

The Canadian Response to Aboriginal Residential Schools: Lessons for Australia and the United States?

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The common policy of the Australian, Canadian and United States governments of removing Aboriginal children from their families and placing them in institutions is now well documented. This article considers the responses to the stolen generations in Australia, Canada and United States. A major focus of the article is the historic compensation package agreed to by the Canadian government. Whilst the Canadian federal government has not been without criticism on this issue, it must be applauded for its efforts to meet a peaceful solution to a tragic past. The political responses in Australia and United States and Canada are simply incomparable. The failure to address the plight of the stolen generations of Australia and the United States evidences a major failing in Indian/Aboriginal policy in these two nations that needs to be addressed. Australia and the United States have much to learn from the reconciliatory policies of the Canadian government.

1. Introduction

The common policy of the Australian,¹ Canadian² and United States³ governments⁴ of removing Indigenous children from their families and placing them in institutions is now well

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¹ See especially the Human Rights and Equal Opportunity Commission ('HREOC') Report, *Bringing them Home; Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

² See especially *Royal Commission on Aboriginal Peoples Final Report* (1998) ('RCAP'). See also *Statement of Reconciliation: Learning from the Past*, 7 January 1998; Indian Residential Schools Resolution Department ('IRSR'), 'Key Events' and 'The Residential school System Historical Overview', www.irsr-rqpi.gc.ca; Aboriginal Healing Foundation, *The Healing Has Begun: An Operational Update from the Aboriginal Healing Foundation*, May 2002; J Cassidy, 'A Legacy of Assimilation: Abuse in Canadian Aboriginal Residential schools' (2003) 7 *Southern Cross University Law Review* 154.

³ See especially Report of the Committee on Labor and Public Welfare, Subcommittee on Indian Education, United States Senate, *Indian Education: A National Tragedy, A National Challenge* ('Kennedy Report') (1969); Committee on Indian Affairs, United States Senate, *Performance of Bureau of Indian Affairs Off-Reservation Boarding Schools* (1995). See also Estelle Fuchs and Robert J. Havighurst, *To Live on this Earth* (Garden City: Doubleday, 1972); David Adams, *Education for Extinction: American Indians and the Boarding School Experience 1875-1928* (Lawrence: University Press of Kansas, 1995); Scott Riney, *The Rapid City Indian School, 1898-1933* (Norman: University of Oklahoma Press, 1999); B Johansen, 'Education – The Nightmare and the Dream – A Shared National Tragedy, A Shared National Disgrace' (2000) *Native Americas Journal*; Ward Churchill, *Kill the Indian, Save the Man* (San Francisco: City Lights Books, 2004); Carolyn J. Marr, *Assimilation Through Education: Indian Boarding Schools in the Pacific Northwest* University of Washington Digital Collections <<http://content.lib.washington.edu/ajpnw/marr.html>> at 13 October 2009; David H. Getches, Charles F. Wilkinson and Robert A. Williams Jr, *Cases and Materials on Federal Indian Law* (5th ed, St Paul: Thomson, 2005) chap 3; F Cohen, *Handbook of Federal Indian Law* (University of Mexico Press, 2005) chap 2.

⁴ Note, as the policy of removing Aboriginal children from their families in Australia pre-dated federation, State governments initially promulgated the policy. Post federation the policy continued to be furthered by the State governments as the Commonwealth's legislative powers over 'race' (*Constitution Act 1901* (UK) s 51(xxvi)) excluded the 'Aboriginal race.' It was not until 1967, pursuant to a national referendum amending the Commonwealth *Constitution*, that the Federal Government obtained legislative powers over Aboriginal affairs. