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STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Reference: Stolen Generation Compensation Bill 2008

WEDNESDAY, 16 APRIL 2008

SYDNEY

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SENATE STANDING COMMITTEE ON

LEGAL AND CONSTITUTIONAL AFFAIRS

Wednesday, 16 April 2008

Members: Senator Crossin *(Chair)*, Senator Barnett *(Deputy Chair)*, Senators Bartlett, Fisher, Hurley, Kirk, Marshall and Trood

Substitute members: Senator Hogg for Senator Hurley

Participating members: Senators Abetz, Adams, Allison, Bernardi, Birmingham, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, George Campbell, Chapman, Colbeck, Coonan, Cormann, Eggleston, Ellison, Fielding, Fierravanti-Wells, Fifield, Forshaw, Heffernan, Hogg, Humphries, Hurley, Hutchins, Johnston, Joyce, Kemp, Lightfoot, Lundy, Ian Macdonald, Sandy Macdonald, McEwen, McGauran, Mason, Milne, Minchin, Moore, Murray, Nash, Nettle, O'Brien, Parry, Patterson, Payne, Polley, Robert Ray, Ronaldson, Scullion, Siewert, Stephens, Sterle, Stott Despoja, Troeth, Watson, Webber and Wortley

Senators in attendance: Senators Barnett, Bartlett, Bob Brown, Crossin, Hogg, Marshall and Kirk

Terms of reference for the inquiry:

To inquire into and report on: Stolen Generation Compensation Bill 2008

WITNESSES

Committee met at 9.02 am

CHAIR (Senator Crossin)—Good morning. I declare open this hearing of the Senate Standing Committee on Legal and Constitutional Affairs. This is the second hearing for this committee's inquiry into the Stolen Generation Compensation Bill 2008. The inquiry was referred to the committee by the Senate on 14 February 2008 for report by 16 June 2008. The bill is a private senator's bill introduced into the Senate by Senator Andrew Bartlett. Its primary purpose is to address compensation for the stolen generation of Indigenous children. The bill proposes a compensation model for ex gratia payments to be made to those Aboriginal and Torres Strait Islander persons who are found to be eligible for such payments under the bill. We have received 72 submissions for the inquiry. Most of those submissions have been authorised for publication and are available on the committee's website.

I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. We would prefer all evidence to be given in public, but witnesses have the right to be heard in a private session. It is important for witnesses to give us prior warning or notice if they want their evidence to be heard in camera. I also remind witnesses that, if they object to answering a question, they should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time.

DURBACH, Associate Professor Andrea, Director, Australian Human Rights Centre

THOMAS, Ms Laura, Solicitor, Indigenous Justice Program, Public Interest Advocacy Centre

CHAIR—I welcome representatives from the Public Interest Advocacy Centre and the Australian Human Rights Centre. PIAC and the Human Rights Centre have lodged submission No. 69 with the committee. We have received that. Before I ask you to make an opening statement, do you wish to make any changes or amendments to that submission?

Prof. Durbach—No, thank you, Senator.

CHAIR—I invite you to make a short opening statement. At the end of that we will go to questions.

Prof. Durbach—Thank you Senator Crossin and members of the committee for the opportunity to address you. In 1997, in response to the recommendations of the *Bringing them home* report, and to provide an alternative to litigation as a means of securing redress for the harm suffered by members of the stolen generations, the Public Interest Advocacy Centre developed a proposal for the establishment of a stolen generations reparations tribunal. Three years later, PIAC presented a model of the proposed tribunal to the Senate Legal and Constitutional Committee on the implementation of the *Bringing them home* recommendations. The Senate committee report, *Healing: A legacy of generations*, recommended the establishment of a reparations tribunal to address the need for an effective process of reparation, including the provision of individual monetary compensation. That was in recommendation 7. Recommendation 8 of that report recommended that the model proposed by PIAC be used as a general template for the recommended tribunal and considered the most effective ways to deal with issues of reparation. Recommendation 9 recommended the details of the form and operations of the tribunal be finalised following consultation at a proposed national summit.

That 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.

While the Stolen Generation Compensation Bill 2008 seeks to address one component of measures of reparation—that is, monetary compensation—in our view it retreats significantly from the commitment clearly articulated by the Senate committee in its 2000 report, and, in so doing, we 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.

In recognition of the documented and far-reaching impact of removal policies on stolen generations, our submissions seeks to address these considerations by proposing a slightly amended stolen generations reparations bill, an alternative to the compensation bill which would reflect the commitment made by this committee in 2000 to develop a tribunal that would meet the key objectives of validating the specific experience of the stolen generations and their identity, of ensuring that Indigenous people are involved in the shape, design and delivery of reparations processes and outcomes and of developing reparations measures in accordance with the van Boven principles. So it would serve the dual objectives, we argue, of redressing past harm—the act of forced removal—plus additional amounts to be paid for aggravated harm, such as sexual abuse and assault, and of creating measures of reparation that offer long-term social, cultural and economic benefits to those affected.

Our submission draws the committee's attention to a successful international reparations model—that of the Canadian Indian Residential Schools Settlement Agreement—which was devised to address a history of human rights violations comparable in many ways to that of the stolen generation. In designing that agreement the Canadian government acknowledged the express needs of survivors and the research of the Law Commission of Canada. In its report, *Restoring dignity*, it recognised that any mechanism of redress must: acknowledge the harm done; account for that harm; make an apology; facilitate access to therapy, education and financial compensation; provide resources for memorials; raise public awareness of the abuse; and allow for the sharing of individual experiences in a safe and culturally appropriate forum. It did this by setting up a Truth and Reconciliation Commission, which is not something we would advocate, given the work of the *Bringing them home* inquiry, but certainly what we would endorse is the setting up of a commemoration fund and a healing fund, whereby members of that community could approach appropriate services for assistance in the long term.

Finally, while New Zealand does not share the forced removal history of Australia or the residential schools policies of Canada, the Waitangi Tribunal, which investigates claims by Maori prejudiced by laws and policies of the Crown, offers a constructive approach. Generally the claims relate to large-scale dispossession—land transactions, confiscation of natural resources—and the tribunal makes recommendations to the government such as compensation, reparations or settlement packages. The words of the tribunal chairperson and Chief Judge of the Maori Land Court, Joe Williams, are particularly helpful in shaping our submission. I quote:

In the past the Tribunal has expressed the view that a simple damages approach to reparations is neither possible nor appropriate.

… … …

In any event, it is in the nature of indigenous grievances that cash compensation alone will never work. The approach of the Waitangi Tribunal is to support packages which … more future looking and should help to get communities out of grievance mode and into development mode sooner.

… … …

The process of colonisation affected the whole of life for Maori. Mostly in a negative way. Reparations packages must equally affect the whole of life for Maori today if those packages are to make a difference. 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.

My colleague and co-author Laura Thomas will make a brief point on the actual compensation bill.

Ms Thomas—I would like to make one small point about the terms of the Stolen Generation Compensation Bill, particularly about the eligibility criteria. If claimants are required to prove or satisfy the tribunal that they were forcibly removed or that duress was involved in their removal, we know from the experience of stolen generation litigation which has been conducted that many people will not be able to prove or satisfy, no matter what standard is applied. The evidence simply will not remain—documentation, frailty of memory and the like. Based on PIAC's experience in representing people before the Aboriginal Trust Fund Repayment Scheme in New South Wales, I would say that many people will experience not having successful claims as essentially a denial of their identity as members of the stolen generation. I really want to focus on that point: if you make the eligibility criteria too difficult to satisfy, for many people the experience of having their claims denied will mean that you have done more harm than good to those particular individuals.

PIAC's proposal—and you can see it in our proposed stolen generations reparations tribunal bill, but it could equally be adapted to the compensation bill that you are considering—is that people should only have to show that they were removed prior to 1975 and then, should the government choose to challenge any particular claim, it should fall to the government to show that that removal was in the best interests of the child. That was the standard that was proposed in *Bringing them home* and we say that it is the most appropriate standard because, firstly, it should not fall to people to have to, after all these years, bring evidence that they were forcibly removed or that duress was involved in their removal. Secondly, we would say that that approach acknowledges that racist assimilation policies were behind most people's removal, and it is about acknowledging the historical wrong generally as well.

CHAIR—It was put to us yesterday in Darwin that some members of the stolen generation thought the point you raised was very valid. They would have trouble trying to prove that they had been forcibly removed. Some thought the level of compensation in the bill was too low,

but their view was that it is better than nothing. So where do we move that thinking from, 'It looks a bit too hard,' 'It's better than nothing,' to your proposal that you have developed a best model?

Prof. Durbach—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 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.

Some of the suggestions were: providing educational fellowships for children of members of the stolen generations, commemoration projects, memorials, oral history projects and healing centres, because people still say today that that experience is so entrenched in their psyche and they do not feel that they have been healed beyond that experience. Another suggestion related to parenting skills, with counselling services or specific services being set up. It was suggested that educational curricula be changed so that the history of the stolen generations is included in history generally for Australian school children. 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.

Ms Thomas—If I can add that giving people broad options about what they might want to ask for as part of a reparations package is a way of giving them ownership over what they are getting out of the tribunal rather than just saying, 'This is it.'

Senator BARTLETT—You would be aware, I am sure, of the model that was put forward and adopted by the Tasmanian parliament and implemented, as I understand it, with payouts not too long ago. We have also had reference to a scheme in Western Australia to do with people in institutions, which includes but is not specifically framed around stolen generations, as I understand it. Do you have any comment on the adequacy or otherwise of each of those systems, particularly the Tasmanian one? I think this legislation as it stands would exclude people who have received payments under that scheme from accessing this one.

Ms Thomas—Yes, I have a few comments about both of those schemes. I think the Tasmanian scheme has to be seen in its specific context in Tasmania. I would make a few comments about it. Firstly, in Tasmania they have already had a scheme, which has just recently been reopened to compensate people who experienced abuse while they were in state care. That element, which is covered by our reparations scheme, has already been addressed in a separate scheme in Tasmania, similar to Redress WA, which I think is the other scheme that you are referring to, Senator Bartlett. We would say that that is one factor that needs to be taken into account. That has already been done there.

I think that what was good about the Tasmanian scheme was the level of consultation and involvement with the Tasmanian Aboriginal community, but some people were nonetheless left out of that process. There are obviously a very small number of claimants overall in Tasmania, but there was a small cohort of unsuccessful claimants, who made up about 10 per cent of all applicants, who were unsuccessful because they were not able to prove Aboriginal descent, which is really unsurprising given the history of the stolen generation in Tasmania. Those people say that there was pressure on them or their families to assimilate and for that reason they were no longer able to prove descent. That is one issue that needs to be taken into account as well. The whole stolen generation scheme in Tasmania also needs to be considered in the context of the Tasmanian government handing back land to Tasmanian Aboriginal people. That has also already been done.

The other thing I would say about Redress WA is that we would support this. It is something which is also in our reparations package. It does allow for individual assessment of the harm that people suffered—physical abuse and sexual abuse—so that payments can be changed or scaled depending on the severity of the harm that people endured. We say that that is a good thing that can be implemented under our reparations tribunal model.

Senator BARTLETT—I know you have also been involved in court processes for some people regarding stolen generation issues. I suppose there are two aspects to my question. Firstly—and I think it is a related issue—the comment that is often made is that the parliament, having adopted a national apology, would open the floodgates et cetera to legal claims. Is there any substance to that? Is there a floodgate that you are about to open? Secondly, if there is not a scheme such as this, is there a likelihood of very many successful legal claims or even potentially successful claims? I guess you can never predict that regarding the stolen generation. How different are the benchmark and the processes compared to this type of scheme?

Prof. Durbach—Perhaps I could answer that. In relation to your first point about 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.

Firstly, there was not the evidence to support the claim, because so many of the witnesses we needed to rely on were either not available or they were in different parts of the world. Secondly, a lot of the documentary evidence was never actually created, or it was destroyed, or it was insufficient. But, thirdly and most importantly, as we went along the track of litigation and exposed our clients to the various requirements to demonstrate their claim—going to see psychologists to get psychological reports about the extent of damage—we were in a sense forcing our clients to revisit that history and trauma in an adversarial setting, which was counterproductive to their healing. They then withdrew—partly with our acquiescence, because we did not feel this was the appropriate forum within which to pursue an action for redress. So I do not think there will be a floodgate. It is very difficult to demonstrate, support and substantiate claims. As our reports make clear, the adversarial system is not a mode of

resolution that Indigenous communities appreciate. It is not a mode of resolution where there is comfort at all.

These proceedings are also very protracted and very expensive, and I think there are a number of factors which militate against litigation being run. Having said that, a couple of weeks ago I was at a national meeting with members of the Aboriginal Legal Service, and we were talking about the compensation bill and their response to it. I was quite surprised to hear that still there were people coming to those services seeking redress through the courts. 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, difficult as they are.

Ms Thomas—PIAC is certainly very much focused on finding a political solution to stolen generations reparation at the moment, but we would never foreswear taking on stolen generations litigation in the future. 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.

The last thing I would say is that even if there are only a handful of cases, the cost—not only the social cost to the applicants but to the government—is enormous. So you do not really need to open floodgates of claims in order for that cost to be just something that the government should avoid if at all possible.

Prof. Durbach—I think Laura is absolutely correct in saying that the apology has energised an interest in claims, but so did the Trevorrow decision. I think people saw $520,000 as the outcome in damages and believed: 'If Mr Trevorrow can establish the harm and get that sort of amount, then perhaps there is some sort of precedent there that we should pursue.' I do not think it is closed. Together with the apology, I think the Trevorrow decision has really opened up that possibility in people's thinking. But also Laura made the point that the Gunner and Cubillo case alone cost over $10 million to run, and that was unsuccessful. So just the actual cost to government and to the community of mounting this kind of litigation is extraordinary.

Senator HOGG—How does one achieve the balance between personal compensation and the broader consequences of the stolen generation and then, in context, the balance between that and the need for broader Indigenous funding policy out there in the community? That is a very difficult issue to grapple with.

Prof. Durbach—Yes, and I think a very important one, because so much of the discussion around compensation has been addressed via the notion of practical reconciliation—that, rather than addressing, as we would suggest, through a reparations model, the harm, it would be better for the Indigenous community overall to get measures on education, health care, housing et cetera in that practical reconciliation framework. 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.

Senator HOGG—I am trying to get at the practicalities faced by any government, regardless of its complexion—so this is not partisan politics—with a bucket of money to allocate to a funding proposal. Without going into policy issues, I am trying to get an appreciation of how a government, in allocating funds, achieves a balance between satisfying the requirements of those people who have a claim for personal compensation, satisfying the broader consequences of the stolen generation—and I can understand your point quite well—and addressing even broader Indigenous policy issues that need to be addressed. How does a government go about coming up with a model that adequately satisfies all the desires, needs and competing interests in those circumstances?

Ms Thomas—I would first of all reiterate Andrew's point that the 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.'

Prof. Durbach—May I add one point, and that is that we would endorse the kinds of amounts suggested in the compensation bill because we simply see those as notional amounts. You cannot ever address the absolute harm.

Senator HOGG—I was not trying to pin you down to a figure; I just want to be clear on that.

Prof. Durbach—I appreciate what you are endeavouring to do. It is a difficult question. When we were doing this project we thought, 'If we are proposing a national model, do we seek resources for that from each state, from the churches who were complicit in a lot of the institutional harm?' There are other bodies that might want to contribute to a fund which could support these kinds of innovations. The point that we want to highlight is that the amount of individual monetary compensation must be nominal. That way you can contain and perhaps have more resources available for the broader reparations measures that would be introduced.

Senator HOGG—All right. Thank you.

Senator BARNETT—Thank you very much for your submission. I appreciate it very much. It is very comprehensive. Following on from those questions and your answers, in terms of Tasmania—and I am a Tasmanian senator—and those compensation arrangements having been set up and paid and sorted, what more could be done in Tasmania? For example, to deal with the collective harm, would you be recommending that a healing and commemorative fund be set up that would apply in Tasmania, and the individual compensation arrangements have then been sorted, or would there be more that needs to be done in that regard?

Ms Thomas—The way that issue is addressed in our bill is slightly different from the way it is addressed in the Stolen Generation Compensation Bill 2008 in that our bill says that any compensation that a person has received under a state scheme or in the courts is taken into account when you assess their reparations package more broadly. So it would be up to members of the stolen generations and their communities in Tasmania to come to the federal reparations tribunal and propose to that tribunal what reparations packages they feel could be of further use to them in addressing the harm that they suffered as members of the stolen generations and their communities. As I said earlier, I think other things have been done in Tasmania, including compensation for physical and sexual assault that occurred in state care and the handing back of land, which might mean that the reparations packages that they might ask for might be more limited than what people in other states that have not had those steps taken would ask for.

Senator BARNETT—So in essence you would leave it to the reparations tribunal to ensure that there was no doubling up or double payments or whatever. No problem.

Ms Thomas—Exactly.

Senator BARNETT—Thank you for that. In terms of a few other areas, you indicated earlier that the issue of the 'sorry' and apology via the parliament and the recent litigation have energised further interest in compensation claims and so on. Why do you think the government are refusing to allow us to see their legal advice with respect to the impact and the consequences of that parliamentary resolution? Can you understand why they would be so resolute in denying this committee access to, firstly, the instructions to their legal counsel and, secondly, the legal counsel's advice regarding the impact and consequences of that parliamentary resolution?

Prof. Durbach—I do not think we can answer that directly, but when we were devising the PIAC project we sought advice from senior counsel about the impact of an apology and whether that might assume liability on behalf of the government in relation to potential claims by members of the stolen generation. 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. That is probably as far as I can take it.

Senator BARNETT—That is most informative. Is it possible, either on notice, in confidence or in any respect, for us to review or to access either the content of that advice or the advice in and of itself? You might need to take that on notice.

Prof. Durbach—I am happy to take that on notice.

Senator BARNETT—And even if you believe you cannot give us the exact advice, perhaps you could give us the thrust or the content of it. Perhaps you could take on notice the summary of your response just then and flesh that out so that we have a better understanding of your legal advice in terms of the impact of a parliamentary resolution.

Prof. Durbach—I am happy to take that on notice. I probably should also just add the proviso that the advice of another counsel, another law firm, might have been completely in contradiction to the one that we got.

Senator HOGG—It is called 'lawyer shop'!

Prof. Durbach—That is right.

Senator BARNETT—I am aware of your views, being a fellow lawyer.

CHAIR—I think this committee, more than any other committee of the parliament, understands that.

Senator BARNETT—I have a final question in terms of your submission to the legal and constitutional committee some years ago. I think it was pretty much endorsed at the time that they supported your views on the merits of a reparations tribunal, so congratulations on that. That was some years ago. What has changed since then, in your opinion or in your view, with respect to how we should deal with this matter?

Ms Thomas—If I could say one very bleak thing to start: a lot of members of the stolen generation have died in that time. I know, because I have been working at PIAC for only six months and several of my clients have died in that time. It is a very bleak thing to say but I think it is a very important thing to keep in mind.

Prof. Durbach—I think it is also a consequence of almost a decade of dismissing the stolen generation. We had a member of the previous government even say as much—that there is no such thing as the stolen generation. There was a kind of general dismissing of that experience, a dismissing of their identity. In my conversations with members of the stolen generation over the last few years, I think there has been a dampening of spirit and I think that dampening of spirit actually manifests in illness, drug addiction and alcoholism. The fact that this bill has now been presented is an enormously important and valuable validation of that experience once again, and people are feeling there is now possibly an opening up again of being heard and redressed in some form. We would welcome the bill very much for that reason.

Senator BOB BROWN—I thank PIAC very much, particularly for the model legislation. It is extremely helpful to a committee like this to have alternative legislation to look at in tandem with Senator Bartlett's Stolen Generation Compensation Bill. Ms Thomas, you were just talking about the point that people in the stolen generation are dying. The urgency of addressing this issue has repeatedly come before this committee. The practicality of it is: if we

are left with the potential for another few years of procrastination or with having this bill go ahead in its simple form, which would you choose?

Ms Thomas—I do not think that you have to choose if you are a little bit creative in the way you set up a slightly more complicated system like our stolen generation reparations tribunal. For example, in Canada where they have a more multifaceted approach as we are proposing, there was a common experience payment which would be analogous to the payments that are proposed under the Stolen Generation Compensation Bill. That element was implemented extremely quickly. You could also get, if you were particularly elderly or very sick, an interim, immediate payment. That sort of interim payment system has also been a feature of other compensation schemes, such as the scheme to compensate people who were abused in state care in Ireland, I believe. In Canada they are moving on to the process where they assess compensation for specific harms—sexual abuse and physical abuse—and to the Truth and Reconciliation Commission and those other elements of their scheme now that they have rapidly rolled out their common experience payments.

Senator BOB BROWN—Does your model legislation incorporate a common experience reparation payment?

Ms Thomas—That is what it is called in Canada, and that is the idea that you can have a flat amount. I think in *Bringing them home* they say a 'minimum lump sum payment'. So it is something that everybody gets, as opposed to payments where you might have to show specific harms to do with sexual abuse or physical abuse, analogous to the payments that have been proposed in a compensation bill.

Senator BOB BROWN—Does your bill facilitate that approach as well—that is, a common payment and then further investigation of the complications of specific claims of harm that people who are part of the stolen generation have experienced?

Ms Thomas—Our bill just allows the tribunal to award monetary compensation, although we do say in our submission that the approach of having this type of flat payment, as proposed in the compensation bill, could easily be part of what the reparations tribunal does.

Senator BOB BROWN—Yes. The concern I would have is that a tribunal set-up might take a long time to look at some hundreds or thousands of claims. In the meantime, members of the stolen generation may not survive. But, if there were a common payment up-front, as Senator Bartlett is suggesting, of $20,000 or some figure like that, people like the witnesses we had before us just yesterday—and these were elderly witnesses—have indicated that they would feel that some very big step had been taken in recognising the hurt and harm that they had dealt with as well as giving them monetary compensation, which goes beyond that, actually: it would be quite symbolic that they had been recognised and that something had been done in return. Would your tribunal be able to say at the outset: 'We want to take this course of action of having a general payment to people who are part of the stolen generation'?

Prof. Durbach—I think our bill would adequately accommodate what you are suggesting, and I think it is a very vital point that there is nothing to stop the tribunal making that immediate recommendation for payment, given the circumstances of particular claimants. The simple add-on to the bill in our reparations model is that, where people wish to create more enduring and communal reparations, they have that opportunity. The whole foundation and

rationale for our bill is exactly to pre-empt a situation where people get some monetary compensation now, and then years later think, 'Well, now what?' What we are trying to do here is serve two purposes. One is exactly the point you are making, which is to address immediately the obvious harm of the past and, to some degree, of the present if there were sexual or physical assault. But in addition, very simply, what we are asking for is a simple expansion of the role of that tribunal to create the opportunity for more enduring measures to be put in place, shaped by members of the stolen generation in the long term. So there would be two processes going on, in a sense. The first is that immediate payment, as you described, and the second is where people come before the tribunal to design measures which would address the more long-term harm.

Senator BOB BROWN—Whereas the bill we have before us would do the first, but then you would have to create a new process to do the second?

Prof. Durbach—Yes. But I think it is a dual process. I think you simply tell claimants when they come before the tribunal that they have two options and they can take one or both. One is to seek that notional amount, the $20,000, and the other is to seek a broader reparations measure in consultation with the tribunal.

Senator BOB BROWN—Thank you very much. The only other question I have is about schedule 1 of your proposed bill. It says that it would set out the details of the powers the tribunal would have to investigate, how a claimant might be legally represented and other matters such as staffing and appointments. That is generally not a very complicated process to set up, is it?

Prof. Durbach—No. In fact, a lot of work that we did in relation to that was looking at existing administrative models and tribunals—veterans, equal opportunity et cetera. We looked at existing models of those sorts of administrative tribunals and in fact suggested that they simply be an add-on role for an existing model if that were suitable. So it is not creating this whole new mechanism. It actually draws on existing institutional arrangements.

Senator BOB BROWN—Thank you very much.

Senator KIRK—Thank you for your submission and also for the work the PIAC has done. My question today is, in a sense, quite a narrow one. I am really just seeking your view in relation to it. Yesterday we were in the Northern Territory, so we heard from a number of people up there who have been victims or part of the stolen generation. They pointed out to us that they are in a unique position because many of them were removed under the Aboriginal Ordinance 1911. As they pointed out to us, they are a unique group to whom the Commonwealth is responsible. It got me thinking about the practical realities and the world in which we live, and I wonder about your view as to whether or not we could look at the Commonwealth showing some leadership by taking a stand and perhaps setting up some kind of fund or tribunal in relation to just that group of persons. I know that obviously you would like to see this operating at a broader level, but I would welcome your comments in relation to that.

Prof. Durbach—They would envisage a separate tribunal to a national one, specific to their experience?

Senator KIRK—Yes. It would be set up by the Commonwealth but it would have jurisdiction—I suppose you would say—in relation to only those persons affected in the Northern Territory—

Senator BARTLETT—And try to pressure the states—

Senator KIRK—Yes, showing some sort of leadership on the part of the Commonwealth, and then hopefully the states would follow suit and do something similar.

Ms Thomas—I think a much better approach would be for a national scheme that would treat all members of the stolen generations equally, but I would certainly support the Commonwealth government encouraging the state governments and, indeed, the churches to contribute to the fund that payments are made from in recognition of their responsibility for creating the stolen generations.

Prof. Durbach—I would endorse that, and I think it is something that could be brought to a national tribunal's attention when people from the Territory actually make claims that they are in a specific category, if you like. But I would certainly endorse that approach.

CHAIR—Thank you very much for your evidence this morning and certainly for the work that you have done in relation to this matter over many, many years. It has not gone unnoticed. It is certainly appreciated.

[9.54 am]

ARMSTRONG, Mr David, Law Clerk, Kingsford Legal Centre

CODY, Ms Anna, Director, Kingsford Legal Centre

ANTHONY, Dr Thalia, Associate, Sydney Centre for International Law

SAUL, Dr Ben, Director, Sydney Centre for International Law

CHAIR—Welcome. We do have submissions from you. The Kingsford Legal Centre's submission is numbered 63, and the Sydney Centre for International Law has lodged a submission, which is numbered 57. Before I invite you to make a short opening statement, are there any aspects of those submissions that you need to amend or change?

Ms Cody—No.

Dr Saul—No.

CHAIR—I invite you to make a short opening statement and then we will go to questions. We are trying to stick very rigidly to time this morning, so the shorter your statement the more time we have for questions.

Ms Cody—Thank you very much for the opportunity to appear before the committee. I would first like to acknowledge the traditional owners of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to those people and elders past and present. Drawing on one of the issues that you raised in the last questioning, I would impress upon the committee the urgency of this issue. To illustrate that, you would be aware that Kingsford Legal Centre represented Joy Williams in her claim against the state of New South Wales. Joy Williams has, sadly, passed away in the time since the end of her litigation. That demonstrates that, if this scheme were to be set up, she will not be able to gain the benefit of any such scheme.

I would also like to tell the story of Des Donley, who was in my office yesterday. He is a 93-year-old man, born in 1914. He was taken away from his family in Queensland when he was six months old. He was institutionalised in a Salvation Army home and then he spent some time with various foster families, who looked after him for his first seven years. He never met his mother. When he sought to get some records, he found that the records had been in a flood and then in a fire. So there are no records remaining for him to be able to pursue any possible legal case against the state of Queensland. At the age of 14, Des started to work as a farmhand in Queensland but he was never paid wages for the three years that he worked. He has now met his nephew. Des is an amazing man: a fighter, supporter of the unions, and he has survived until the age of 93. He went down to Canberra for the apology and was very touched and moved by that apology.

The other story is of Joy Williams, a strong woman, a Wiradjuri woman, whose mother signed a consent form when her baby was some days old. Joy was involved in legal proceedings from 1989 to 2001, and she went to the High Court twice pursuing her case. The toll that it took on her was such that she was unable to give oral evidence at her trial. She was in hospital at the time.

I raise these stories because of the issues that they illustrate about the problems of bringing litigation. The reasons that neither Mr Donley nor Ms Williams succeeded were: the difficulties in being found to be credible witnesses after having suffered such intense psychological harm as a result of removal; the destruction of records, which makes it exceedingly difficult to bring litigation; and the high personal cost. The individual cost for a societal harm is perhaps one of the largest issues to raise.

Other matters raised in our submission are: the importance of recognising removal and having a payment for the actual removal; the problems with having duress, as stated in the proposed bill; and also the need for legal representation for anyone who would appear before the tribunal. I would also impress on the committee the need for consultation with Indigenous peoples in formulating a tribunal. Certainly the Declaration of the rights of Indigenous Peoples refers to the need for consultation with Indigenous peoples. To sum up, those two stories that I have told you demonstrate some of the problems that people have faced and continue to face in trying to bring litigation. I commend Senator Bartlett for proposing a tribunal to deal with some of those issues.

CHAIR—Mr Armstrong, do you want to add any comments?

Mr Armstrong—No, thank you.

CHAIR—Dr Anthony or Dr Saul, would you like to make a statement?

Dr Saul—Yes. We would like to acknowledge the traditional owners of this land and thank you for the opportunity to appear. Also, we recognise the assistance of our student intern at the Sydney Centre for International Law, Ms Naomi Hart, who assisted us in our research. We would like to make a few short points. Firstly, at international law the duty to compensate for serious violations of human rights is well and long established, including for violations of the genocide convention of 1948. We note that compensation 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.

Secondly, we say an apology—although of course welcome—is not sufficient to discharge the obligation to make reparation at international law. Sometimes an apology is enough—if, for example, the material harm done is very slight or insignificant, and that is plainly not the case here. Thirdly, we support a lump-sum payment to recognise the underlying legal and social wrongs which were done as a result of child removals. We think it avoids the legal technicalities involved in litigating where trying to individually assess every element of a claim. But we do say 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.

There are different ways of doing that. You can, of course, cap that additional payment, as is the case in the recent Canadian scheme, which is capped at about $275,000. We are open to the idea that the government should be able to plead a defence that it was in the best interests of the child to take them in specific cases but not in the best interests in the way it has been

broadly argued in the past. By 'best interests' we mean there must be a legitimate public policy reason for taking a child, because, for example, they were vulnerable to serious abuse or other severe difficulties which could not be redressed in other ways—for example, through other forms of less invasive intervention. We note that for most of the stolen generation the removals were based on a racialised rationale as opposed to a narrow public policy welfare model.

Finally, we say that of course any scheme needs to consider whether it will displace common law claims. We are open to think more about this. One good model, I think, is providing for an opt-in or opt-out scheme, so members of the stolen generation themselves can choose whether to go for the statutory compensation model or, instead, pursue common law claims. HREOC, for example, says common law claims should not be precluded, but of course in Canada they have gone in the other direction and provide for an opt-in, opt-out process which gives Indigenous people themselves the choice. My colleague, Dr Anthony, will address a few supplementary points about the procedures of any tribunal.

Dr Anthony—I would also like to thank the committee for the invitation to give evidence today. I feel that it is a highly appropriate initiative to consider this issue in light of the apology. What I will talk to in terms of our submission are the practical reasons for such a bill and developing the model for a reparations fund—the scope of the fund and some of the procedural aspects of a reparations fund. I would first like to say that it is nice to be discussing issues of compensation outside of the context of the courts. A statutory scheme is a far more efficient, less costly and less traumatic process for dealing with claims. 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.

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.

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. Further to Dr Saul's comments, while the statutory scheme should seek to minimise legal claims, it should not require that stolen generation victims relinquish their legal rights. Therefore, we believe the reparations fund should provide an ex gratia payment, compensation for additional loss, compensation for unlawful acts related to the administration of the forced removal policies, payment to mothers

who suffered loss because of the forcible removal of their children, and potential compensation for other family members.

On a jurisdictional level, we would suggest that the Commonwealth work with the state governments to provide a national and holistic approach to this national loss and tragedy. In addition, we believe that the Commonwealth government should work with the churches in encouraging them to contribute to the fund. Finally, the Commonwealth government should consider a contribution from employers, such as in the cattle industry in the Northern Territory, which benefited from the labour of the victims of the stolen generations. On a procedural level, I would like to note that it is vital that Indigenous people take a leading role in the fund and in the tribunal. The tribunal should work in a way that is flexible and informal and perhaps look to the stolen wages tribunal in New South Wales as a model. I think the tribunal should last for at least 10 years in providing a compensatory mechanism, and it should be a source of healing and empowerment in itself.

Dr Saul and I mentioned in our submission a number of other healing mechanisms, which I will not speak about at the moment, but I would just like to note that we may consider a tribunal as having a broader role than simply administering compensation.

Senator HOGG—You raised an interesting point—that the tribunal should have a life of at least 10 years—which implies some sort of sunset clause. Would you see the overall package having some sort of life—that is, a sunset clause to address specifically that issue, such that with the advancement of time, whilst the funding might be moved out of that part, it would be moved into the other part of Indigenous funding? I am just trying to get some sort of feel for what might happen.

Dr Anthony—The bill that is proposed puts forward a seven-year sunset clause. In light of other international experiences with tribunals and commissions, the 10-year period seems to be more standard and appropriate for the longevity of these claims.

Senator MARSHALL—I want to explore the concept of opting in and opting out of the regulatory compensation scheme and not relinquishing legal rights in that respect. It occurs to me that you could have two people with identical circumstances but one has access to records that were not destroyed and witnesses who are still alive and able to be provided and another person in identical circumstances does not have access to those things. The equity issue concerns me, because you are going to have lots of cases where the circumstances are identical but the evidentiary base is problematic. How would you see that being dealt with equitably across the board?

Dr Anthony—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 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. So I do not think it would be a matter of half-half, where you would have half of the people opting in and half out. 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.

Senator MARSHALL—Ought that be a decision for a tribunal rather than the individual?

Dr Anthony—I think that the decision should be taken with legal advice. A tribunal would be able to offer the various avenues and what payments could be made available but, beyond that, if the nature of the abuse was so substantial then it should be taken on legal advice.

Ms Cody—Supporting what Dr Anthony is saying, it 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.

Senator BOB BROWN—That raises the question of the proposal that there be legal advocates in this process. Can you comment a little more on that? On the one hand it is clear that people appearing before a tribunal would be assisted by legal advocates but on the other hand a tribunal would be more effective, presumably, if it were not simply a replication of the courts.

Ms Cody—If I may respond to that, I think there are various models of tribunals that function with the assistance of legal advocates but are not necessarily dominated by legal advocates. I think it is really important that claimants be able to tell their story in their own words. I also think that the role of advocates and advice is essential but it would be up to the tribunal to determine how legal advocates appear before them. Some of the models that you could look at would be the Social Security Appeals Tribunal and the Victims Compensation Tribunal.

Senator BOB BROWN—And the tribunal ought to be able to hear evidence in camera. This committee has already had its attention drawn to cases where people might be further traumatised or damaged by simply the publication of information about what happened to them: sexual abuse, other abuse, other hardship. How would you deal with that?

Ms Cody—I would say that it would be up to the claimants and also to the tribunal, which would have representation of the Indigenous community on it, to make that decision. Claimants should certainly be able to ask for in camera proceedings.

Senator BOB BROWN—Finally, do you see much needing to be done to Senator Bartlett's Stolen Generation Compensation Bill to accommodate the submission you have? Do you think it needs to be replaced or enhanced? If so, would you be prepared to put to the committee how you think it might be modified to encompass the points that you have brought forward?

Dr Anthony—I think it is effective in dealing with the ex gratia lump-sum payments. I think what is needed for its enhancement is an additional role for the tribunal to play in processing compensatory claims. As has been mentioned before, this process goes hand in hand. The lump sum payment would be something that could be claimed in a fairly expedient manner, as recognition of the wrongfulness of the policy, and then the compensatory process would be ongoing and would perhaps require further evidence that the tribunal would assess.

Dr Saul—I would add that, if you do add this additional individualised assessment process to the bill, it provides an incentive for claimants to opt out of continuing on the common-law route, because effectively you are duplicating common-law bases of liability in a tribunal but subject to much less stringent legal standards and procedures. It would be a much more inclusive process if you did that.

Senator BOB BROWN—Do you see the PIAC model of legislation as encompassing that aspect? Secondly, do you think there is any great difficulty in amending Senator Bartlett's legislation to encompass that second factor?

Dr Anthony—Generally I would say that I endorse the PIAC position. I think that, as stated, the bill can remain but with the additional recommendations put by PIAC and by the Sydney Centre for International Law about the compensatory route.

Senator BOB BROWN—This committee, I am sure, will be interested in this. Do you see taking Senator Bartlett's bill and incorporating the PIAC added measures as a simple or a difficult matter? Maybe what I should ask—and I know that PIAC representatives are still here—is: would you be interested in putting forward the amendments to Senator Bartlett's bill that would effectively have us end up with the PIAC proposition?

Dr Anthony—Yes, we would certainly be interested in putting in a lot of work in that regard. Further, I would like to say that, because we believe one of the practical concerns in this bill is to short-circuit the litigation process, as Dr Saul stated, the only way is to have that additional compensatory mechanism incorporated. We would work towards developing that, but we would also like to see Indigenous people take a role in that process.

Senator BOB BROWN—Chair, just being mindful, my concern is that, if we do not take the opportunity that Senator Bartlett has presented, we may be sitting here and looking at this again in three years time. I do not want to take up your time or PIAC's time, but I think it would be very helpful to the committee if you could bring forward a proposition for amendments that enhance Senator Bartlett's bill that would end up with us taking it forward to where you and the previous witnesses have said it should go.

Dr Anthony—Certainly. In the absence of the compensatory mechanism being made available, we would in no way want to sacrifice the bill as it stands at the moment. What we are suggesting is that it should also address the greater loss that individuals experienced and try and get away from the courts and do it through a conciliatory process.

Senator BOB BROWN—Thank you. I think I am not overstating it when I say that we have had no witness who has said that it would be better to not have it.

Dr Anthony—Thank you, Senator Brown.

Senator KIRK—Thank you all for your submissions here today. I wanted to follow up on a point that was made in the submission from Dr Saul and Dr Anthony in relation to the need for wider reparation. You suggested the establishment of some kind of truth and reconciliation commission based on the model that exists in South Africa. Could you explain to me how such a commission would sit alongside any kind of compensation tribunal; what would be the differentiation between the roles of the two bodies?

Dr Anthony—I think at this stage, and in light of the *Bringing them home* report, the most appropriate way of addressing healing through the tribunal would be by allowing it to have informal mechanisms where there could be a process for storytelling and truth telling. So providing compensation would go hand in hand with giving Indigenous people, giving victims, a platform to have their concerns heard and, if they so choose, recorded or, if they do not, kept confidential. So in some respects we see this tribunal as taking a less legal role and having a healing role. In addition, we think the healing mechanisms that should take place should prioritise projects such as Link-Up which I understand have suffered some funding reductions in the states in recent times. We think that reunification is one of the best ways for victims to experience some type of healing and to feel that they have been compensated for their loss.

Senator KIRK—I take it then that this truth and reconciliation commission would be complementary to the tribunal. I am just wondering whether there would be duplication in the roles of the two bodies.

Dr Saul—It is a good point, and I think, as a matter of economy, it would be possible to combine them. For example, you could take wider evidence from claimants before the commission, and some of that evidence would feed into the broader aim of encouraging rehabilitation and reparation between communities, but some of that evidence would also be relevant to assessment of the compensation awards. So, as long as that commission served both functions, you could certainly have some economies there. That is the way it has been done in some other post-conflict situations.

Senator KIRK—Thank you.

Senator BARTLETT—Thank you for your submissions. In the submission from the Kingsford Legal Centre, I appreciate the point you made about the use of the term 'duress'; it is something we would have to take on board. I note your recommendation 2 recommends the bill 'not refer to specific legislative provisions', which I guess is one of the issues if you have a national scheme: you have to make sure you encompass all of them. You have recommended instead covering children who were 'forcibly removed from their communities'. Wouldn't the use of a term like 'forcibly' also raise issues of definition?

Ms Cody—Thank you, Senator Bartlett, and thank you for proposing the bill. Yes, I do recognise that that may create problems, having to prove forcible removal. Probably, in thinking further about this and after reading more of the other submissions, it would be better to just have 'removed' rather than 'forcibly removed' and having to show that. Then the onus would be on the government or the state to actually show removal was in the best interests of the child.

Senator BARTLETT—Thank you. You would be aware of the model that PIAC has put up; are you supportive of that?

Ms Cody—Yes. I am not aware of the detail, but certainly we are supportive of that model as an alternative, in addition to the recommendations that we have made, and we support that broad reparations model based on the van Boven principles.

Senator BARTLETT—Just on those van Boven principles, I think they go a bit more to the area of international law. I do not want to go too far outside the bill, but the committee

under its terms of reference is meant to look at related recommendations from the HREOC report and see if there are other ways of dealing with the whole issue of reparation. The van Boven principles cover restitution, compensation, rehabilitation, apology and guarantees of non-repetition. Are there other things, beyond the apology and a mechanism like this bill, that you think we need to act on that have not been adequately addressed yet?

Ms Cody—I would just support what has been previously said about the importance of, for example, providing funding for healing centres, recognising the damage that members of the stolen generation have had to their parenting skills and their ability to hold down jobs and recognising the broad range of services that people would need as a complete package rather than just the need for a payment of compensation.

