

# Moving forward

## achieving reparations

~ ISSUES PAPER ~

### Who are the stolen generations?

From the late 1800s until 1969 Australia had a policy of removing indigenous children from their families. As many as 100,000 children are estimated to have been separated from their families. These are known as the stolen generations.

Indigenous children were put into institutions run by government and churches, adopted by white families, and fostered into white families as part of a policy of assimilation. Today indigenous children and young people continue to be removed from their families at a higher rate than the general population.

### Why reparations

The devastating impact of forcible removal policies was finally given proper public recognition during the *Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* by the Human Rights and Equal Opportunity Commission. It documented the grief, trauma and loss of culture resulting from the policies.

The report of the inquiry, *Bringing Them Home*, concluded that the forcible removal policies were a denial of common law rights and a serious breach of human rights. The report recommended reparations be made for these violations. It said they were a breach of human rights amounting to genocide.

### Responses so far

State and Federal Governments, and the churches involved in the removals policies, have made a range of responses to *Bringing Them Home*. There has been some acknowledgement and apologies, and funding for reparations measures such as counselling, and family reunion services. The level of government funding and the way it has been spent has been criticised by many indigenous organisations. An important criticism is lack of consultation with those most affected. No government or church has provided monetary compensation.

Many communities have taken their own initiatives to heal the pain. An example is the Journey of Healing by the National Sorry Day Committee. Some people have made claims for compensation in the courts. None have been successful so far.

### Moving forward – a Reparations Tribunal

To help move forward the debate about providing adequate reparations a Reparations Tribunal has been proposed. The project, *Moving forward – achieving reparations*, aims to develop a model for a Reparations Tribunal based on the views of indigenous Australians.

The proposed Tribunal would deliver reparations measures, including compensation. It would be established and funded by the Federal and State governments and the churches involved in removals policies.

The Labor Party and the Democrats expressed support for a Reparations Tribunal in the report of the Senate Inquiry into the Stolen Generations last year, *Healing: a legacy of Generations*. The idea for a Reparations Tribunal was based on a submission to the Inquiry from the Public Interest Advocacy Centre. The National Sorry Day Committee made a similar proposal.

### What are the issues?

We would like to hear the views of indigenous Australians about:

- should the Tribunal be created along the lines proposed?
- what should the Reparations Tribunal be able to do?
- who should be able to make applications for reparations measures?
- what sort of processes should the Tribunal have for making decisions?
- what should be the approach to deciding compensation?



'Reparations' means acknowledging doing something wrong, apologising, making amends for the harm, and making sure it does not happen again.

### Have your say

Submissions are welcome from all indigenous Australians by **31 May 2001**. The views expressed in response to this issues paper will be published in a project report. The report will be presented to political parties, governments and the churches at a *Reparations Conference* in Sydney in August 2001. Everyone who makes a submission will receive a copy of the report.



## A Reparations Tribunal

### The idea for a Tribunal

In this paper some options for a Reparations Tribunal are proposed. The features of the Tribunal are based on *Bringing Them Home*, and the majority report of the Senate Inquiry last year. It also uses international reconciliation processes – the Waitangi Tribunal in New Zealand, the Canadian Aboriginal Healing Foundation, and the Truth and Reconciliation Commission in South Africa.

The Tribunal is proposed as a preferable alternative to the present litigation, in which Federal and State Governments continue to defend claims for compensation by members of the stolen generations. Tens of millions of dollars have been spent on these cases, in litigation that focuses on narrow issues of legal liability.

Under the proposed Tribunal it would be accepted that removals policies were wrong and harmful. The main question for consideration of the Tribunal would be the most appropriate form of reparations.

There is a model for this approach in Canada. After State and Federal governments, and the churches, were successfully sued by children removed under similar policies, schemes were set up to settle remaining claims. There is also some precedent in Australia. People abused while in the care of church-run institutions as children have sued the churches responsible, resulting in schemes for compensation.

Usually people who make claims under these type of schemes give up their right to pursue individual compensation in the courts.

### Legal basis and funding

The proposed Tribunal would need to be set up under laws made by the Federal and State Governments on the basis that they acknowledge the wrongs of forcible removal policies. The relevant churches would also need to be part of the Tribunal, acknowledging their responsibility for running institutions in which children came to harm.

There would need to be acknowledgment by governments that they had in place a policy that favoured separation of indigenous children from their families. As a result, the Tribunal would not consider questions about whether removals occurred with or without the consent of parents.

