirmed the 'well recognised' significance of 'the bond and attachment between mother and child.'[23] In addition to the contemporaneous evidence that forced removal of a child from its mother might not coalesce with the 'best interest of the child', Justice Gray referred to the legislative constraints which operated in the exercise of powers under the *Aborigines Act 1934–1939* (SA):

> First, [the power to take children from their natural parents and place them into the custody of others] could only be exercised in circumstances where it was demonstrably in the best interests of the child that he or she be removed. That required detailed consideration of all the relevant circumstances. It did not empower the APB [Aboriginal Protection Board] to move children around without regard to the needs of the child or the consequences to that child. Second, it could only be exercised by the APB. In the present case, it could not be said that removing the plaintiff from his natural family was in his best interests without an inquiry, and in the absence of evidence, that he was in fact neglected. Furthermore, departmental officers effected the removal of the plaintiff with only the subsequent ratification of the board. The process of removal placed the plaintiff under the direct and immediate control of the APB. The plaintiff was a vulnerable infant. Even if the removal was lawful the circumstances gave rise to a duty of care both with respect to the removal and the subsequent separation and return.[24]

The *Trevorrow* decision was heralded as a landmark judgment. Aboriginal and Torres Strait Islander Social Justice Commissioner Tom Calma said that the case

> represents a watershed moment for all members of the Stolen Generation. It sends a powerful message to other

> states and territories that compensation is rightfully owed to the victims of these policies which were in place across Australia for most of the 20th century, and impacted badly on generations of Indigenous Australians.[25]

Following the *Trevorrow* decision, the South Australian Government, the defendant in *Trevorrow*, announced that rather than appeal the judgment it would examine the Tasmanian compensation fund and ascertain the success of the Tasmanian approach.[26] Expressing concern at the need for Stolen Generations members to seek redress via litigation, Mike Rann, the Premier of South Australia, indicated that his Government was keen to explore options for resolving claims 'more sensitively and efficiently.'[27] To this end, South Australian Aboriginal Affairs Minister, Jay Wetherill, commented that

> [t]he people that have been subject to these abuses have been waiting, in some cases, for generations and a number of them are no longer with us sadly. We should be ensuring that it doesn't happen to anyone else.[28]

In response, Mary Buckskin, Chief Executive Officer of the peak body representing Aboriginal health services in South Australia, called on Premier Rann 'to consult with the Aboriginal community on any such fund to ensure that it appropriately meets the needs of our Stolen Generations' and to educate the broader community about the need for and importance of such a fund.[29]

Six months later and two weeks after the Australian Prime Minister, Kevin Rudd, delivered a motion of apology to the Stolen Generations in the Federal Parliament,[30] the South Australian Attorney-General, Michael Atkinson, announced that the South Australian Government would appeal the *Trevorrow* decision. In announcing the appeal, the Attorney-General confirmed that the Government would not seek the return of the award of compensation, nor the subsequent award of interest of $250 000 paid to Mr Trevorrow; rather, the appeal was to be brought to clarify the future liability of the South Australian Government, particularly in relation to the Court's findings regarding 'the powers and duties of the Aborigines Protection Board under the (now repealed) *Aborigines Act 1934–1939*', 'misfeseance in public office by various parties and the duty of care owed to Mr Trevorrow', and whether he was entitled to an extension of time under the *Limitation of Actions Act 1936* (SA) in order to bring his claim.[31]

Initially, the findings of the South Australian Supreme Court might have offered other members of the Stolen Generations some hope of judicial success – or alternatively, prospects for the development of a compensation fund similar to the Tasmanian model (discussed below). Both hopes will be suspended as the *Trevorrow* appeal takes it course, also raising potential obstacles for litigation commenced in the Northern Territory and Western Australia on behalf of 600 members of the Stolen Generations.[32]

However, the prospect of protracted and expensive litigation and of revisiting the trauma of removal and subsequent harm in an adversarial setting has presented very real barriers to legal recourse by actual and potential claimants who have elected to withdraw from or avoid litigation.[33] The *Cubillo* litigation comprised four years of legal proceedings and 106 days of hearings involving 60 witnesses. The case cost somewhere between $11 million and $12 million.[34] Despite evidence (and a subsequent finding by Justice O'Loughlin) that the plaintiffs, who were taken from their parents at an early age, had suffered painful experiences of separation and physical and sexual abuse, counsel for the Commonwealth, Douglas Meagher SC, subjected the plaintiffs to what has been described as 'humiliating and harrowing treatment in court'.[35] Kim Beazley, the then leader of the Australian Labor Party Opposition, said that the Commonwealth adopted a line of defence that displayed a 'singular lack of compassion or cultural sensitivity … [which] has astounded those who have studied [the case]'.[36] Beazley also said:

> Any person thinking of making a complaint, and any legal service thinking of supporting them is to be left in no doubt as to the consequences. The matter will be fought out in court. The process will be long and expensive. No secret, no private matter, no youthful indiscretion will go untouched. The Commonwealth will set out to humiliate, discredit and defeat every claimant.[37]

As the case of *Cubillo* demonstrated, the legal and evidentiary obstacles – the limitations barriers, the absence of key witnesses and records, the adversarial and often brutal nature of cross-examination, the reluctance of the courts to see behind or beyond the apparent good intentions underlying government policy at the time – make the conduct, let alone the viability, of these cases extraordinarily complex and questionable.[38] The drawbacks of litigation, coupled with the denial of the existence of a 'Stolen Generation'[39] and the consistent failure of the Howard Government to apologise

to the Stolen Generations and offer redress,[40] often meant that legal proceedings were initiated as the only or inevitable option open to the Stolen Generations to exact some justice from a recalcitrant government.

While litigation can 'identify the legal cause of a past injustice',[41] clarify the law and, where the evidence demonstrates its breach, yield some redress, courts can 'not set right all of the wrongs of the past.'[42] In an article on reconciliation and the requirements for justice, Sir Gerard Brennan argues that

> sometimes the injustice is beyond legal remedy. … Even if the law identifies the cause of a past injustice, it cannot undo the hurt, the alienation, the loss of dignity, the self-abnegation which the injustice (and particularly institutionalised and repetitive injustice) has produced. The law does not provide, indeed cannot provide, remedies for every kind of injustice or every aftermath of an injustice suffered. It provides remedies only for an infringement of a legal right and its remedies are too blunt to undo all the effects of past injustices.[43]

III Waiting It Out: The Imperative of Reparations

> *[It is] very sad that this young man [Bruce Trevorrow] has had to go to the courts to seek redress … The governments of Australia have had a report recommending an appropriate administrative, non-litigious response, and with the exception of Tasmania, have done nothing to implement that.*
>
> – Fred Chaney, board member of Reconciliation Australia and a former Liberal Aboriginal Affairs minister[44]

> *I want to make it very plain on behalf of the government that we do not support the idea of a reparations tribunal. One of the reasons we do not support it is we do not believe it would be cheaper than going through the court system.*
>
> – John Howard[45]

The limitation of the courts in forging comprehensive and long-term social solutions in relation to the removal of Aboriginal children from their families was addressed by Justice O'Loughlin in *Cubillo*:

> the subject of the removal and detention of part Aboriginal children has created racial, social and political problems of great complexity ... [While] [h]istorians may wish to adjudicate on the racial and social policies of former Governments … it must be left to the political leaders of the day to determine what, if any, action might be taken to arrive at a social or political solution to these problems.[46]

In late 1997, six months after the tabling of the *Bringing Them Home* Report, the Federal Government allocated $63 million over a four-year period (1998–2001) for mental health counselling, family reunion services, parenting support programs, preservation of Indigenous languages and culture, oral history recordings and archiving of records.[47] This package, embodying the notion of 'practical reconciliation', was criticised as being directed to only 17 of the 54 recommendations contained in the *Bringing Them Home Report*, being determined without consultation about the use of the funds, and failing to address individual harm and the right to reparations via recommended and accepted measures, such as a national apology and compensation.[48] Those criticisms aside, clearly the Howard Government saw the need to offer a response to the National Inquiry's recommendations and meet its international human rights obligations in some form. However, its insular concern to contain potential liability rather than take up Justice O'Loughlin's invitation to fashion an enduring social or political solution saw Prime Minister Howard consistently avoid a national apology and hold that the court process was the appropriate mechanism for securing compensation.

In the *Bringing Them Home* Report, the National Inquiry stated that 'the only appropriate response to victims of gross violations of human rights is one of reparation.'[49] In doing so, it adopted the *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* ('van Boven Principles') drafted in 1996 by the former UN Special Rapporteur on the Rights to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, Professor Theo van Boven.[50] The National Inquiry, by reference to various submissions and recommendations, noted that the term 'compensation' is limited to a monetary form, whereas 'reparation' is more 'comprehensive' and 'encompassing', and includes acknowledgment and apology, guarantee against repetition; measures of restitution; measures of rehabilitation; and monetary compensation.[51]

In addition to its recommendation that 'reparation' comprise a comprehensive package, the National Inquiry recommended that reparations be extended to include not only the individuals removed but also family members, communities and descendants of those who were forcibly

removed, 'who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land'.[52]

Most of the State and Territory governments apologised to the Stolen Generations almost immediately after the tabling of the *Bringing Them Home* Report in May 1997,[53] with the exception of the Northern Territory Government, which apologised after a change of government in 2001. In addition, as is detailed below in this paper, the Tasmanian, Queensland and Western Australian governments have developed and implemented schemes of redress, though only the Tasmanian scheme is Stolen Generations-focused. And finally, despite John Howard declaring in October 2007 that 'there are millions of Australians who will never entertain an apology because they don't believe that there is anything to apologise for',[54] within three months of the Labor Party securing power from the Howard Government in 2007, Prime Minister Kevin Rudd unreservedly apologised to the Stolen Generations on behalf of the Australian Parliament.[55] The apologies and the schemes of monetary compensation have been significant developments; but they continue to fall substantially short of the *Bringing Them Home* recommendations, the van Boven Principles and the needs and desires of the Stolen Generations.

A The Public Interest Advocacy Centre Reparations Proposal

Taking its lead from the National Inquiry's recommendations for reparations and from the Council of Australian Governments' proposal for the establishment of a National Compensation Fund, the Public Interest Advocacy Centre ('PIAC')[56] proposed the establishment of a Stolen Generations Reparations Tribunal in 1997 ('the PIAC Proposal').[57] The PIAC Proposal was a response to three concerns: firstly, that the nature of potential claims and the redress sought would not necessarily be accommodated appropriately 'within the confines and limitations of the traditional legal process';[58] secondly, that there was a need to extend the role of the proposed National Compensation Fund[59] beyond its limited focus on monetary compensation to allow for a more comprehensive approach to reparations in keeping with the van Boven Principles;[60] and thirdly, that there were strong social and economic imperatives to address the extensive and continuing damage articulated by members of the Stolen Generations at the National Inquiry within an innovative and compassionate framework.

The PIAC Proposal, developed in consultation with representatives from numerous organisations,[61] recommended the establishment of a tribunal that would meet the key objectives of:

- ensuring that Indigenous people were involved in the design and delivery of reparations processes and outcomes;
- validating the specific experience and identity of the Stolen Generations; and
- acknowledging, both symbolically and substantively, the magnitude of the moral wrong perpetuated against the victims of removal policies and the pain and enduring harm borne by the Stolen Generations.[62]

The Proposal called for a legal mechanism that would incorporate some of the key advantages of a reparations model as against litigation. These included:

- requiring that claimants comply with certain threshold tests or criteria for eligibility for reparations, rather than engaging in the difficult and, at times, artificial exercise of trying to fit concepts such as loss of culture, loss of Aboriginality and entitlement to traditional land into narrow legal categories which go to questions of fiduciary and statutory duty, harm and liability;
- an absence of emphasis on corroborative evidence (in cases where threshold criteria have been clearly met), in recognition of the facts that with the effluxion of time many witnesses are no longer alive or are unavailable and documentary evidence is often non-existent or has been destroyed;
- avoidance of the prospect of revisiting the trauma surrounding acts of removal and subsequent harm in an adversarial setting;
- an absence of overly formal procedures and the inclusion of tribunal members and staff with links to Indigenous communities, appropriate training and a demonstrated understanding of and expertise in Stolen Generations issues and history;
- the determination of relief expeditiously, with minimal costs to both claimants and respondents;
- a shift away from a focus on damages sounding in individual monetary compensation. In developing the proposal, PIAC consulted extensively with members of the Stolen Generations across Australia. On the question of compensation, many members of the Stolen Generations expressed a concern that it was

difficult and inappropriate to determine a measure of damages sufficient to meet the extent of their suffering. In addition, individual monetary compensation was considered divisive and reparations offered a more collective approach to redress in recognition of the harm suffered by whole families and communities;[63]
- the form of reparations, determined by reference to the van Boven Principles, would be shaped by the claimants with reference to historical and sociological factors, community need and available resources.[64]

PIAC's Proposal drew extensively on models such as the New South Wales Victims Compensation Tribunal and the Veterans Review Board and envisaged that the reparations tribunal would be accommodated within an existing structure, have a specific term of operation and that only claims lodged within 10 years of its establishment would be assessed. The Proposal also highlighted growing commitment by international governments to a right to reparations for gross violations of human rights, in particular where governments were confronting contemporary harm incurred by citizens as a consequence of policies implemented by previous governments. In this regard, PIAC drew on the work of the Canadian Healing Foundation (an initiative which developed from the deliberations of the Royal Commission on Aboriginal Peoples),[65] the South African Reparations and Rehabilitation Committee (established to implement the recommendations of the Truth and Reconciliation Committee),[66] and the New Zealand Waitangi Tribunal.[67] The rationale for and development of all of these bodies lies in stark contrast to the approach adopted by the Howard Government – 'that our generation should [not] be asked to accept responsibility of earlier generations, [for events] sanctioned by the law of the times'.[68]

The PIAC Proposal sought to achieve the implementation of a holistic and enduring resolution grounded in the testimony presented to the National Inquiry and designed in accordance with the needs of potential claimants and the principles of participation and self-determination. A central aspect of the formulation of the Proposal, which drew on ideas and suggestions collated during a national consultation process, was to ensure that those affected by forcible removals have an active role in shaping the nature and content of reparations rather than 'constantly being the subject of other people's decisions about what is best for you, what you deserve, what you are entitled to.'[69] In addition to the potential benefits for members of the Stolen Generations, the model also offered significant implications for governments, including:

- access for 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
- an effective mechanism for providing social justice for Indigenous people.[70]

B The 1999 Senate Inquiry on Alternatives to Litigation

In November 1999, the Australian Senate referred an inquiry to the Senate Legal and Constitutional References Committee to review the implementation of recommendations made in the *Bringing Them Home* Report, including the adequacy and effectiveness of the Government's response. The Committee's terms of reference included consideration of the establishment of

> an alternative dispute resolution tribunal to assist members of the stolen generations by resolving claims for compensation through consultation, conciliation and negotiation, rather than adversarial litigation …[71]

The Committee tabled its report, *Healing: A Legacy of Generations* (the '2000 Senate Committee Report'), in November 2000.[72] Its primary recommendations focused on the reporting and monitoring of responses to the *Bringing Them Home* Report and on the establishment of a Reparations Tribunal. The Senate Report recommended a Reparations Tribunal as the model best able to 'address the need for an effective process of reparation, including provision of individual monetary compensation'[73] and noted that the model put forward by PIAC should be used 'as a general template for the recommended tribunal.'[74] The Federal Government tabled its response to the 2000 Senate Committee Report in June 2001, rejecting the Reparations Tribunal proposal and other recommendations, adding that:

> State governments are responsible for the laws which were in place in their jurisdictions during the period that indigenous child removals took place. No state government

has offered to pay monetary compensation or establish such a tribunal. It is a matter for the non-government organisations involved in the removal and care of children to respond to compensation claims addressed to their actions.[75]

C State Government Responses

In light of the Howard Government's response,[76] PIAC began to direct its efforts at State governments. In 2003, in an independent evaluation of government and non-government responses to the *Bringing Them Home* Report, the Ministerial Council for Aboriginal and Torres Strait Islander Affairs noted that, in spite of the apologies made by all the States and Territories to the Stolen Generations and the broad range of initiatives initially promised by State governments to address the reparations recommendation, most of the States had 'diverted from their original commitments', illustrated by the fact that 'many of the deliverables [did] not match up.'[77] While failing to establish Stolen Generations reparations schemes, both the New South Wales[78] and Queensland[79] governments have established reparation schemes to address claims relating to wages and entitlements (such as welfare payments) owing to Indigenous people. These amounts were taken by State officials and paid into government trust funds pursuant to government policy to control the financial and other affairs of Indigenous Australians. In addition, while not specifically directed at the Stolen Generations, a Queensland Government scheme was established in 2007 to provide redress to people who had suffered institutional abuse or neglect as children.[80]

In a significant development in September 2006, Tasmania became the first state in Australia to introduce legislation to financially compensate Indigenous people forcibly removed from their families. Delivering his annual State of the State address to the Tasmanian Parliament, the Tasmanian Premier Paul Lennon said Tasmania was '"setting the standards" for other states by recognising the wrongs of the past.'[81] The *Stolen Generations of Aboriginal Children Act 2006* (Tas) was passed by both Houses of the Tasmanian Parliament in November 2006. The legislation created a $5 million fund to provide payments to eligible applicants, including children of deceased members of the Stolen Generations. Eligible applicants are entitled to ex gratia payments of $5000 each, with a maximum of $20 000 for a family group. An Office of the Stolen Generations Assessor was established and claims for compensation were determined by mid-January 2008.[82] The criteria for eligibility under the Tasmanian legislation centred on the act of removal: they required applicants to have been removed from their families between the period 1 January 1935 and 31 December 1975 for a continuous period of 12 months or more.[83]

While the Queensland and Western Australia governments have implemented similar initiatives, applicants to the schemes must have suffered abuse while in State care to be eligible for available payments. The act of removal from family *per se* is not deemed sufficient for redress. Redress WA, established by the Western Australian Government in 2007,[84] provides eligible applicants (who include members of Stolen Generations) with an ex gratia payment of $10 000. If an applicant can provide medical or psychological evidence of loss or injury sustained as a result of that abuse, they may be entitled to up to $80 000. Applicants are required to lodge their claims between the period 12 May 2008 and 30 April 2009. In addition to issuing an apology, Redress WA has undertaken to establish a 'prominent and permanent memorial' to acknowledge those who experienced harm.[85] While not referring specifically to the Stolen Generations, the Queensland Redress Scheme seeks to address key recommendations of the Forde Inquiry (1998–99), which investigated the abuse of children in Queensland institutions. Applications for payments (which range from $7000 to $40 000)), to be lodged between October 2007 and 30 September 2008, are limited to those who experienced institutional abuse or neglect.[86]

When introducing the Tasmanian legislation, the then Premier Paul Lennon said that the 'fundamental' issue of compensation 'has to be addressed before we can achieve true reconciliation with the Tasmanian Aboriginal people'.[87] While the Tasmanian initiative suggests a significant way in which leadership at a State level can shift the divide between Indigenous and non-Indigenous Australians, authentic and effective reconciliation requires a cohesive national commitment to justice rather than splintered State-by-State 'manifestations of benevolence.'[88] The *Bringing Them Home* Report called for a 'whole-of-government response' to a history which 'had a profound impact on every aspect of the lives of Indigenous communities.'[89] This response, which after a decade remains illusive, required 'immediate targets, long-term objectives and a continuing commitment', with each component – 'whether provision of family history information or enhancing well-being through medical and mental health services' – needing to 'derive its rationale from that central policy commitment.'[90]

D The Senate Inquiry into the Stolen Generation Compensation Bill 2008 (Cth)

In March 2007, the former Queensland Democrats Senator Andrew Bartlett tabled an exposure draft of the Democrats' Stolen Generation Compensation Bill 2008 (Cth). Similar in content and structure to the Tasmanian legislation, the Bill was introduced in 'an effort to address some of the unimplemented recommendations from the Bringing them Home report … tabled … in May 1997.'[91] In March 2008, the Senate referred the Bill to the Senate Legal and Constitutional Affairs Committee for inquiry and report. The Bill provided for the establishment of a Stolen Generations Tribunal which would have the power to award ex gratia payments to eligible applicants from a Stolen Generations Fund (comprising $40 million).[92] Failing once again to incorporate a broader reparations model, the Bill, with its focus on monetary compensation, perhaps sought to acknowledge that although

> loss, grief and trauma experienced by victims of gross human rights violations can never be adequately compensated … [f]rom the victims' perspective, it has been suggested, monetary compensation 'concretizes ... the confirmation of responsibility, wrongfulness, s/he is not guilty, and somebody cares about it.' Thus, '[i]t's not the money but what the money signifies – vindication.' ... Importantly, as well, for many victims, monetary support can make a practical difference, can make the lives of communities and individuals easier.[93]

As mentioned above, the 2000 Senate Committee Report, *Healing: A Legacy of Generations*, recommended a Reparations Tribunal as the model best able to 'address the need for an effective process of reparation, including provision of individual monetary compensation',[94] and noted that the model put forward by PIAC be used 'as a general template for the recommended tribunal.'[95]

In a joint submission to the 2008 Senate Inquiry into the Stolen Generation Compensation Bill 2008 (Cth), PIAC and the Australian Human Rights Centre ('AHRC') reiterated the 2000 Senate Committee's recommendations and suggested that any retreat from the core recommendations would risk continuing to ignore the key recommendations of the *Bringing Them Home* Report and Australia's international legal obligations to redress the enduring social, cultural and economic damage endemic to the Stolen Generation's experience. Additionally, the PIAC/AHRC submission stated that a failure to implement a national reparations strategy would suspend and prolong the critical healing of Stolen Generations communities and undermine any real prospect of effective reconciliation.[96]

The submission also argued that a focus on monetary compensation would detract from the need for a (previously endorsed) broad reparations strategy. Included for consideration in the PIAC/AHRC submission was a draft Stolen Generations Reparations Tribunal Bill, which would establish a tribunal, similar to that envisaged by Senator Bartlett's Bill, with powers to award reparations measures, including monetary compensation. Despite PIAC and AHRC making (at the request of the Australian Greens) a joint supplementary submission to the Senate Inquiry, which amalgamated Senator Bartlett's Bill and the proposed Stolen Generations Tribunal Bill, the Senate Inquiry Report, handed down on 16 June 2008, rejected both Bills and instead recommended a National Indigenous Healing Fund. The Fund is to be incorporated within the Federal Government's 'closing the gap' initiative, 'to provide health, housing, ageing, funding for funerals and other family support services.'[97] Perhaps constrained by its brief to focus on the Stolen Generation Compensation Bill, and despite acknowledging the 'vast majority' of evidence in support of compensation presented to the Inquiry,[98] the Senate Committee recommended 'that the Bill not proceed in its current form',[99] but concluded that reparations for the Stolen Generations required urgent resolution.[100] The Committee's Report (the '2008 Senate Committee Report') makes no recommendation in relation to the Stolen Generations Reparations Tribunal Bill but the Committee states that 'monetary compensation is only one component of reparations', and endorses a 'holistic, nationally consistent approach [as] the most appropriate means of … promoting an effective model of healing'.[101] The Committee said that 'governments are under an obligation to resolve this issue as a matter of priority'[102] and indicated that the reparations tribunal model proposed by PIAC and the AHRC offered a 'valuable [framework] for consideration in the development of any reparations scheme.'[103]

IV The Illusion of Reconciliation

> *[T]rue reconciliation between the Australian nation and its indigenous peoples is not achievable in the absence of acknowledgment by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal*

> *peoples. … [N]ational shame, as well as national pride, can and should exist in relation to past acts and omissions, at least when done or made in the name of the community or with the authority of government. Where there is no room for national pride or national shame about the past, there can be no national soul.*
>
> – Sir William Deane[104]

> *Let none tell me the past is wholly gone.*
>
> – Oodgeroo Noonuccal[105]

Soon after the *Trevorrow* judgment was handed down, a major Australian television network conducted a nationwide poll on the question: 'Does the 'stolen generation' [sic] deserve compensation?' The poll indicated a 67 per cent vote against awarding compensation.[106] While clearly not a comprehensive or conclusive analysis, the response to the media poll suggested that many Australians 'have little idea of the trauma suffered by Aboriginal people',[107] despite the extraordinarily widespread dissemination, media coverage and public response to the publication of the 700 page *Bringing Them Home* Report. HREOC reported that

> tens of thousands of copies of the community guide to the [*Bringing Them Home*] report were requested and sent to schools, to community groups and to others, over 20 000 copies of the report were sold and thousands of copies of the *Bringing them home* video were distributed to Indigenous and non-Indigenous communities …[108]

In October 2007, in the lead-up to the federal election, the then Prime Minister John Howard announced that if re-elected he would seek, via referendum, the support of the Australian people 'to formally recognise indigenous Australians'.[109] To this end, the Prime Minister saw as his primary goal the incorporation of 'a new Statement of Reconciliation' into the preamble of the *Australian Constitution*.[110] While the Prime Minister believed that the time was 'right to take a permanent, decisive step towards completing some unfinished business of this nation', he remained of the belief 'that a collective national apology for past injustice fails to provide the necessary basis to move forward.'[111] In an interview after his announcement, Mr Howard, when pressed on an apology to the Stolen Generations, said:

> I have always supported reconciliation but not of the apologetic, shame-laden, guilt-ridden type. … I think in the past we have become obsessed with things like apologies and there are millions of Australians who will never entertain an apology because they don't believe that there is anything to apologise for.[112]

In his article 'Race Apologies', Eric Yamamoto conveys a concern expressed by participants in the South African Truth and Reconciliation Commission proceedings that

> storytelling about personal trauma and words of apology alone are unlikely to be enough to engender meaningful reconciliation. Those who suffered need to perceive an apology as complete and sincere[.] … For many the acknowledgment and the apology must also be accompanied by social, structural and attitudinal changes.[113]

In Australia, a critical contribution to meaningful reconciliation and 'attitudinal change' remained absent for over a decade under a Government that continued to hold out against offering an apology to the Stolen Generations on behalf of the nation. In addition, while some resources necessary for the application of measures of 'practical reconciliation' were made available, the former Federal Government made it clear that courts were the only national fora appropriate for the determination, or otherwise, of an entitlement to reparations claimed by those who have suffered harm as victims of forced removal policies. At Corroboree 2000, a major event organised by the Council for Aboriginal Reconciliation, Mick Dodson said that:

> although issues of health, housing and education of Indigenous Australians are of course of key concern to us as a nation, they are not issues that are at the very heart or the very soul of reconciliation. … [T]hey are, to put it quite simply and plainly, the entitlements every Australian should enjoy. … Reconciliation is about far deeper things, to do with nation, soul and spirit.[114]

The comprehensive apology to the Stolen Generations by the new Labor Government, made at its first parliamentary sitting, has undoubtedly provided a significant advance to aspirations of reconciliation. To many, however, the national apology is considered a 'first step' towards effective healing for the Stolen Generations:[115] compensation is viewed as an essential and concrete manifestation of the apology, giving substance to a critical but symbolic gesture. The 2008 Senate Committee's rejection of compensation for the Stolen Generations dealt a massive blow to the hopes of the Stolen Generations, which had been buoyed by the national apology. The 2008 Senate Committee Report's

alternative recommendation for the establishment of a National Indigenous Healing Fund as an extension of the 'closing the gap' initiative may suggest parallels with the Howard Government's 'practical reconciliation' approach. Warning governments not to use 'extra money for health and education services in indigenous communities in lieu of compensation payments', Aboriginal leader Lowitja O'Donoghue said: 'They're talking about closing the gap [on Indigenous disadvantage] now ... but they must not consider that to be a compensation.'[116] The 2008 Senate Committee Report does, however, recommend that services provided via the National Indigenous Healing Fund be 'specifically directed to the stolen generation [sic]'[117] as an 'additional and discrete element of focus and funding.'[118] The 2008 Senate Committee Report's endorsement but lack of recommendation regarding the provision of reparations is an additional blow, particularly given that the 2000 Senate Committee Report had recommended the establishment of a national Reparations Tribunal.