Dr Saul—The other unresolved question here is, of course, the allegation that this amounted to genocide, which is the big international law question. It is not necessarily politically palatable to characterise it that way, but I think it is worth emphasising that there has been a great deal of confusion in the law on this point. In my view, the category in the genocide definition of the forcible removal of children was left in the genocide convention during the drafting precisely in order to recognise some aspect of so-called cultural genocide. This was left out of the drafting for the most part—for example, if you prohibit the speaking of a minority language in schools, it is not genocide—but this aspect of the ultimate destruction of the group by eliminating their cultural identity through removals between different groups is plainly genocide. There is no case law on it, to my knowledge—and this is one of the main areas of my research—but it is certainly open to be argued that it is genocide.

Senator BARTLETT—Do you mean there is no international case law?

Dr Saul—There is no case law on that element of the genocide convention, but it has plainly been recognised—for example, in the Akayesu decision of the Yugoslav tribunal—that it is regarded as a legal aspect of the genocide convention, which in the right case could sustain a finding. The point there is that you do not need to establish criminal liability for genocide in order to recognise the duty under civil law to compensate for the commission of genocide.

Senator BARTLETT—Putting the genocide point to one side for a minute—not just because it is politically contentious but because of time—in the Centre for International Law's submission, you have listed international human rights law in regard to the ICCPR. A lot of these practices occurred after Australia became a party to that. That is correct, isn't it?

Dr Saul—Yes. Australia became a party in 1980, after the convention was signed in 1966. Obviously, there were some removal practices long before then. To that I would say that, while the Universal Declaration of Human Rights is not a binding legal instrument, it nonetheless reflects customary law from about 1950 onwards, in my opinion. It was just that the international community still had to agree on the remedial procedures which would attach to those substantive rights, and that came later in the mid-1960s.

Senator BARTLETT—Those sorts of things are not enforceable in Australia under Australian law through our courts unless they are incorporated in our legislation, as I understand it, but are you aware of any efforts to approach international bodies to get findings with regard to breaches through those?

Ms Cody—The removal and the issue of stolen generations have been raised in non-governmental reports to the treaty monitoring Australia's compliance with its obligations under the International Covenant on Economic, Social and Cultural Rights, and there have been recommendations including observations relating to this issue. I know, because I participated in the process, that in 2000 those concluding observations referred to the need to implement all of the recommendations of the *Bringing them home* report. I know that it has also been included in the current NGO report, which has just been submitted in response to Australia's obligations under the same treaty.

Dr Anthony—Could we take it on notice to provide you with further information about those claims internationally?

Senator BARTLETT—Yes. That would be useful. Thank you.

Senator BARNETT—Thanks for your submission. I have a quick question with regard to something we touched on with the first witnesses this morning. In terms of a reparations tribunal or a compensation tribunal, are there any examples that you would like to share with the committee of those in state care who have had problems and abuse and so on that would be analogous to the compensation regime that is currently being considered for the stolen generation people?

Ms Cody—I think it is exceedingly difficult for anyone who has been in state care, whether they are Indigenous or non-Indigenous, to bring a common-law claim. The only difference is that the claim is probably not as old, so in that way they do not face the burden of finding evidence which has possibly been destroyed or finding that witnesses have died. I am not aware of any cases that have been brought successfully.

Senator BARNETT—I am really asking about any state legislative regimes that have been established for those who were in state care that are similar to the reparations tribunal that was discussed this morning by PIAC and that is being considered by this committee. Are there any legislative regimes that you can point to that we could consider?

Ms Cody—Do you mean within Australia or internationally?

Senator BARNETT—Within Australia—or internationally if you have got some examples.

Ms Cody—Tasmania is the only state in Australia that has such a system, and we have heard about that regime, which in some ways reflects the current bill. Internationally, the Canadian reparations scheme for the residential settlement program that was just enforced in 2007 would be one model. It does provide a base payment similar to that proposed in the bill, but there are other avenues for compensation that are capped. Again, we can provide further information on that scheme, and I think that is something the committee should look at.

Senator BARNETT—Sure. Thanks for that. Finally, I have a quick question regarding the parliament's resolution to say sorry, the apology to the Indigenous people, and its impact on or consequences for legal action. Do you think it has stimulated opportunity for further legal action? The previous witnesses talked about it energising matters but not having any distinct legal ramifications. Do have a view on that matter?

Ms Cody—My view is that it does not impact legally on people's capacity to bring claims—it does not add to the strength of their claim. It is more that it is a symbol, and it is an encouragement on a symbolic level rather than on the legal level.

Dr Saul—I would agree. It is plainly not an admission of specific legal liability in particular cases, and I am not aware of any common-law cases where an apology has been a basis grounding liability.

Dr Anthony—Finally, can I just say that what 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. I would suggest, if possible, that the committee recommend that the tribunal deal with both compensation for the wrongfulness of the policy and potential compensation for the unlawful nature of the implementation.

Ms Cody—I would like to note that each of the state and territory parliaments also made an apology and that those apologies had no impact on the way they then ran cases.

Senator BARNETT—Thank you.

CHAIR—Dr Anthony and Dr Saul, Ms Cody and Mr Armstrong, thank you very much for your submissions today and for taking the time to appear before this committee. It is much appreciated.

[10.35 am]

DICK, Mr Darren, Director, Aboriginal and Torres Strait Islander Social Justice Unit, Human Rights and Equal Opportunity Commission

HUNYOR, Mr Jonathon, Director, Legal Services, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. HREOC has lodged submission No. 70 with the committee, which we have received. Before I invite you to make an opening statement, do you want to amend or change your submission in any way?

Mr Dick—No.

CHAIR—I invite you to make a short opening statement and then we will go to questions. It is good to have you both here again.

Mr Dick—We begin by acknowledging the traditional owners of the land, the Cadigal people. HREOC welcomes the opportunity to appear before the committee today, and we send apologies of both our president, Hon. Justice John von Doussa, and the Social Justice Commissioner, Tom Calma. They both had longstanding commitments that they could not vary; they would otherwise be here. In 1997, *Bringing them home* recognised that past government practices led to generations of Indigenous children being removed from their families and communities. Since that time, state and federal governments have pursued a range of responses. However, one of the report's central recommendations has never been implemented: that a national tribunal be established to financially compensate members of the stolen generations and their families.

As HREOC comes before the inquiry today, we note with regret the federal government's position 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 and education. The federal government has an obligation to ensure basic services and opportunities for all of its citizens, Indigenous and non-Indigenous. Therefore, in HREOC's view, the provision of such services, while welcome, should not be regarded as an alternative option to compensation.

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

We also submit that a number of further measures should be considered surrounding the issue of funding for measures in the bill. I would point to the recommendations in the submission. Firstly, it is our position that 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.

Secondly, HREOC welcomes the bill's proposal to allocate funding to healing centres and would encourage state and territory governments, churches and non-government agencies that played a part in the removal of Aboriginal children from their families to jointly contribute to such a fund upon its establishment. We see healing as a necessary component of responding to the needs of the stolen generations, although we do not see it as an alternative to compensation. We note that in 2001 this committee tabled its report *Healing: a legacy of generations*, recommending that a reparations tribunal be established and identifying that it was a necessary component of a meaningful and comprehensive response to *Bringing them home*, so it is disappointing that that same debate is being had seven years later. HREOC would urge the committee to recognise the government's obligations to deal with unfinished business. This has long been known and it is now long overdue. There are many models that could be put forward to address this need, and this includes the more comprehensive model that is proposed by PIAC that HREOC has long supported. However, HREOC supports the current bill and believes that it provides an appropriate framework for taking forward these issues.

HREOC would urge the committee to recognise the government's obligations to deal with unfinished business. It has long been known about and is now long overdue for action. There are many models that could be put forward to address this issue and this need, and they include the more comprehensive model that has been proposed by PIAC that HREOC has long supported. However, HREOC supports the current bill and thinks that it provides an appropriate framework for taking forward these issues. One final comment: we have noted that there are some technical drafting issues within the bill. But we have not elaborated on them, because we think that they are picked up in their entirety in the Castan Centre's submission. We endorse the comments that they made there.

CHAIR—Mr Hunyor, did you want to add anything to that?

Mr Hunyor—No, thank you.

CHAIR—I have some questions. Mr Dick, regarding proposed technical changes to the bill, you are suggesting that rather than you providing us with further evidence we should examine the proposed changes or amendments in the Castan Centre's submission, because you endorse them.

Mr Hunyor—If there are particular issues that are of interest or concern to the committee, we would be happy to have a look at them. Our written submission has not focused on those.

We have simply noted after reviewing some submissions that the Castan Centre has picked up a number of things that we think are appropriate to be considered. If there are particular issues, we would certainly be happy to try to assist.

CHAIR—There is one thing I wanted you to clarify for us. Because the Northern Territory people affected by this policy were directly under the control of the Commonwealth prior to self-government in the Northern Territory, there has been a suggestion in relation to the Northern Territory that one way to proceed is to get this bill up and running—in the first instance it can only refer to people in the Northern Territory. You, along with PIAC and the Australian Human Rights Centre, are suggesting that a preferable way to go would be to put this on a COAG agenda and develop a national tribunal that states would contribute to. Is that your preferred model?

Mr Dick—Yes. 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.

CHAIR—If that were the model that was adopted, I have two questions. What would happen with the Tasmanian legislation? Is there not a need to have complementary legislation in the other states, such as South Australia, Victoria, New South Wales and Queensland?

Mr Dick—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.

CHAIR—What do you see coming first? Do you think that you would need to have that dialogue at the national level before this bill is put through the federal parliament or do you think that you could do both at the same time?

Mr Dick—That is probably a political judgement. If you establish a federal scheme and expect states to contribute to it—

CHAIR—They probably would not.

Mr Dick—they probably would not unless you had had that dialogue, I would imagine, and came to an agreement. That is more of a political judgement.

CHAIR—I am thinking in terms of where this committee might focus its recommendations. We could recommend that in the first instance this dialogue should occur, with a view to introducing some sort of legislation.

Mr Dick—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.

Senator BARTLETT—As a number of submissions, including your own, have mentioned, the notion of a compensation scheme, however it is structured, is a core part of the broader notion of reparation. We have had the apology and acknowledgement on a national level and I am sure that is widely welcomed. My understanding of the recommendation regarding acknowledgement and apology, which was implemented by the federal parliament, was that it was intertwined, if you like, with these other notions such as compensation and guarantees against repetition. Could you confirm that that is correct rather than a stand-alone thing? I also wanted to get a sense from you about whether—I want to make sure that I phrase this correctly—the parliament's apology is like a global apology for the overall practice. A compensation process is also a mechanism of individual acknowledgement if not apology. In that sense, it still contains components of acknowledgement. Is that a correct interpretation? I am really trying to get to the heart of the van Boven principles that are fairly well established internationally.

Mr Dick—I think that is right. It is a good way to put it that there are different measures that are needed to address different consequences of the actions in the past. For example, one measure that we understand will likely be taken later this year, which will also contribute to implementing these recommendations, will be the government indicating its support for the Declaration on the Rights of Indigenous Peoples, which contains provisions, in articles 7 and 9, that relate to guarantees against repetition, for example. So there are a suite of measures that are necessary. That is the approach of the van Boven principles. You are quite right that at the time of the inquiry they were draft principles that were being considered by the Commission on Human Rights. I think it was in 2005 that they were formally adopted by the commission in substantially the same format with the same set of heads of principles and so forth, so they are now quite well accepted as part of the body of international law.

Senator BARTLETT—The *Bringing them home* report is over 10 years old and the inquiry that led to it is older again. Things have changed to some extent; things have moved on and other things have happened. Is it being too linear to go back to the report and say, 'Okay, we've got to implement all these recommendations'? Are there things that have changed since then such that in HREOC's view—you are continually reviewing all of the wider human rights issues and social justice issues—we can accept that some of those no longer need to apply? Perhaps other mechanisms such as what the federal government is saying are at least another valid pathway to dealing with some of these things.

Mr Dick—I think that one of the things that is critical in the recommendations is around the participation and consultation with stolen generations people. That is a fundamental baseline. If stolen generations groups believe that things have moved on or that different issues have arisen or different paths ought to be taken then that would probably be quite legitimate. But in the absence of that, I do not think it is for HREOC to say. Ultimately, there are a set of principles there that are well thought out. They are a holistic response with different aspects. At this point, I think all we can say is that all of those aspects have not been addressed. There should be consultation with stolen generations as to the adequacy or not of that and ways forward.

Senator BARTLETT—Even though you are not necessarily doing stolen generations specific consultation processes, every year you do the social justice reports and those sorts of things that give a broader overview. Have you not in a sense identified a shift in view amongst even the wider Indigenous communities, let alone stolen generations people?

Mr Dick—I think it is reasonably well known that, when the apology was being prepared, Commissioner Calma was asked to facilitate a range of meetings with stolen generations groups and he did convene two national workshops which the minister attended along with the National Sorry Day Committee and the Stolen Generations Alliance. The messages from both of those groups were consistent and quite clear that the apology was a first step and that there were still a range of other issues to be dealt with. Both groups were, at that time, aware of the Prime Minister's position that there would not be compensation paid and both groups made it quite clear that that was an issue for another day, but it was still an issue.

Senator BARTLETT—Have any reports come out of those meetings or has that information been reflected in any statements?

Mr Dick—No. I think the primary purpose of participation was in terms of what might be in the apology. It was convened specifically for that purpose. It did leave a lot of these issues for subsequent discussion. I am sure in their appearances the National Sorry Day Committee and Stolen Generations Alliance would have made their position known. They have both been very public and clear that they think there are still a range of issues that need to be addressed, ranging from the appropriate levels of resourcing for link-ups through to compensation.

Senator BARTLETT—Thank you.

Senator HOGG—I might be well ahead of the game here in asking this question. It seems to me that if this proposal is adopted in some form there are going to be substantial amounts of money involved. Would this be subject to the scrutiny of the likes of the Australian National Audit Office, whether it be by way of performance audit or financial audit, to ensure that the money was being distributed in the appropriate manner? Is that envisaged?

Mr Dick—I do not think we can answer that. We do not know what is envisaged in that regard.