Funding for the Tribunal would be provided

by Federal and State Governments and by the churches involved.

The Tribunal could be run as part of an existing body such as the Human Rights and Equal Opportunity Commission, or it could be established as a separate body.

### Tribunal members

The members of the Tribunal would be a mix of indigenous and non-indigenous people. There would be representatives of governments, churches and indigenous people. All Tribunal members would have appropriate skills and expertise and cultural awareness. They would be required to act in the best interests of those affected by forcible removal policies.

## The Issues

### What the Tribunal would do

The proposed Tribunal would be responsible for collecting information about forcible removals. It would hear from indigenous and non-indigenous Australians with direct knowledge of forcible removals policies and the effects. In this sense it would be like the Human Rights and Equal Opportunity Commission Inquiry and the Truth and Reconciliation Commission in South Africa.

It would also consider applications for reparations. These might be in the form of funding for reparations programs or services, individual monetary compensation or recommendations about government policies and practices. It would have its own fund from which to make grants, administer programs and provide compensation.

*Should the Tribunal be created along the lines proposed?*

### Powers of Tribunal

The types of reparations measures that could be supported by the proposed Tribunal would not need to be limited. The Tribunal could:

- respond to applications for reparations measures (including compensation), in response to individuals, families, or communities;
- devise programs of its own, such as memorials or community development projects; and
- make recommendations about current government practices and programs.

*Should the Tribunal only respond to applications or be able to make grants and recommendations on its own initiative?*



### Who can apply for reparations?

All indigenous people who have been affected by forcible removals, whether directly or indirectly. Some people argue that only those who were directly affected (people who were removed, their families and descendants) should be able to apply for reparations (compensation is discussed later).

Others argue that communities should also be able to apply in recognition of the widespread effect of the family separations on Aboriginal society and culture. One suggestion is that applications could be made by:

- individuals who were removed,
- their families,
- their descendants, and
- indigenous communities.

If this model is adopted communities could apply for reparations. Communities could be represented by representative organisations, or by individuals nominated by the community.

*Should applications to the Tribunal be limited to people directly affected by forcible removals, or should it be more open?*

Indigenous children and young people are removed from their families at a higher rate than the general population in Australia. This is partly a legacy of forcible removals policies, but there are many other factors.

*Should people affected by contemporary removals be able to make applications?*

### Establishing entitlement

If there are restrictions on who can apply for reparations people will need to be able to show that they meet the criteria for who can apply. For example, some evidence will be needed to show that a person applying is Aboriginal or Torres Strait Islander and how they were affected by forcible removal policies. The requirements would have to recognise that for many people there are no proper government records. It would also need to recognise that people who have been removed may not be recognised as Aboriginal by their community.

Some suggestions for the type of evidence that might be appropriate to require with applications to the Tribunal are:

- a Certificate of Aboriginality or Torres Strait Islander identity; and
- a sworn statement briefly describing the circumstances of the removal.

### 'Reparations' for the stolen generations consists of:

- acknowledgment and apology;
- guarantees against repetition;
- measures of restitution;
- measures rehabilitation; and
- monetary compensation.

*(Bringing Them Home report, 1997)*

*What kind of evidence should be required to show that a person is entitled to make an application?*

### The process for applications

The proposed Tribunal would have an active fact finding approach. Applications could be made in writing and applicants could choose if they want a public hearing to present their story personally.

Under the Canadian programs, regional projects have been set up with full time staff and funding for social workers and lawyers. There are meetings held in communities to allow people to tell their story to a 'fact finder' who documents what happened. Therapists are provided for those who need them, and there are 'welcome home' ceremonies for those removed and their families.