The work of the National Inquiry and others, such as the Council for Aboriginal Reconciliation ('CAR'), demonstrated that many of the thousands of families torn apart by forcible removal policies have never been reunited, and Indigenous communities remain affected by the trauma of separation and its impact on family and cultural life. *Bringing Them Home* further recorded how separation 'not only from family, but from heritage and cultural identity',[119] endured in differing degrees by successive generations of Indigenous people, is undoubtedly an underlying cause of violence, alcoholism, drug abuse, suicide, crime, family breakdown and widespread health problems within Indigenous communities.[120] It is for this reason that CAR (now Reconciliation Australia) has referred to the history of the Stolen Generations as the 'unfinished business' of reconciliation.[121] While the effective implementation of 'practical reconciliation' and 'closing the gap' initiatives are essential to halting the 'enduring cycles of disadvantage' endemic to Indigenous communities, at the core of true reconciliation is acknowledgement of 'the realities of the lives and aspirations of individual men, women and children who wish simply to have their humanity respected and their distinctive identity recognised.'[122] Addressing the Australian Reconciliation Convention in Melbourne in 1997, Vice-Chairperson of the South African Truth and Reconciliation Commission Dr Alex Boraine spoke of the 'three anchors' required to ground the vision of reconciliation in reality: truth-telling, which creates a common or shared memory, upon which a shared identity, necessary for the unity of a nation, depends; restitution, which involves 'helping those who have been hurt'; and 'moral transformation', the rediscovery of the soul of the nation.[123]

In a statement to the UN Working Group on Indigenous Populations in Geneva soon after the establishment of CAR, the Minister for Aboriginal and Torres Strait Islander Affairs at the time, Robert Tickner, said that 'there can be no reconciliation without justice' and that that process should address Indigenous aspirations, human rights and, social justice.[124] Sir Gerard Brennan has argued that, 'in the absence of reconciliation, injustice festers with the passing of time'.[125] Conversely, it may be argued that the absence of justice erodes the possibility for effective reconciliation, that an 'obligation of justice' is intrinsic to reconciliation.[126] Despite the 'monumental'[127] national apology, apologies from State parliaments and church organisations, some success at tracing and reuniting family members, Sorry Day commemorations, and 'bridge walks' in every major city by thousands of Australians, Australia's ongoing failure to demonstrate accountability through reparation[128] stands out as a significant lost opportunity for a nation to realise its commitment to reconciliation. Members of the Stolen Generations across Australia courageously came forward to give testimony about broken lives and irreparable harm caused by government-sanctioned[129] 'laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress [and] undue influence.'[130] However, the inseparable parts of the whole context of reconciliation require not only 'confession [and] repentance' but the corresponding concept of reparations,[131] the 'act of recognition',[132] and the acceptance of national responsibility. Without the implementation of a broad reparations strategy, required under the van Boven Principles and endorsed (but not recommended) in the 2008 Senate Committee Report, trauma is repeated and even re-enacted, and the progress of reconciliation remains illusory.

In the 2000 Senate Committee Report, the Committee recommended that

> the Commonwealth convene a Summit meeting twelve months from the date of the federal government's response to this inquiry to co-ordinate and address the issues and recommendations identified in [the] report …[133]

Having endorsed the establishment of a reparations tribunal based on the PIAC Proposal, the Committee further

recommended that details of the form and operations of the tribunal be finalised following consultation at the proposed national summit.[134] Eight years later, the proposed national summit is yet to be convened, a fact failing even to warrant a mention in the 2008 Senate Committee Report.

A month after the Prime Minister announced that the new Government would apologise to the Stolen Generations, Federal Indigenous Affairs Minister, Jenny Macklin, when asked about a corresponding provision of compensation, echoed the sentiments of former Prime Minister Howard and declared on national television:

> We don't think that it's the right thing to have a national compensation fund. We think it would be far more productive to really put that money into addressing the very serious levels of disadvantage that still exist in Indigenous communities. … [D]ifferent states are addressing this issue in different ways and … that really is something that I respect. … We've made clear our decision. And we really do make this decision in the full knowledge that we want to make a difference to people's lives in the areas of health, education, building economic independence. We think that's if you like the middle way forward to really look to the future and make a difference to people's lives.[135]

It seems that, in light of the Minister's comment, the subsequent Senate Committee's consideration of the Stolen Generation Compensation Bill 2008 (Cth) had minimal prospects of resulting in the Bill's adoption. As the new Federal Government struggles to distinguish itself from the old, it is disappointing that its Indigenous Affairs Minister seems to have reverted to an approach endemic to the Howard Government's failure to 'to cope adequately … with the human misery' of Indigenous communities and respond appropriately to their long-standing needs.[136] Firstly, this approach continues to fail to acknowledge that current levels of serious and enduring disadvantage are inextricably linked to past practices of removal. In response to Minister Macklin's 'unequivocal rejection'[137] of compensation for the Stolen Generations, Lyn Austin, Chairperson of Stolen Generations Victoria, reiterated the findings that emerged from the National Inquiry:

> We've [still] got people living in third world conditions in our communities – you've got homelessness, you've got drug and alcohol issues, you've got people that have some sort of addiction and you've got people in and out of the system being incarcerated and that's part of them being separated from their families and you go through that whole system again and again.[138]

Secondly, the new Minister's adherence to the denounced 'practical reconciliation' catch cry of the Howard Government ignores the critical obligation of a government to provide its citizens with appropriate acknowledgement and meaningful redress for harm incurred from gross violations of their human rights.[139] Providing better health care and access to education and creating opportunities for economic development and independence are, as Mick Dodson has pointed out, entitlements that should be enjoyed by all Australian citizens.[140] The physical and psychological experience of members of the Stolen Generations, however, has to be addressed in ways which recognise and validate individual trauma if the process of healing and moving forward is to be executed effectively.[141] Brendan Hamber writes,