Senator HOGG—Would you see that being appropriate?

Mr Dick—The first comment I would make is that I do not think it involves substantial amounts of money. At the moment, the bill proposes $20,000.

Senator HOGG—I am talking a little bit beyond what might be in the bill before the committee.

Mr Dick—I understand that. Look at the schemes that have been established in Tasmania. That was a $5 million act. You are not talking about billions of dollars here; you are talking about 0.001 per cent of GDP or the annual budget. It is not a substantial amount of money. I wonder whether we would audit receipt of a $20,000 payment in other circumstances. I do not know. It is simply not an area I have expertise in.

Senator HOGG—I just thought I would raise it.

Senator BOB BROWN—Thanks for your submission. I refer to COAG. The COAG process is by consensus and therefore can be much delayed. Some matters that have gone to COAG are still awaiting resolution 10 years down the line. It means that if one state or territory has a different point of view, the whole thing will be held back. Would you see the recommendation that the Commonwealth, through COAG, develop a consistent approach about the funding mechanisms being done in parallel with the progress of this legislation, or do you think this legislation should wait until that COAG agreement has been made—which is something I would be a bit worried about?

Mr Dick—There are a lot of things you could say about the COAG process and what it achieves. I think you have seen in recent times with commitments around closing the gap and other issues that where there is the will to drive it through the support has come quite willingly. So it may well be an issue of the leadership and drive behind it. I think Senator Crossin asked a similar question as to which comes first—whether you go ahead with the scheme and then expect the states to pay if they have not been involved in the consultations and so on. Our overriding concern is that the recommendations be implemented and that people get the support that they ought to get and have the closure so that they can move forward with their lives. We are not precious about the suggestion. Our broader principle, to put it crudely, is: the 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.

Senator BARNETT—I want to follow up on the question from Senator Hogg. You indicated that the cost in terms of the total compensation amount would be minimal or nominal or whatever. Can you give us a better feel for that? You have mentioned a percentage of GDP. That is my first question. Have you considered replicating the Tasmanian scenario? You mentioned the $5 million, which is accurate. If that were replicated nationally, what sort of cost are we looking at?

Mr Dick—We would have to come back to you with those figures. We could not give them to you off the top of our heads. But if you look at what is in the bill at the moment, it does envisage $20,000 payments. The report talks about between one in 10 and one in three people being removed. Then you have descendants being able to claim through the bill as well. We would have to pull together some basic figures on that.

Senator BARNETT—Would you be happy to take that on notice and give us a broad estimate of your views?

Mr Dick—Yes.

Senator BARNETT—Secondly, your submission, under point 17, refers to a minimum specified ex gratia payment. Why did you recommend a minimum ex gratia payment, not a maximum? Why should there be a minimum or a maximum in any event?

Mr Dick—That paragraph is summarising the features of all the different schemes that exist nationally—for stolen wages, for abuse while people were in state care and so on. It is referring to the different features of the schemes that exist nationally and noting that all of the

schemes that exist provide a minimum payment model. The reason why a minimum payment model is appropriate is that it is a case of simplicity in many ways. People have before them options to pursue litigation which are often incredibly difficult and stressful. In some places—particularly in the Northern Territory—they are incredibly unlikely to succeed because of the scope of the Territory's power and the legislation that underpinned the removal.

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. 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.'

We also note in another part of the submission that an important feature of the bill ought to be that it does not require there being a legal indemnity given when you receive the payment. That is supported by the same sort of line of reasoning. There may be circumstances in which the evidence exists and you can then pursue a legal claim. Courts would obviously take any payments that you have received through other schemes into account in awarding damages. But the simple reality for many people is that the evidence does not exist. People have died and the records are not held by governments, so they are unable to pursue litigation. So we litigate very strongly for a simplified model that enables people to have some form of justice. A minimum payment is a central feature of that.

Senator BARNETT—I want to go back to some evidence that we had this morning in terms of the parliamentary resolution to say sorry and to apologise and the impact of that legally. Do you want to respond to that question?

Mr Dick—Sure. 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? We can provide that to the committee, but in 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. More generally, I would certainly endorse what Dr Saul and Thalia Anthony said this morning in those terms.

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.

Senator BARNETT—Finally, you touched on it in your opening statement and you mentioned that this was still an issue but I was just wondering if you think that by having this inquiry and pushing this legislation we are actually setting up and creating false hopes, bearing in mind that the Prime Minister has indicated he does not want to go down this track in terms of compensation. It is just a fear that I think needs to be addressed and it is a legitimate concern.

Mr Dick—I think there is some expectation from people and these issues remain very raw for members of the stolen generation. It is a slight digression, but late last year the HREOC published a magazine called *Us taken-away kids*, which was to commemorate 10 years of the *Bringing them home* report. It has stories, poems and other things by members of the stolen generations, including a number of photos that families submitted where they had been reconnected with their family. We have had quite an amazing experience where a number of people have contacted us to say, 'Look, there is a photo in there' or, 'You refer to a particular person' and, 'I think that is part of my family who I have not been reconnected with.' We have actually been able to put people back in touch with their families through this magazine.

I think the reality is that people are still out there who have not gone home and have not been able to be reconnected to their family. These issues live in people, and the need for healing for people is a very real one, which relates to things like the services that can assist them to be reconnected to family. I know that New South Wales Link-Up are at the back of the room, although they are not appearing today. They will tell you the hardships they face in organising funerals and other basic supports that they end up providing to stolen generations people that are still not addressed. So there are a whole suite of measures, and compensation is one that stolen generations groups have continually said is important to them. So whether it creates false hope, I think the hope has been there for a long time in any event and it is simply an unmet need.

Senator BARNETT—Sure. Can I just pick you up on that point? Is there any evidence in terms of how many people have not been reconnected? This is a very important issue for a lot of people, obviously personally. Do you have any such evidence or can you advise the committee where we could get that evidence?

Mr Dick—No. I think that the best estimates you get would come from services like Link-Up, who are doing this on a daily basis. My understanding is that they remain very busy at the end of the day and that it is not something they have dealt with and moved on from. They are continually doing it. It is often very complex to do it in terms of record searches and finding the sort of documentary evidence that is there.

One point I would make, which you may well be aware of, being a senator for Tasmania, is that in our discussions with the assessor for the Tasmanian compensation scheme he told us that, through the process of running that scheme, they were able to uncover a lot of information and also to assist families to be reconnected and to understand some of their descendants. They would find graveyards that people had not known were where their descendants were buried—all sorts of things. So often the act of going through this process can lead to a lot of those other things as well. That is a very practical way of demonstrating a bit of what the PIAC model's point is, about how these issues are connected. That sort of holistic approach through a tribunal can address a range of those matters. So, with the act of

going through a compensation process, there will be people who may well end up being reconnected because of the various documentation and other issues that are addressed through it.

Senator BARNETT—The feedback from Ray Groom was that it was an all-absorbing approach—a whole-of-government and whole-of-life approach. He was certainly absorbed in the process.

Mr Dick—Yes. It seemed to be quite an amazing experience. I recall him telling us stories about finding the graves, and people being able to visit the mother who they had never met—these sorts of things—and the importance of that. These things do not necessarily happen in a linear way.

CHAIR—Mr Hunyor and Mr Dick, thank you very much for appearing before us this morning and also for the work that HREOC continues to do. It is much appreciated.

Proceedings suspended from 11.05 am to 11.32 am

GILLIES, Dr Christine Kay, Private capacity

CHAIR—Welcome. You have sent us a submission, which we have numbered 49. Do you wish to make any changes or amendments to your submission?

Dr Gillies—No. I would like to firstly acknowledge the traditional owners of the land and also state that I will be referring to stolen generation people. I mean no disrespect to the people here if I speak in the third person.

CHAIR—I invite you to make a short opening statement and then we will go questions.

Dr Gillies—Obviously I support the notion of compensation, but my concern is more to do with the treatment component that is referred to in the legislation and the notion of healing centres. I am concerned that the treatment rights of the stolen generation are not enshrined in the legislation and that treatment to the same standard as any other compensation recipient in Australia is not specified or guaranteed. I would also state that all service provision for Indigenous people in Australia today is based mainly on the counselling model, and best outcome evaluation studies for trauma management clearly show that there are other models which produce more beneficial results with symptoms of post-traumatic stress disorder. I do not think this is being addressed. Those are the main points I want to make.

CHAIR—Thank you. I might start off the questions. You make an interesting point at the start of your submission—that victims of crime and people injured in workplace accidents and motor vehicle accidents currently all have their rights to compensation legislated.

Dr Gillies—Yes.

CHAIR—Do you find that some form of legislative instrument that Indigenous people, and not just stolen generation people, can turn to for compensation is lacking in this country?

Dr Gillies—I suppose that, generally, Indigenous people are entitled to use the other programs that are available, but that often does not happen—and that could be a problem with your consultations here: many of the groups you consult with will not have had experience with using compensation systems. Occupational health and safety systems such as WorkCover are only at the very earliest stage of development inside Aboriginal health centres. My understanding from the Aboriginal WorkCover worker is that they are only beginning audit processes that happened in other workplaces probably 15 years ago. The number of Aboriginal people claiming victim-of-crime compensation is very low. So I think experience with compensation systems is very low.

CHAIR—In relation to Senator Bartlett's draft legislation that we are inquiring into, where does that fit in with the work you have done with your clients in terms of their mental illness or stress or their ability to come to terms with those policies of the past?

Dr Gillies—I think, since turning away from mental health models 10 years ago, there has not been any work developed on, for example, desensitising anxiety in Aboriginal people, teaching Aboriginal people how to sleep at night if they have nightmares relating to their past, teaching them to be able to control a whole range of reactions that they might have. A typical example would be when you see stolen generation members trying to talk about what happened to them in their past and not being able to talk because of the trauma reactions.

Treatments for that kind of condition exist and are well developed in other populations—say, Vietnam veterans, victims of crime or bank hold-up victims—but they have not filtered through to the Indigenous health model. So the population that I see as being one of the most traumatised populations in the country is not actually receiving proper trauma management.

CHAIR—Okay. Senator Brown, do you have some questions?

Senator BOB BROWN—Yes. In having trauma management through access to the services that you are talking about, Dr Gillies, what is the crossover with counselling in terms of being able to not only talk people through their own problems but also move beyond that to talk to families and potentially with perpetrators, if they can be located?

Dr Gillies—Counselling is based on talking about issues and then people gaining insights about situations and slowly coming to terms with what happened. Trauma management is about taking very traumatic situations that are just too big to deal with in one chunk and breaking them down into component pieces and just working on one small component at a time, allowing your nervous system to actually desensitise so that your adrenal levels settle—there are adrenal surges occurring because of the trauma reaction. So the approaches are totally different. In fact, in trauma management you do not talk about what happened until the treatment has finished.

Senator BOB BROWN—Just to add to that a little more, what do you do?

Dr Gillies—Let me think of an example. You generally work from the memories that are coming up and intruding into somebody's consciousness at the time. If people are trying to go shopping or just trying to carry out normal functions and they have memories flooding into their minds about their past, you would start with those memories. There are a series of exercises that you teach people to do when they are remembering the memories. They carry out relaxation exercises so that a relaxation response is actually paired up with a memory rather than a startled response, which actually continues to trigger people.

Senator BOB BROWN—Is this time related? Does the effectiveness of trauma counselling change if the actual trauma that occurred was decades ago, as will be the case with many people from the stolen generation?

Dr Gillies—No. There was a major change about 15 years ago in the way that Vietnam veterans were being treated. People who had not been able to get their trauma symptoms under control since the Vietnam War have started to see major improvements in their mental health as a result of this sort of treatment.

Senator BOB BROWN—Can we get the reference to a study that is able to quantify the outcome?

Dr Gillies—There are hundreds of studies. It is extremely well documented.

Senator BARTLETT—Obviously everybody is different in terms of how they respond to, deal with and are affected by their experiences. I wonder if you have a general view about the potential for positive health impacts on people as a result of the acknowledgement and recognition at an individual level that comes from getting compensation, separate from monetary compensation that can be used to pay for making their lives more comfortable. Are there separate, identifiable health benefits for individuals that comes with compensation?

Dr Gillies—People certainly improve at the end of a compensation case. Often there is a lot of stress associated with going through compensation. I think what the outcome study shows is that even when people receive monetary compensation the symptoms and the illnesses for which they have claimed compensation are present. Even so, it is more a human justice issue to compensate loss rather than the fact that money itself corrects the issue. The old notion that symptoms miraculously disappear because compensation has been paid is just not supported by the literature.

Senator BARTLETT—It is obviously a decision of parliament and government as to whether a compensation scheme goes through. As I imagine you are aware, at the moment the current government's view is that they are not supportive of such an approach. By putting up a process like this, does it raise false hopes that people might get compensation? Obviously none of us can say for sure whether it is going to happen, but I wonder how sensitive we need to be to that potential of doing further damage by raising false hopes of compensation.

Dr Gillies—I feel the issue of compensation needs to be pursued. In our system, all other people who receive an injury are compensated. If people receive an injury at work, they are compensated. If people slip and fall in the supermarket and are injured, they are compensated. Why shouldn't the stolen generation be compensated? Some people might suffer an injury that affects the last five years of their working lives, but the stolen generation have suffered an injury that affects their entire lives.

CHAIR—We do not have any other questions for you, Dr Gillies.

Dr Gillies—There were a couple of other little things that I wanted to say but I was a bit nervous.

CHAIR—Please go on.

Dr Gillies—The other thing I was going to say is that in the bill there is no mention of a funding status for the healing centres and for how long the funding will apply. I think that everyone will agree that there is a history in Australia of funding services, the money being available for a very short period of time and then the services drying up. If you look at how other trauma centres have been established for, say, Vietnam veterans, normally a centre is established and teams of experts from all the various forms of trauma management are brought together. They work together and evaluate their outcomes and, slowly over a couple of years, work out the best way to treat the client population. But these programs have been running for 20 years. They are not programs that can be run for five minutes and then you can expect an outcome. In addition, with stolen generation people there is first generation traumatisation, but the literature surrounding transgenerational traumatisation is growing by the day and becoming quite huge. We really do not know the actual treatment techniques that are going to work with that population. It is not just a matter of funding a centre; you have to fund something that can evaluate and review and work out the measures for that population.