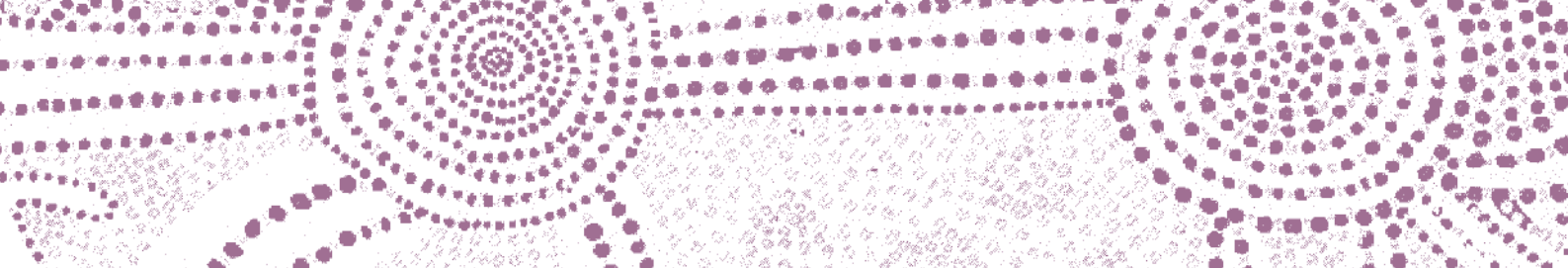
The Tribunal's decisions would be primarily based on the merits of the measures to heal the pain of the present and provide for the future.

*What sort of processes should the Tribunal adopt for collecting information and considering applications for reparations?*

### What about compensation?

Many indigenous people have supported the need for monetary compensation by governments and churches as part of recognising their accountability.

Compensation is aimed at addressing a range of harm, including racial discrimination, loss of culture and land rights, physical or sexual abuse, pain and suffering. *Bringing Them Home* suggested that compensation would only be paid to individuals who were removed and their families.



### What about compensation (cont'd)?

Under some of the Canadian programs all people who had been removed could make claims for minimum lump sum amounts of between \$3,000 and \$5,000. People making claims for minimum amounts usually only need to provide basic evidence of their entitlement. For example, proof of Aboriginality or Torres Strait Islander status, and the circumstances of removal and care.

Where there has been specific abuse, in addition to removal, larger amounts would be awarded. These cover harm caused by physical or sexual abuse, or labour exploitation. Under the Canadian programs amounts of between \$20,000 and \$200,000 have been paid. Similar arrangements were made in Australian cases by people abused in church-run institutions, with up to \$25,000 for the most severely harmed. Victims Compensation Tribunals in most Australian State and Territories make payments of up to \$50,000 for victims of crime.

It is proposed that this type of scheme for compensation be available through the Tribunal.

People making claims for specific abuse

would need to provide evidence of the event and the harm. The rules of evidence in the Tribunal would be more relaxed than a court, but more than just a statement by the applicant would be needed. For example, evidence from witnesses, psychology experts or from government records. This will be difficult for many people.

The government and churches would be able to contest claims for compensation if they believe a claim is not valid. Applicants could make a claim in writing only, or they could choose to request a hearing. Where an applicant has requested a hearing and the claim is contested people could be subject to cross examination.

*Who should be entitled to claim for monetary compensation?*

*Is it acceptable to have a scheme that provides a certain amount for all those removed and their families, and other amounts for specific abuse?*

*What sort of evidence should be required for compensation claims?*

### About the project

The project is managed by PIAC, with a project reference group to provide guidance and advice. Members of the project reference group are:

- Audrey Kinnear, co-chairperson, National Sorry Day Committee,
- Elizabeth Evatt, chairperson, PIAC,
- Brian Butler, ATSIC Social Justice Commissioner,
- Dr William Jonas, Human Rights and Equal Opportunity Commission, and
- Harold Furber, chairperson, Central Australian Stolen Generations Corporation.

The Myer Foundation, Rio Tinto Aboriginal Foundation and other philanthropic organisations fund the project.

### About PIAC

Public Interest Advocacy Centre is a Sydney based community legal centre. It has advocated for an alternative to the courts to address the needs of the stolen generations since 1996. It is currently providing legal representation for people claiming compensation for forcible removal and abuse in children's homes in the Victims Compensation Tribunal in NSW.

### Further information

[www.atsic.gov.au](http://www.atsic.gov.au)  
[www.journeyofhealing.com](http://www.journeyofhealing.com)

## Have your say

Indigenous Australians are invited to send a submission letter, fax or email by **31 May 2001**. If you would like to discuss the project contact us by telephone.

As part of the project 10 focus group meetings will be held around the country. The meetings will offer people a chance to meet together to discuss the issues. If you would like to hold your own meeting please let us know.

The views expressed in response to this issues paper and at the focus groups will be published in a project report. The report will be released in August 2001 at a *Reparations Conference* in Sydney in August organised by HREOC, ATSIC and PIAC. The report will also be presented to a national indigenous conference in Alice Springs in September. Everyone who makes a submission will be sent a copy of the project report.

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