> [s]ocial reconstruction as a form of reparation (eg, providing better access to health care, job-creation schemes …) has its place, but this form of 'reparations' should take place in addition to, and not to the exclusion of, individualised reparations or collective reparation strategies …[142]

Lyn Austin makes the point that

> [p]eople get compensation from [sic] victims of crimes, prisoners get compensation for some unjust treatment in the prison system or I could walk out in the street and fall over and I could sue the council for injuries ... why not the stolen generations for the past injustices that were done?[143]

The granting of reparations by governments not directly accountable for the harm suffered by its citizens is not novel or exceptional. There are many examples of governments recognising the critical importance of a nation 'making acknowledgements to people'[144] who have suffered human rights abuses at the hands of former administrations.[145] These governments on different continents, confronting varied histories and differing post-conflict scenarios, have chosen to lead their respective nations and recognise that reparations 'concretise the state's acknowledgement of wrong-doing', restore dignity to survivors and 'raise public consciousness about [a nation's] moral responsibility to participate in healing those hurt in the past.'[146] The response of Minister Macklin is perhaps more peculiar given her

statement that she 'respects' the actions of different States (such as Tasmania, Western Australia and Queensland) who have taken steps to address the issue of reparations while her own government is unwilling to commit to taking a similar step at the national level.

V Conclusion

In an address to a Sydney conference in 2001 on reparations for the Stolen Generations, Nathalie des Rosiers, President of the Law Commission of Canada, referred to a Law Commission of Canada report initiated by the Canadian Federal Minister of Justice to assist governments in responding to claims and lawsuits arising out of child abuse in institutions, including abuse suffered by Aboriginal children sent to residential schools from the late 1800s to the 1980s. The report,[147] which articulates government not as defender but as 'protector of the public interest', provides a range of options for a government response to the variety of needs of survivors.[148] Ms des Rosiers warned the conference about the '"costs of doing nothing" … the costs to the Aboriginal society, to the Canadian society of not responding, of not acknowledging the past history'.[149] In acknowledging the complex nature and cost of healing 'a wounded society', Ms des Rosiers highlighted the need for an imaginative, flexible and urgent response and compensation, the absence of which would simply 'worsen the injury.'[150]

Since late 2007, the Canadian Government has been implementing a Settlement Agreement concluded in May 2005 with the Assembly of First Nations, Aboriginal organisations, and legal representatives of churches and former residential school students. The Indian Residential Schools Settlement Agreement, with a total value of more than CDN $2 billion, makes provision for 'common experience payments'[151] and additional Independent Assessment Process payments, awarded to former students who suffered sexual or serious physical abuse, or other abuse that caused serious psychological effects.[152] The Settlement Agreement also provides CDN $60 million for the establishment and operation of a Truth and Reconciliation Commission ('TRC'), which will, inter alia, collate

> an accurate and public historic record of the past, … promoting awareness and public education about the [residential school] system, and its impacts on the human dignity of former students.[153]

At the end of the TRC's five year mandate, a permanent research centre will be established.

On 1 June 2008, the TRC was established[154] and on 11 June 2008, the Canadian Prime Minister, Stephen Harper, issued an apology to former students of Indian residential schools.[155] A key role of the TRC will be to approve national and community commemorative projects for which $20 million has been allocated to memorialise the residential school experience. Finally, a further $125 million will be provided to the Aboriginal Healing Foundation (established to fund healing programs by the Canadian Government in 1998 with an original grant of $350 million).

In designing the Settlement Agreement, the Canadian Government acknowledged the expressed needs of survivors and the research of the Law Commission of Canada, contained in its report *Restoring Dignity: Responding to Child Abuse in Canadian Institutions*;[156] that any successful redress mechanism must:

> acknowledge the harm done; account for that harm; make an apology; facilitate access to therapy and education; offer financial compensation; provide resources for memorials; raise public awareness of institutional child abuse; and implement strategies to prevent its recurrence.[157]

The breadth of the Canadian Government approach to a history that has many parallels to that of the Stolen Generations is all the more acute when compared to the minimalist Australian commitment to the clear and sustained requests made by those most affected by removal policies since the publication of the *Bringing Them Home* Report, requests recently transformed into legitimate claims in the *Trevorrow* decision. While New Zealand does not share the forced removal history of Australia or the residential schools policies of Canada, the Waitangi Tribunal investigates claims by Maori prejudiced by laws or policies of the Crown that are in breach of the Treaty of Waitangi. The Tribunal may make recommendations to government such as compensation, reparations or settlement packages, and proposed changes to policies and legislation. The words of the Tribunal Chairperson and Chief Judge of the Maori Land Court, Joe Williams, are instructive:

> In the end the resolution of indigenous grievances is about indigenous survival. That is about ensuring the survival of indigenous identity and difference. Linguistic, cultural,

political economic and so forth. If reparations packages do not focus on this, they will fail in their primary purpose which is to settle the grievance. Thus they must be future looking and they must be organic. They must create a relationship between the tribe, first nation or community and the state which is positive, beneficial and perpetual.[158]

In the light of the conclusions of the 2008 Senate Committee Report, Australians now have the opportunity to be 'future looking' and to hold government to its commitment to implement a national process of reparation as a matter of urgency. A failure to grasp this opportunity means that we risk remaining unwitting peddlers of the mythology of reconciliation.

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1 Aboriginal and Torres Strait Islander Social Justice Commissioner (Michael Dodson), *First Report*, Human Rights and Equal Opportunity Commission ('HREOC') (1993) <http://www.austlii.edu.au/au/other/IndigLRes/1993/3/5.html> at 18 August 2008.

2 Alex Boraine (Speech delivered at the National Press Club, Canberra, 22 May 1997).

3 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families ('National Inquiry'), *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

4 Ibid 282. Recommendation 3 (at 282) of the *Bringing Them Home* Report states:

> that, for the purposes of responding to the effects of forcible removals, 'compensation' be widely defined to mean 'reparation'; that reparation be made in recognition of the history of gross violations of human rights; and that the van Boven principles guide the reparation measures. Reparation should consist of:
>
> 1. acknowledgment and apology,
> 2. guarantees against repetition,
> 3. measures of restitution,
> 4. measures of rehabilitation, and
> 5. monetary compensation.

5 *Trevorrow v South Australia (No 5)* [2007] SASC 285 ('*Trevorrow*').

6 Ibid [1215]–[1217].

7 This case was unreported and the reasons remain confidential.

8 The alleged assaults which were the subject of the application occurred in 1958. Section 26(1) of the *Victims Support and Rehabilitation Act 1996* (NSW) provides that applications for compensation must be lodged within two years of the relevant act of violence occurring. However, s 26(2) of the Act entitles the Director of the Tribunal to accept applications despite the fact that they have been lodged out of time, and s 26(3)(b) establishes a presumption in favour of giving leave in cases involving sexual assault. At the time, the maximum compensation payable by the tribunal was $50 000.

9 National Inquiry, above n 3, 194.

10 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1 ('*Cubillo*').