I suppose what I am saying is that any kind of healing centre that is established would need to start with a massive input of funding for experts to come together for evaluation and for there to be an audit process of the actual skills that are needed. There is an assumption that extra money could be added to the existing services. I am not critical in any way of the existing services—the existing services are needed—but they are totally inadequately funded

and, because of the lack of funding, there has been no ongoing education for the staffing working in those programs. Many of the trauma management methods that produce the best outcome require the highest levels of training, and I do not think people have reached that level yet. I think that you would need to do some kind of audit to see what skill level you have to work with. The other situation that I see is that there has been no major review of what the symptoms are that are present in current stolen generation people. So you do not fully know the symptoms that are present and you may not have the staff with the skills to provide the treatment. I think there needs to be some more evaluation.

Senator BARTLETT—Do you have any knowledge of how the Tasmanian scheme has run or of the people who have gone through that?

Dr Gillies—Not really.

Senator BARTLETT—We have had a few people—including some of the people this morning from the legal centres—suggest that the traumatising experience of going through the court can retraumatise or create new trauma, particularly in terms of not being believed. How critical in any sort of compensation scheme which is meant to be non-adversarial that it is run in a way that minimises the prospect of people being traumatised by the process? There is no way to completely avoid that prospect—people, by virtue of putting their name forward, have to acknowledge past traumatic process—but how big a risk is that if we do not get that sort of process right?

Dr Gillies—It is absolutely a risk. People who have untreated trauma reactions will become sick when they discuss what has happened. The other part of that is that there could be another stage before that where there are actually treatment programs that help to desensitise people, so that they are able to speak without being traumatised. That is the goal of desensitisation.

In fact, if you treat a bank hold-up victim who later sues their employer for compensation, that person would be put through a treatment program first that would allow them to be able to talk about what happened to them. That would not be the sole purpose but that would be the result: they would be able to talk about what happened to them when they go to court. I have certainly seen people who have not been fully desensitised going to court and not being able to fully tell their story and then being disadvantaged in court because they have not been able to give all related evidence because it is just too upsetting for them. Part of the trauma reaction is that, the minute you are triggered, you experience what is called a fight or flight reaction. You will either become angry or simply have to leave. Even if your compensation is pending, you will have to leave, simply to get away from the triggers. That could make evidence incomplete.

Senator HOGG—Following on from that, are the treatment programs in place now or would they have to be developed?

Dr Gillies—These sorts of treatment programs are fully developed. They would have to be made more culturally appropriate. We would have to look at the treatment programs and see—

Senator HOGG—So what would be the time frame required to make them culturally appropriate?

Dr Gillies—I do not think it would be very long at all.

Senator HOGG—Regarding the delivery of these programs, given that it would be in a very diverse range of environments, would there be any particular difficulties confronted in trying to deliver them in a diverse range of centres throughout Australia? In other words, would there need to be special assistance for the delivery of the programs?

Dr Gillies—Yes, there would. I think that you would have to firstly develop a specialist centre that developed the programs and then you would have to bring staff in to provide training. That centre could become a training unit. If you waited for everybody to advance through the different levels of university training to be actually trained in these methods you would be looking at maybe 10 years, but if people with some level of training were brought in for additional, on-site training at a specialist centre then the skill level could be increased.

Senator HOGG—So there would be an actual time lag between the acceptance of the concept and its actual delivery?

Dr Gillies—Yes.

Senator HOGG—Do you have any idea of what that time lag might be? What would it be 12 months or two years or are you talking about three or four years? I am not holding you to this; just roughly.

Dr Gillies—It would depend on the will of the people offering the programs. You would firstly have to have a group of people go through a program and include Indigenous people in the establishment of treatment to make sure that things are culturally appropriate and then you would have to, I suppose, put the teaching programs together and start training. It should not take too long—maybe a year. If people were truly committed and decided that they really wanted to get it done, they could do it in a year.

Senator HOGG—Would there be a finite period for the training? In other words, would you see it needing to last for five, 10, 20 or 30 years in that sense?

Dr Gillies—I suppose you could use a model like the one at the St Vincent's Hospital Anxiety Disorders Unit. It has been running for 20 years and its role has included continuing development, continuing research and ongoing training.

Senator HOGG—So this would be an ongoing commitment; it is not a one-off—

Dr Gillies—No, it is not a one-off thing.

Senator HOGG—No, and I never thought you were implying that, but I just needed to ask that for the sake of the record.

Dr Gillies—The other thing is that I think it needs to be recognised that there are layers of therapy. People will start off being able to tolerate one level of therapy and will then move on to another and another. They may acquire some skills at one level and then relapse and have to come back again. For people to complete all the different layers that are required to be symptom free may take years.

Senator HOGG—My last question is about the availability of people with the requisite skills to deliver such a program. I understood you to say that there would be a need for some

training, but how desolate is the field in terms of people with even the rudimentary skills that you could build upon?

Dr Gillies—Every master's degree program in psychology in Australia provides training in those skills. So there would be enough people to train in that area. But that is just the psychology program. I do not want to leave out the other sorts of programs that would need to be included as well. There would need to be Indigenous health programs of the sort that are run in Canada—

Senator HOGG—Yes. This is a specialist area which you are familiar with, and that is why I am asking that question. I am not excluding the other areas.

Dr Gillies—I am not either.

Senator HOGG—Thank you.

CHAIR—Dr Gillies, thank you very much for your time today. Your submission and evidence are very much appreciated.

Dr Gillies—Thank you.

[11.57 am]

BOWDEN, Mr Cecil Walter, Member, New South Wales Sorry Day Committee

HILL-WOOD, Mrs Nancy, Member, New South Wales Sorry Day Committee

MELITO-RUSSELL, Mrs Marie-Louise, Chairperson, New South Wales Sorry Day Committee

NEWHAM, Ms Sandra Lorraine, Member, New South Wales Sorry Day Committee

WENBERG-PENRITH, Ms Leilla, Member, New South Wales Sorry Day Committee

CHAIR—I welcome representatives from the New South Wales Sorry Day Committee. We have a submission from the New South Wales Sorry Day Committee, submission No. 46. Would you like to make any changes to that submission?

Ms Newham—We would like to make one addition to the submission. Under 17.1 we would like to add 'individuals', because we are aware that there are some individuals who were involved in the institutions that may actually have records. We would like to add 'individuals' so that all records could be accessed and brought together in terms of seeking compensation.

CHAIR—All right, thank you. We have got that change. Who is going to start?

Mrs Melito-Russell—I would like to acknowledge the Gadigal people of the Eora nation, their descendents past and present. We have respect for our brothers and sisters in the Gadigal country. We are here today to talk about the submission, to put a few things across. Personally, I would like to say that adopted and fostered children should be included in this because we were stolen just the same as the ones in the homes. We had no-one to go to. We were all alone and we went through the same trauma.

Mr Bowden—I was taken away as baby—I was about 18 months old—whilst my father was fighting during the Second World War. He fought in the First World War and he backed up for the Second World War. I was six years of age when the war finished. I can remember him coming back to the Bomaderry home, where we had been put, hoping to take us home. He had finished fighting in two world wars for freedom for this country but he could not have his kids.

Mrs Hill-Wood—I was born at Kyogle in 1941. I will be 67 next week. I was taken to Bomaderry Children's Home as a one-month-old baby. We were there until 12 years old and then to Cootamundra to the girls training home for domestic work for child slave labour for the white Australians. All this: we have had no childhood and you expect us to wipe it from the slate. That is what is hurting deep in my heart and soul. It will never go away. I am an only child. I am here to let you know how I feel. We all feel the same. We have all suffered the consequences.

To give a little bit of history, I come from Woodenbong. My mother, uncle and auntie came from Kyogle and Stony Gully. The manager for that management was John Howard's grandfather. I used to see between the lines. I knew there was something wrong with him. It hit the nail right on the head—taking away the generations of my people, my family. They

must have suffered hell. This is who I am about. It is hurting today and it will always hurt. It will never go away. Nothing will ever stop it. The generation will go on and on—it continues. Thank you.

Ms Wenberg-Penrith—I was taken as a baby. I was six months old when I was put into Bomaderry, until I was 12 years of age and then I went to Cootamundra. My name was Penrith at the time—I was married for 40 years. To go back to what I was saying: I was at Bomaderry and then I went to Cootamundra at 12½ years old to work in the home as a domestic worker until I was 15 when I had to work at Wagga Wagga.

When I went away from Cootamundra, I was put in Parramatta Girls' Home, put on a mission and everything. Then I was fostered out to Mr and Mrs Garden-Oakley when I was about 12½ years old. I did not get to stay with them very long—it was only 12 months. I kept running away. In the meantime, I cannot read and write to everybody, but this is what I am going through—a lot of hell. Thank you for listening to me.

Mrs Melito-Russell—I was born in Crown Street Hospital. I was taken away from my mother without permission. I was adopted and made a Catholic placement to a non-Indigenous family. My father sexually and physically abused me and another girl who was fostered by them. I found out a month ago when one of his relatives contacted me that the whole family knew but nobody did anything about it. For years, we suffered sexually. We went through the most horrid cruelties. We were so scared. I lived a life of being scared all the time and frightened to do anything. It is wrong.

CHAIR—Ms Newham, did you want to say anything or are you happy to go to questions?

Ms Newham—I would also like to speak to the submission when that is required. I would just like to say that in the time that I have been working with the stolen generations I have found them to be a truly inspirational group of people who have waited a very long time for justice. We are now sitting here among you. You have the ability. We all trust that you will do something very definite so that this can change. Hopefully, this is the first step. We commend Senator Bartlett for having the courage to propose the bill. We are hearing here today from the people who are alive but, as we know, there are many who have passed. This group here today have been waiting for 40 years for some sort of justice. We are here today with a lot of hope that this can be the start of something. As I said, we commend you, Senator Bartlett, for bringing this to something now. Everybody has been waiting a very long time.

I would like to talk briefly about our committee, if I can. Our committee is mainly made up of members of the stolen generations. We meet every week. The committee has been around since 1998. In the last four years it has changed fairly dramatically, because it is mainly now made up of members of the stolen generations. The aim of our committee is for members of the stolen generations to have a voice and for self-determination to occur. We meet on a regular basis, usually weekly. For the last four years we have had substantial Sorry Day commemorations. In Sydney last year we had a state march. What we are seeing is a group of people coming together who are supportive of each other. There is definitely healing occurring in the group.

We have created, and are trying to create on a bigger level, what we are calling a 'Belonging Place' for members of the stolen generations who have never really belonged

anywhere. We are trying to start the group in Sydney and hopefully groups will extend out into other places in New South Wales—we can only speak for New South Wales. That is the aim. We feel that healing cannot occur until people know where they belong. As we know, healing is a very individual process. We cannot just create healing centres and expect that everyone will be healed, because it does not work that way. From an Aboriginal cultural point of view, we have a very strong belief that we do not move along unless we are helping the ones who are behind us. We do not move forward without bringing with us other members of the stolen generations who are suffering. We want to bring them with us and help them. Some have not been able to come to different groups. They cannot relive the pain of their childhood experiences openly. They relive it every day in their lives. We heard a lot this morning about past policies. It is true that the policies were in the past, but the ongoing effects are experienced every day by members of the stolen generations, their families and the communities that have lost members.

That is a little bit about our group. We have been struggling for funding. We have not got any ongoing funding at all. Up until August of last year, we lived out of the back of my car because I was the only one who had a car. In terms of our meetings, we carted everything with us and went from hall to hall until we finally managed to rent temporary premises. The reason that we bring that up today is that we can see the lack of resources that are being made available for members of the stolen generations who are trying to do something for themselves in a way that is self-determined. In terms of the submission, it is great that it has happened. We see it as the first step in the whole process. All of the 54 recommendations of the *Bringing them home* report should be addressed. We see this as one step towards that, and we welcome it.

As Aunty Marie said, fostered and adopted children have been left out of the bill, and we feel that should be amended because, as Aunty Marie said, fostered and adopted children suffered just as much. Sometimes children were taken overseas as well, and some parents went overseas because they were very upset by the loss of their children.

Another issue that the bill has not addressed is what Dr Christine Gillies spoke about earlier, the transgenerational 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.

We feel that the time to make an application for compensation—I think it was PIAC that mentioned it earlier—should be extended from seven to 10 years from the commencement of the act because we think that would give everyone a bit more time to get things in order. We know that there is going to be a lot of searching for documents to be able to bring that information and that evidence forward.

In terms of the ex gratia payment, PIAC mentioned earlier that it should be seen as a recognition of wrongful process and given as a lump sum. We agree with that because we feel that this is only part of the compensation. As we pointed out in the submission, we feel it should be determined on a case-by-case basis because different people were in different institutions for different periods. We know that $3,000 per year has been mentioned. It should be equivalent to common-law damages because, as Dr Gillies, I think it was, said a little while ago, if somebody falls over somewhere or harms themselves they are entitled to compensation for that, and these experiences are far more serious than an accident like falling from a bus or something of that nature. We also feel that the payments should be tax free and should not affect Centrelink payments. That has not been mentioned, so we are not sure if that is to be the case.

In terms of the different models that have been spoken about, we feel very, very strongly that the stolen generations must be included in all consultations and all decision-making processes. In view of us being here today, we would like to say that we were not meant to be here today. We were quite concerned, upset and angry—the whole range of emotions—when we realised that no stolen generation members were actually going to be speaking here in Sydney. While we respect that stolen generation members and various groups had the opportunity to speak in Darwin, as Aboriginal people we also feel that that is a different area and that the voices here also need to the heard. We know that New South Wales was impacted on quite severely and early on in the case, in terms of children being taken, and we appreciate being able to be here today. But that is part of what we are saying in terms of consultation and decision making: we urge you to consider that Aboriginal people be consulted on anything that comes out of this inquiry before things are put into place.