11 Ibid 47.

12 *Cubillo v Commonwealth* [2001] FCA 1213.

13 Alexis Goodstone, 'Stolen Generations Victory in the Victims Compensation Tribunal' (2003) 5(22) *Indigenous Law Bulletin* 10, 11.

14 *B v R* (1995) 127 FLR 438, 446–7 (Fogarty, Kay and O'Ryan JJ). See *Cubillo* (2000) 103 FCR 1, 32 (O'Loughlin J).

15 Chris Cunneen and Julia Grix, 'Chronology of the Stolen Generations Litigation 1993–2003' (2003) 5(23) *Indigenous Law Bulletin* 14.

16 Jennifer Clarke, 'Case Note: Commonwealth Not Liable: *Cubillo and Gunner v Commonwealth*' (2000) 5(2) *Indigenous Law Bulletin* 11, 14.

17 Ibid.

18 Ibid 11.

19 *Kruger v Commonwealth* (1997) 190 CLR 1, 76 (Toohey J). See *Cubillo* (2000) 103 FCR 1, 39 (O'Loughlin J). See also *Williams v The Minister, Aboriginal Land Rights Act 1983 (No 2)* [1999] NSWSC 843, per Abadee J at [757]:

> It is appropriate to repeat, that the events that I am being asked to judge and evaluate commenced in 1942

> and finished in 1960. Thus in 1999 I am asked to judge that which took place 39 to 57 years ago (over a half a century)! I repeat again that these are events that occurred in a different Australia, a society with different knowledge, and with different moral values and standards. To apply attitudes of the present community to a period commencing so long ago would be to apply the standards of today not those of the 1940s and 1950s.

See *Cubillo* (2000) 103 FCR 1, 40 (O'Loughlin J).

20 *Cubillo* (2000) 103 FCR 1, 408 (O'Loughlin J).

21 W E H Stanner, 'Foreword' in Marie Reay (ed), *Aborigines Now: New Perspectives in the Study of Aboriginal Communities* (1964) vii, ix; quoted in Robert van Krieken, 'Is Assimilation Justiciable?' (2001) 23 *Sydney Law Review* 239, 259.

22 *Trevorrow* [2007] SASC 285, [14].

23 Ibid [1046]. At [1104], the judgment makes reference to parliamentary debate on the Aborigines Half Caste (Children) Bill 1921 (SA), during which a Member of Parliament said:

> To take a child from its mother's arms, as may be done under this Bill, is altogether too drastic. … I am not going to be a party to taking a child away from its parents unless with the consent of the parent and the child, particularly the parent. ... This is one of the cruellest things I have ever heard of.

Another Member of Parliament is cited by Gray J (at [1104]) during the second reading speech on the *Aborigines (Training of Children) Act 1923* (SA), stating: 'The dictates of humanity forbid the State to deprive mothers of their infant children in cases when the mothers desire to keep them, even though it were ultimately for the child's benefit'.

24 Ibid [1095].

25 Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), 'Stolen Generation Compensation Long Overdue' (Press Release, 2 August 2007) <http://www.hreoc.gov.au/about/media/media_releases/2007/52_07.html> at 18 August 2008.

26 Channel 9, 'SA May Create Fund for Stolen Generation', *National Nine News*, 3 August 2007.

27 Mike Rann, 'Bruce Trevorrow will get Full Compensation' (Press Release, 2 August 2007) <http://www.ministers.sa.gov.au/news.php?id=1963> at 18 August 2008.

28 Channel 9, above n 26.

29 Aboriginal Health Council of South Australia, 'SA Aboriginal Leader Congratulates Bruce Trevorrow and Calls on Rann to Consult Aboriginal Leaders Regarding a Compensation Fund for SA's Stolen Generations' (Press Release, 7 August 2007) <http://www.ahcsa.org.au/media/docs/media_release07.08.07.pdf> at 18 August 2008.

30 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister).

31 Mike Rann, 'Findings to be Tested in Trevorrow Appeal' (Press Release, 28 February 2008) <http://www.ministers.sa.gov.au/news.php?id=2838> at 18 August 2008.

32 ABC Radio National, 'SA Govt to Appeal Landmark Stolen Generations Case', *The World Today*, 29 February 2008 <http://www.abc.net.au/worldtoday/content/2008/s2176377.htm> at 18 August 2008. Lawyer Martin Bennett commented that 'claimants have to make difficult choices between what at the moment is an inadequate, Redress WA situation' and the rights 'they may or may not have at law.'

33 See Andrea Durbach, 'Repairing the Damage: Achieving Reparations for the Stolen Generations' (2002) 27(6) *Alternative Law Journal* 262. See also Cunneen and Grix, above n 15; Chris Cuneen and Julia Grix, *The Limitations of Litigation in Stolen Generations Cases*, Research Discussion Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies (2004).

34 Judith Bessant, 'Procedural Justice, Conflict of Interest and the Stolen Generations' Case' (2004) 63 *Australian Journal of Public Administration* 74, 78.

35 Kim Beazley, quoted in Bessant, above n 34, 78.

36 Ibid.

37 Ibid.

38 Durbach, above n 33, 264.

39 This denial was made by then Federal Aboriginal Affairs Minister, John Herron: Commonwealth Government, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generation: Executive Summary* (2000) <http://www.australianpolitics.com/issues/aborigines/> at 18 August 2008. Senator Herron, delivering the Government's submission, claimed that no more than 10 per cent of children were taken from their families 'including those who were not forcibly separated and those who were forcibly separated for good reason', in his view a number too insignificant to constitute 'a generation'. The submission also asserted that the treatment of separated children was 'essentially lawful and benign'.

40 Many will recall the declaration by Prime Minister John Howard in 2001 that Australians of 'this generation should not be required to accept guilt and blame for past actions and policies over which they had no control': John Howard, 'Opening Speech' (Speech delivered at the Australian Reconciliation Convention, Melbourne, 26 May 1997); quoted in Acting Aboriginal and Torres Strait Islander Social Justice Commissioner (Zita Antonios), *Social Justice Report 1998*, HREOC (1999) 63.

41 Sir Gerard Brennan, 'Reconciliation' (1999) 22 *University of New South Wales Law Journal* 595, 596.

42 *Nulyarimma v Thompson* (1999) 96 FCR 153 at 173–4 (Merkel J).

See *Cubillo* (2000) 103 FCR 1, 34 (O'Loughlin J).

43 Brennan, above n 41, 595.

44 Penelope Debelle and Jo Chandler, 'Stolen Generation Payout', *The Age* (Melbourne), 2 August 2007 <http://www.theage.com.au/news/national/stolen-generation-payout/2007/08/01/1185647978562.html> at 18 August 2008.

45 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 August 2000, 18 841 (John Howard, Prime Minister).

46 *Cubillo* (2000) 103 FCR 1, 41 (O'Loughlin J).

47 A further $54 million over four years from 2002 was allocated by the Government in response to a report conducted by the Senate Legal and Constitutional References Committee. See Senate Legal and Constitutional References Committee, Parliament of Australia, *Healing: A Legacy of Generations* (2000) <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/stolen/report/contents.htm> at 18 August 2008; Acting Aboriginal and Torres Strait Islander Social Justice Commissioner (Zita Antonios), *Social Justice Report 1998*, above n 40, 56–7.

48 See, eg, Aboriginal and Torres Strait Islander Social Justice Commissioner (William Jonas), *Social Justice Report 2001*, HREOC (2001); HREOC, *Moving Forward – Achieving Reparations for the Stolen Generations* <http://www.humanrights.gov.au/social_justice/conference/movingforward/index.html> at 18 August 2008.

49 National Inquiry, above n 3, 281.

50 See ibid, 649–50.

51 Ibid, ch 14. Recommendation 14 (at 304) of the *Bringing Them Home* Report states that monetary compensation should be provided to people affected by forcible removal under the following heads of damage: racial discrimination; arbitrary deprivation of liberty; pain and suffering; abuse, including physical, sexual and emotional abuse; disruption of family life; loss of cultural rights and fulfillment; loss of native title rights; labour exploitation; economic loss; and loss of opportunities.

52 Ibid 652 (recommendation 4).

53 Western Australia, 27 May 1997; South Australia, 28 May 1997; Queensland, 3 June 1997; Australian Capital Territory, 17 June 1997; New South Wales, 18 June 1997; Tasmania, 13 August 1997; Victoria, 17 September 1997; Northern Territory, 24 October 2001. See HREOC, *Content of Apologies by State and Territory Parliaments* <http://www.humanrights.gov.au/social_justice/bth_report/apologies_states.html> at 18 August 2008.

54 'PM Must Say Sorry: Indigenous Groups', *The Australian* (online), 12 October 2007 <http://www.theaustralian.news.com.au/story/0,25197,22573508-5013404,00.html> at 12 October 2007.

55 See *Parliamentary Debates* (Kevin Rudd), above n 30.

56 PIAC is an independent, non-profit legal and policy centre located in Sydney. Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. The author is a former Director of PIAC.

57 PIAC, *Providing Reparations: A Brief Options Paper* (1997).

58 Alexis Goodstone and Amanda Cornwall, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generation: Addressing Term of Reference (2)*, PIAC (2000) <http://www.piac.asn.au/publications/pubs/SenateInquiryintotheSG.pdf> at 18 August 2008.

59 The National Compensation Fund would assess claims on the balance of probabilities, and administer minimum lump sum payments to Indigenous people who had been removed from their families during childhood by compulsion, duress or undue influence.

60 Goodstone and Cornwall, above n 58. PIAC argued for a body that 'should not only make awards of monetary compensation, but also allocate funding for other reparation measures, and have the power to recommend that third parties (for example, churches, welfare agencies) take action to implement reparations, where appropriate': at 18.

61 These included Link Up (NSW), the Stolen Generation Working Group (NSW), the State Reconciliation Council (NSW), NSW Department of Aboriginal Affairs, the NSW Attorney-General's Aboriginal Justice Advisory Council, HREOC, National Inquiry Secretariat, Aboriginal and Torres Strait Islander Commission, Aboriginal Legal Services, Aboriginal Medical Services and focus groups of Stolen Generations members across the country. PIAC's Proposal gained widespread support from Indigenous and non-Indigenous organisations after it was further developed via a series of consultations with urban, regional and remote Indigenous communities on the proposed tribunal's structure, functions and processes, and on the entitlement to and potential content of reparations measures.

62 Durbach, above n 33.

63 See Goodstone and Cornwall, above n 58.

64 See Durbach, above n 33.

65 In response to the Canadian Royal Commission on Aboriginal Peoples, which addressed amongst other things Canada's residential schooling policy, the Canadian Government established the Aboriginal Healing Foundation, which grants funds to community-based healing initiatives for use in developing and delivering programs and services for the victims of residential schooling. The Government has committed $350 million for the Foundation to distribute. See Aboriginal Healing Foundation <http://www.ahf.ca> at 18 August 2008.

66 The Truth and Reconciliation Commission was established in 1995 to assist South Africa to 'transcend the divisions and strife of the past' and rebuild a future based on respect for

human rights: Desmond Tutu, 'Chairperson's Foreword' in Truth and Reconciliation Commission (South Africa), *Truth and Reconciliation Commission of South Africa Report* (1998) vol 1, 23. It investigated and held hearings into human rights violations and in its 1998 Report recommended that victims of gross violations of human rights receive reparations, including monetary compensation. It also recommended communal reparations in the form of a community rehabilitation program, institutional reform and symbolic measures of reparations. The Commission made findings of gross violations of human rights in relation to 22 000 victims, recommending that they each receive a monetary package based on a benchmark amount of R21 700 (the median annual household income in South Africa in 1997) per annum for six years (at the time, approximately equivalent to A$6000 per annum). See Truth and Reconciliation Commission (South Africa), *Truth and Reconciliation Commission of South Africa Report* (1998).

67 The Waitangi Tribunal in New Zealand was established in 1975 in recognition of the large-scale dispossession brought about by colonisation and the consequences for the Maori nation. Claims may be made where individuals are, or are likely to be, prejudicially affected by any past or present actions or omissions of the Crown which are inconsistent with the principles of the Treaty of Waitangi. See *Treaty of Waitangi Act 1975* (NZ), s 6(1).

68 John Herron, quoted in Aboriginal and Torres Strait Islander Commissioner, *Social Justice Report 1998*, above n 40, 63.

69 Acting Aboriginal and Torres Strait Islander Social Justice Commissioner (Zita Antonios), *Social Justice Report 1998*, above n 40, 8.

70 Goodstone and Cornwall, above n 58.

71 Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations*, above n 47, 1.

72 Ibid.

73 Ibid, 259 <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/stolen/report/c08.pdf> at 18 August 2008.

74 Ibid.

75 Commonwealth, *Parliamentary Debates*, House of Representatives, 28 June 2001, 25 402 (Ian Campbell, Parliamentary Secretary to the Minister for Communications, Information Technology and the Arts).

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144 This statement was made by Archbishop Desmond Tutu at the announcement of the draft South African Truth and Reconciliation Commission's Reparations and Rehabilitations Committee policy recommendations; quoted in Hamber, above n 141, 218.

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> Former students will receive $10 000 for the first year (or part thereof) of institutionalisation, plus $3000 for every subsequent year of institutionalisation (or part thereof). There is no cap on the amount that will be expended on common experience payments, but if less than $1.9 billion is distributed, successful claimants may receive 'Personal Credits' of up to $3000 that can be used for personal, family or group education services. Residual funds to $1.9 billion threshold will be given to Aboriginal organisations for educational programs.

PIAC/AHRC, *Submission to the Senate Legal and Constitutional Affairs Inquiry into the Stolen Generation Compensation Bill 2008* (2008).

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