We feel that there should be a tribunal advisory committee which includes members of the stolen generations and monitors and reports on the functioning of the tribunal.

Item 22 of the bill states that only people who are receiving compensation should be entitled to go to the healing centres. We do not feel this is right. We think that those centres should be open to all stolen generation members; otherwise, we are causing a division. Also, it is almost as though they are being punished again, because services are not going to be provided to people who are in need.

The other part we want to talk about and feel strongly about—and Dr Christine Gillies spoke about it a little while ago—is that there needs to be some sort of counselling if the stolen generation is going to give evidence, because we know it is a very traumatic experience. We can see today that just being here is quite dramatic, and you know that you will tell your story again. But we also recognise that telling the story is part of the healing. You have been hurt, and if you can tell your story and you are in a situation where people are supportive of you it becomes easier. There are other people who will console you and the healing begins. We feel that is an important part of the process.

I think we have covered most of what I wanted to say. There are just a couple of other things. In terms of the eligibility criteria, we think mediation should be included if descendants of deceased stolen generation members—their children—make claims, so that there is no division or arguing caused. Mediation can occur to make that a much easier process. Basically we think that the parliamentary committee must really understand the

holistic value of the *Bringing them home* report. The *Bringing them home* report talks about reparations. Monetary compensation is one of those reparations. When we look at reparations we are looking at the losses that the stolen generation members had. That includes loss of culture, loss of a country, loss of family and loss of connection to country. We know from the native title situation that you have to prove that you had a continual connection to country. In terms of stolen generation members being taken away and placed in institutions or adopted or fostered for 17 years, they then tried to go back and feel where they were connected. Often that would not happen or it could not happen because they would go back and not feel connected there. Hence, similar to the Yorta Yorta situation, people actually walked away and now they cannot prove the continual connection to the land. So there have been major losses for stolen generation members.

We feel that a whole-of-government funding and policy approach relating to the service programs and resources is absolutely essential because otherwise we will have one section working in one way at one time and it will not come together. As we know, it has taken a long time for services to happen. The *Bringing them home* report was tabled in parliament in 1997. Many of the stolen generation members had been in institutions. For example, the Cootamundra Domestic Training Home for Aboriginal Girls started in 1912. So when we start to look at the time that people have been waiting, it is a very long time.

We think that the establishment of task forces to monitor the implementation status of the *Bringing them home* report is essential because it has been 10 years. Last year was the 10th anniversary of the tabling in parliament of the *Bringing them home* report. John Howard was still the Prime Minister. For us it was a time of despair, particularly for stolen generation members, because we could see nothing good happening in the future. The great thing that has happened since then is that Kevin Rudd is now the Prime Minister and the apology has occurred which everyone had been waiting for. Even stolen generation members who felt that it did not mean that much to them, for many when the time came it was an enormous thing that happened. Obviously the stolen generation members need to speak to that. That is most of what we wanted to cover, I think.

CHAIR—We might actually go to questions because that is a really valuable part of the work that we do, and I think people here are keen to ask members of the Sorry Day Committee some questions about what is happening. Before we do that, I will say that we do appreciate how difficult and painful it is to tell your stories today, but it really does add in a substantial way to our consideration of this legislation and it is important that we hear from you. So we do thank you for coming, despite the fact that we recognise it is intensely difficult.

Senator BARTLETT—I also thank you for coming before us and telling us a bit of your story. As you would all know, the federal government have currently ruled out any form of compensation and have said they are going to address the disadvantage faced by Aboriginal people across the board through a range of programs. People often say—and people have said it to us in the last day or so of hearings—that no amount of money will reverse the harm and the hurt that has happened to you. Could you indicate to the committee why you think some form of individual compensation is important and in what way that would be helpful—beyond the benefit of having some money, which obviously everybody recognises?

Mrs Hill-Wood—Like everyone else in Australia, we would like to own our own home. We would like to have a block of land of so many hectares to build whatever we want on it, to give us the comfort that we need to pass down to our families. This is what it is all about, and this is why the land was taken: everyone understood the value of land. And so what have we got? Nothing. I think it would be handy to have that sort of thing as compensation. I do not know about the others, but I think it is a good idea. I could not have children because of the treatment that I had, but I adopted four Aboriginal children so that they would not go through life like I did and so that I could give them a future. I have got eight grandchildren now, and they are all happy, but they never want to know the life story of me. That is fair enough. There is one in the family that understands, and that is better than none. It really hurts wherever and whenever you talk about your family and your history—and going back to your own family, you get racism from them.

I went back when I was 18, from the Aboriginal Welfare Board, and I was shy and timid. I would not say 'boo'. But now I understand the issues around how Aboriginal people suffered and how the white Australians of this country tormented us and did not want us to have an education or anything. I understand it right to a T now. That is why I have got a voice and I am proud of who I am.

Mr Bowden—When our soldiers came back from the war, white Australians were given a house and land package. The Aboriginal soldiers were told to get back on the reserves. When I got out of Kinchela Boys' Home—I was in those homes for 17 years—I came down here to Sydney, and the police in the inner-city suburbs of Sydney were very racist. The result of my being in institutions was increased by a lot of years, because I was in jail for about 35 years. That is all because I was Aboriginal.

Senator BARTLETT—Thank you for that. I appreciate your answers. A comment that has been made at the federal level is that the practices and the things that happened to you and many other people were carried out by the New South Wales government authorities and it should be up to the New South Wales government to put forward some sort of compensation. I presume you have lobbied them and tried to engage them. What sort of response have they given?

Ms Wenberg-Penrith—We have suffered enough. We definitely need something to replace our lost parents. I never saw my parents after I was 12—I never saw them again. This is what I am saying to you now. I am on dialysis now for a kidney transplant. That is what is tormenting me now.

Ms Newham—Can I answer what you asked there, briefly. From my experience with four years, I prefer not to name the person but we did speak to someone at a state level. The response was that it is a federal government issue—it was prior to the change in government. We think it is time to stop passing the buck and that all parties come to the table, that both state and federal governments, who are now all Labor, come to the table with Aboriginal people to ease this hurt and pain that is ongoing and will go on forever. If that can happen, we have the chance for Aboriginal people to have some of the things that have been denied to them by non-Aboriginal Australians. We really think if the government can work together on this with Aboriginal people that progress should be made. As we said, we do not accept that amount of compensation as what is due. We acknowledge it. It would be good for stolen

generation members to have some money they could pay their electricity bills with or buy their car, or put petrol in their car, or have a holiday with their family—we heard that mentioned earlier. That is what we really think should happen. If everyone could work together now, state and federal, it would be wonderful.

Senator MARSHALL—Ms Newham, you indicated towards the end of your submission that the stolen generations should talk about the impact of the apology. I invite people to do that if they so wish.

Mrs Melito-Russell—I found the apology very sincere but an apology is not worth the paper it is written on if we do not get justice and reparation.

Mr Bowden—To me, the apology was an admission of guilt—they done it—and Australia's been denying it for all these years.

Mrs Hill-Wood—We were all in Canberra, but when I heard it and I went out to be interviewed, they said, 'What do you think about sorry?' I said, 'It's just a word. We've just got to wait and see now,' but that is who I am. While I am talking about Canberra, parliament is built on Aboriginal burial ground. So there is history there too. This is why all those traumas are in that place—they never go right, exactly.

CHAIR—Thanks for clarifying that for us.

Senator BOB BROWN—That is interesting. You brought up the point of payments being tax free and not infringing on Centrelink payments. It is an important thing for the committee to consider. I take it from that there would be concern, if a compensation or reparation scheme came in, that there might be some hidden penalty clause such as taking away Centrelink payments. Is that a real concern among people of the stolen generation?

Mrs Melito-Russell—Yes. Most of us are on age pensions.

Mr Bowden—All of us.

Mrs Melito-Russell—All of us, yes. We are all struggling now. It would depend on the amount of compensation. If it was only a small amount, then of course we are going to need them not to penalise us with Centrelink.

Senator BOB BROWN—The figure in the bill is $20,000. The bill says that that is a starting point, that this would be a general payment to people from the stolen generation and after that each person's specific considerations could be looked at. Have you any other figure in mind as a starting point or a general reparation?

Mr Bowden—There are also stolen wages. When I was in Kinchela Boy's Home we worked like dogs.

Senator BOB BROWN—How long were you there?

Mr Bowden—I was in Kinchela for about eight years and Bomaderry for eight years. In Kinchela, we were only little boys and we had to get up at 4 o'clock in the morning and milk the cows before we went to school. On the weekends we did all the farming—ploughing with draft horses. We did not have shoes. We had to walk through those ploughed-up grounds with no shoes on. And we had to get up in the morning with the frost and go and get the cows. The top of your feet would crack and puss would come out. If you put on shoes you were flogged.

We only wore shoes when we went out, and that was very seldom. When we did have shoes on it nearly killed us because we were not used to wearing shoes.

Senator BOB BROWN—So you were caught both ways.

Mr Bowden—Yes.

Senator BOB BROWN—Thank you for your stories. In considering this bill and in considering how we go back to the parliament and what we say there, it is very important for us to have a sense of the trauma you have been through.

CHAIR—I thank you all for your time today and for making the effort to come in and talk to us.

Mrs Melito-Russell—Thank you for listening.

[12.34 pm]

YATES, Mr Bernie, Deputy Secretary, Department of Families, Housing, Community Services and Indigenous Affairs

DOHERTY, Ms Amanda, Acting Branch Manager, Reconciliation and Repatriation Branch, Department of Families, Housing, Community Services and Indigenous Affairs

JONES, Ms Katherine, First Assistant Secretary, Indigenous Justice and Legal Assistance Division, Attorney-General's Department

CHAIR—I welcome representatives from the Department of Families, Housing, Community Services and Indigenous Affairs and representatives from the Attorney-General's Department. We note that neither department has lodged a submission with the committee, and I am sure people will ask you questions about that. Before we get going, I remind senators that the Senate has resolved that an officer of a department of the Commonwealth shall not be asked to give opinions on matters of policy and should be given reasonable opportunity to refer questions asked of the officer to superior officers or to a minister. This resolution prohibits only questions asking for opinions on matters of policy and does not preclude questions asking for explanation of policies or factual questions about when and how policies were adopted. Officers of the departments are also reminded that any claim that it would be contrary to the public interest to answer a question must be made by a minister and should be accompanied by a statement setting out the basis for the claim. I invite you to make a short opening statement, if you have one, and then we will go to questions. Mr Yates, do you have an opening statement?

Mr Yates—No, Chair, we do not have an opening statement.

CHAIR—Ms Jones, do you have a statement from AG's?

Ms Jones—No, Chair, we do not have a statement.

CHAIR—I will ask the first question. Why don't we have a submission from either of your departments and why don't you have a statement to make about this legislation?

Ms Jones—I might answer first in relation to the Attorney-General's Department. The department does not have any specific policy responsibilities in relation to compensation for the stolen generation and therefore thought it was not appropriate to be making a submission on the bill.

Mr Yates—Our letter to the committee secretary indicated that we had no comment given the position that the government has taken with regards to compensation and that we were not really in a position to be able to assist the committee in commenting on the bill.

CHAIR—I am not going to ask you to give an opinion on a matter of policy, but can you tell us if the government has a policy in relation to compensation for the stolen generation people?

Mr Yates—Yes, it has a public position that there will be no compensation. That was a clear policy statement of the current government made in the context of the apology that was made to the stolen generations.

CHAIR—When was that statement made, Mr Yates.

Mr Yates—Those statements were made in the lead-up to the apology.

CHAIR—Can you provide us with dates and who made those statements and the context in which they were made?

Mr Yates—We would have some relevant material that we could provide to the committee in that regard.

CHAIR—I ask you to take that on notice.

Senator BARNETT—Have you been advised specifically by the Department of the Prime Minister and Cabinet or are you relying on public comments by the Prime Minister or others?

Mr Yates—We would be relying on a number of sources, both direct and indirect—directly with regard to communications with our minister and indirectly through public statements made by the Prime Minister and other ministers that we have sighted.

Senator BARNETT—Can you table that advice?

Mr Yates—No, Senator.

Senator BARNETT—I will come back to that shortly and let the Chair continue her questions.

CHAIR—But, Mr Yates, if I understand your undertaking a few minutes ago, you are going to provide to this committee evidence of that policy position—who said it and when and in what context—are you not?

Mr Yates—Yes, Chair. I apologise if I was misleading there. We will provide examples of public statements that have been made in that regard.

CHAIR—So, Ms Doherty, what work is undertaken by the reparations branch?

Ms Doherty—The Reconciliation and Repatriation Branch deals with the repatriation of Indigenous human remains from overseas as well as work around the apology and ongoing consultations with members of the stolen generations.

CHAIR—I did not quite catch the last bit—ongoing?

Ms Doherty—Sorry; ongoing consultations with members of the stolen generations.

CHAIR—Well, why don't you think it is appropriate to tell this committee what those consultations are and what is happening?

Mr Yates—Senator, the committee's terms of reference and focus are on a bill that goes to the issue of compensation. There are many things that the department is involved with, but they do not relate to that.

CHAIR—But, as I understand it, the committee's terms of reference also go to where matters might be at with regard to other recommendations in the *Bringing them home* report.

Mr Yates—As I understood it, Chair, the bill constitutes the terms of reference.

CHAIR—I will hand you over to my colleagues.

Senator MARSHALL—If the bill is passed by the parliament, what areas and what department will be responsible for administering it?

Mr Yates—I think that may be a machinery of government decision which rests with the Prime Minister.

CHAIR—Mr Yates, the bill also provides for the establishment of other support services, including funding for 'healing centres and services of assistance for people in receipt of compensation'. Again I ask: is there absolutely no work being done within either of your departments in relation to this area—that is, the establishment of other support services?

Mr Yates—We do not run any support services. The main ones, as I understand it, are with the Department of Health and Ageing. There are consultations, as Ms Doherty indicated, with a number of organisations associated with stolen generations people, and they go to matters which, if the government finally takes any decisions in regard to those things, will be made public. But there is no work, no issues and no decisions that I can inform the committee about.

Senator BARNETT—Mr Yates, I am trying to clarify exactly what you have taken on notice to provide to the committee. You said you are looking for examples of public statements by the government regarding compensation for the stolen generations. So can you please advise the committee exactly what you are taking on notice? I ask this question of both departments, Attorney-General's and FaHCSIA, because we are keen to know why you have not made a submission and, specifically, what instructions you have received from your minister and from the government as to why you cannot have any input into this inquiry. What is your response, please?

Mr Yates—I indicated that I would take on notice and provide to the committee examples of public reports and statements made by the Prime Minister or other relevant ministers that go to the Australian government's position concerning compensation. That is what I have taken on notice.

Senator BARNETT—Mr Yates, you would be fully aware that there are public statements made at any one time by a range of government ministers and members of parliament. But, in regard to this particular Senate inquiry, have you received instructions from the minister or anyone else in the government; and, if so, can you advise the committee of those instructions and table that advice?

Mr Yates—No, Senator. I am not in a position to add to anything that I have said or that we have included in our letter back to the committee secretary.

Senator BARNETT—Could I put that question to the Attorney-General's Department, please, Ms Jones?

Ms Jones—I reiterate the point that I made earlier that the Attorney-General's Department does not currently have any policy responsibilities in relation to compensation to the stolen generation. We would not normally provide advice in relation to bills before the parliament that have no connection to our specific policy areas or policy responsibilities.

Senator BARNETT—Have you been advised by the relevant minister or anyone in the government to not present a submission to this inquiry?

Ms Jones—No, Senator.

Senator BARNETT—I would like to ask you some questions about the Attorney-General's Department, Ms Jones, as to the reasons that you are not providing to this committee the advice regarding the parliamentary resolution with respect to saying sorry and compensation. This matter did come up at budget estimates. I ask you again whether you can provide, firstly, the instructions that you gave to the legal counsel regarding that matter and, secondly, the response from the legal counsel.

Ms Jones—You are correct that this issue was discussed in detail at the February hearings of budget estimates. Mr Faulkner, the Assistant Secretary of the Constitutional Policy Unit in that department, noted at the hearing that he was consulted in relation to the apology by the Department of the Prime Minister and Cabinet. He indicated at the time that it would not be appropriate to discuss whether particular advice was sought or provided. Subsequent to that, there was a question put on notice for the department in relation to the questions around the issue of whether advice had been provided. The Attorney indicated that it would not be appropriate for the department to provide the information. I am not in a position to add anything further to that issue.

Senator BARNETT—I will just flag with you that it is a very serious matter, for the Senate committee and for the Senate as a whole, where a department refuses to provide information requested of it, whether that be legal advice or otherwise. Normally, in any refusal, a department must provide the advice from the minister and must set out, for public interest purposes, the grounds for the refusal. I am just flagging that with you. It is very disappointing that that matter has not been forthcoming.

CHAIR—Just before we have officers respond, my understanding is that we can request of the Attorney-General's Department a copy of that advice, and if in fact the Attorney-General does not want to provide us with that advice and it is in the public interest to not provide this committee with that advice, we should be advised of that. If we are not satisfied with that, we need to take it up in the Senate.

Senator BARNETT—Thank you, chair. I would like you to take on notice that I would like not only the advice but also the reasons that advice is being refused. I would like you to take that on notice, please.

Ms Jones—Yes, Senator.

Senator BARNETT—Thank you. I have some questions regarding the bill before us and its impact on Tasmanian legislation and the legislative regime. Have you considered that and how they may fit together? Have you given that any consideration?

Ms Jones—No, Senator, we have not, from the perspective of the Attorney-General's Department, made that analysis because, as I have mentioned previously, we do not have any policy responsibility in relation to compensation to the stolen generation.

Senator BARNETT—In terms of ex gratia payments that have been made, for example, in Tasmania, what are the tax implications?

Ms Jones—I am afraid that is not a matter that I can make comment on.

Senator BARNETT—Can Mr Yates respond to that matter?

Mr Yates—No, I am afraid that I cannot assist. That would involve taxation knowledge that it is not within the purview of my department to be able to comment on.

Senator BARNETT—There have been some comments in the press in the last 24 hours regarding the—and forgive my wording—use of some members of the Aboriginal stolen generations for medical purposes. The media have referred to them as medical experiments. Can you advise the committee of your response to that matter and those media reports that have been circulating in the last 24 hours?

Mr Yates—I am aware of those media reports. I am not in a position to convey any sort of response to them. Obviously, they are of concern. But in terms of any appropriate follow-up or action in that regard, I am not able to advise the committee as to what is happening.

Senator BARNETT—Are they accurate? Are those reports accurate?

Mr Yates—I have no knowledge of the verity or otherwise of those reports.

Senator BARNETT—So, up until today, you had not been aware of any evidence or been provided any information with respect to medical experimentation on members of the stolen generations. Is that correct?

Mr Yates—No, we are not aware of and nor have we provided any advice about such alleged experiments.

Senator BARNETT—Would it be appropriate for you to take that question on notice in order to have a thorough investigation or inquiry within your department as to whether that is entirely accurate or are you giving a cast-iron guarantee that the department has never been advised of or been made aware of or been informed of any medical experimentation or alleged experimentation whatsoever?

Mr Yates—I am fairly confident that the answer to that is that we have not received any such information, but I will confirm it for you to ensure that no other part of the organisation has received any such information.

Senator BARNETT—Thank you. Now that you are aware of the allegations that have been circulating very recently, what efforts are you undertaking or pursuing to validate or otherwise those allegations?

Mr Yates—In conjunction with other relevant agencies, we will examine the nature of those allegations and if and how Commonwealth should respond and, if so, through which relevant agency.

Senator BARNETT—Could you take on notice and advise the committee of the feedback you receive from your inquiries?

Mr Yates—I will take on notice your request.

Senator BARNETT—It is a deeply disturbing allegation and it is something that needs to be taken in the most serious manner. Thank you for that. Finally, I have a question regarding the $63 million package over four years for practical assistance—the government's formal response to the *Bringing them home* report in December 1997. Are you familiar with that?

Mr Yates—Not in detail but in broad terms.

Senator BARNETT—I am interested in the funding for Link-Up services in each state. I am not aware of any funding or services in Tasmania. I am wondering if you can advise whether that is accurate.

Mr Yates—The program is administered by the Department of Health and Aging. The committee would need to refer that question to them. I can certainly undertake to secure that information from that department and provide it to the committee.

Senator BARNETT—That would be useful. Could you advise the government's plans for (1) existing funding and (2) ongoing funding for the Link-Up services into the future in each state and territory and specifically in relation to Tasmania? I am interested to know if there is any funding at all in Tasmania, as I was not aware that that is the case.

Mr Yates—I will put those questions to the Department of Health and Ageing in relation to the historical funding. As you are probably aware, Senator, an additional $15.7 million was committed by the current government for counsellors and further Link-Up family reunion services. I will ask the department to advise what the implementation status is of that commitment.

Senator BARTLETT—I want to get a clear indication from either of you—whoever is most appropriate. The committee is obviously examining a particular bill but it was also asked to review any relevant unimplemented recommendations of the *Bringing them home* report. In broad definition of what is relevant I suppose you could say that would be all the recommendations but, even on a narrow definition of 'relevant', that could be just the ones relating to reparations, which includes the apology, compensation, measures of restitution et cetera. The federal government has clearly indicated that its current position is that it is not interested in setting up a national compensation scheme, and it is obviously the government's right to do that. As part of the ongoing consultations and engagement with members of the stolen generations, is that being done in a way that takes into account the outstanding recommendations of the *Bringing them home* report, or is it just negotiating with them as one Indigenous group amongst many about any issues that may be relevant to them?

Mr Yates—We are obviously concerned to work through with them what their priorities and needs are and what steps we might be able to practically take to respond to those. Whether those priorities and needs correlate to the recommendations in any way, shape or form is, I guess, a matter for them.

Senator BARTLETT—But, from your perspective and the framework within which you are operating, the recommendations are not part of a framework that you use as a reference point in any way; you are just consulting with them and taking on board their views as part of informing delivery of services and that sort of thing?

Mr Yates—Yes. Any further ideas that they want to convey to government will be taken up as part of those consultations. If they have further suggestions or proposals—whether or not they derive from the original recommendations or the experience that they have as organisations working with members of the stolen generations—we will work with those and whatever their priorities are.

Senator BARTLETT—I am fairly sure—but you can correct me if I am wrong—but, amongst some of the statements, certainly by the Prime Minister, regarding the issue of

compensation, he has basically said it is up to the relevant states to set up a compensation scheme if they feel it appropriate, as Tasmania has obviously done. I am paraphrasing him, but I am fairly sure I have heard him say that. Are you able to enlighten us in any way about whether there has been any formal request, pressure or even inquiry towards state governments about whether they are pursuing this path or whether they are being asked, encouraged or requested to do that or whether it is just merely being said: 'That is something for them to think about; we don't have a view either way'? I presume it is recognised that the federal government did have responsibility for these practises at the time, at least with regard to the territories.

Mr Yates—I am not aware whether or not the Prime Minister or other members of the government have made references to the states and territories in this regard. I cannot say whether that has been part of the commentary. I certainly cannot say as to whether or not there has been any advice or direction, or taking it up with any of the states or territories as to whether they ought to be responding to this issue.

Senator BARTLETT—Are you able to check whether there has been any communication with the states regarding this matter that it is appropriate to inform us of?

Mr Yates—I will take that question on notice, Senator.

Senator BARTLETT—Thank you.

Senator BOB BROWN—Ms Jones, you said that the Attorney-General's Department has no policy responsibilities in relation to compensation to stolen generations, but we have heard that the Prime Minister and the government had said that they will not be compensating stolen generations. That is a policy decision, is it not?

Ms Jones—As enunciated by the Prime Minister, to the extent that that covers it, yes, that is correct.

Senator BOB BROWN—Has Attorney-General's given any advice on that matter and, in particular, in relation to the Northern Territory and the ACT, ongoing responsibilities of the Commonwealth to the stolen generations for reparation?

Ms Jones—As mentioned earlier today, whilst I can advise that an officer of the department was consulted in relation to the issue of the apology by the Department of the Prime Minister and Cabinet, I am not in a position to discuss whether particular advice was sought or provided. The Attorney-General has indicated that it would not be appropriate for the department to provide that information.

Senator BOB BROWN—That is particular information about whether or not the Commonwealth has direct responsibility to the stolen generations in the territories because it was in control at the time.

Ms Jones—I have no information in relation to whether any advice has been sought on that specific issue relating to the territories.

Senator BOB BROWN—Can you find out for the committee whether that is the case?

Ms Jones—I can take that on notice, yes, Senator.

Senator BOB BROWN—If you would, please. When it comes to the international covenant, particularly on indigenous rights, can you tell the committee what that has to say about the issue of reparations to Indigenous peoples?

Ms Jones—We could take that on notice, although, as I have indicated, the Attorney-General's Department has not had policy responsibility in relation to this issue, but, in relation to the international covenant, I am sure we can discuss that with our colleagues at FaCSIA and come back to the committee with some in fact.

Senator BOB BROWN—That would be helpful to the committee, if you could. Mr Yates, you said early in the piece that there have been public statements by the Prime Minister and others relating to not giving compensation but also that you were relying on direct communication from the minister. Were those communications oral or in writing?

Mr Yates—They may have been both.

Senator BOB BROWN—Can you provide the committee with the written communication or any note of the oral communication from the minister?

Mr Yates—It is not normal practice to provide communications between the department and the minister on policy matters. I can refer your request to the minister but I am not able to make a commitment to release any such information.

Senator BOB BROWN—Would you refer that request to the minister, please.

Mr Yates—Certainly.

Senator BOB BROWN—Can you say when that communication from the minister came to the department?

Mr Yates—No, Senator, I do not think it is wise to talk about the timing and content or anything surrounding any such things, because we then just get into a whole process of trying to chase down details about things. But I am happy to include that in the request to the minister.

Senator BOB BROWN—But you will understand that, as far as this Senate committee inquiring into this particular matter—and based on Senator Bartlett's legislation—it is very germane to our deliberations that we know what the position of the minister is and if any instructions or other communications have been made to the department.

Mr Yates—I understand your point. I will refer that request to the minister.

Senator BOB BROWN—I also want to know whether—and I may come back to you, Ms Jones, and you, too, Mr Yates—there has been any assessment of Senator Bartlett's legislation and whether you have any recommendations to make to this committee about how it might be improved so as to make its presentation to the parliament better.

Ms Jones—Replying on behalf of the Attorney-General's Department, given that we have no policy responsibility in relation to this issue, we have not made such an assessment of the bill.

Senator BOB BROWN—Yes, I understand that. When you say that you have no policy responsibility, does that mean that you do not because that is your direction from government

or because there is no responsibility in this field as far as the department of itself is concerned?

Ms Jones—We have not received a direction from the minister in relation to this and it is not an area that the department has had any policy responsibility for in the past.

Senator BOB BROWN—Thank you.

Senator BARNETT—I have one very quick follow-up question relating to the matters raised this morning about the federal parliamentary resolution. Has either department undertaken any specific programs, initiatives or actions as a result of the federal parliamentary resolution? If so, could you please provide the details of any action? I am happy for you to take that question on notice.

Mr Yates—We will take that on notice. We have certainly had ongoing consultations with a number of organisations representing the stolen generations, as I indicated earlier. I will encapsulate that in our response that we will take on notice.

Senator BARNETT—I specifically asked about any flowing from the federal parliamentary resolution.

Mr Yates—On the apology?

Senator BARNETT—That is correct; the parliamentary resolution to say sorry and apologise.

CHAIR—I thank all the witnesses who gave evidence to the committee today and I now declare this hearing of the Senate Standing Committee on Legal Constitutional Affairs adjourned.

Committee adjourned at 1.08 pm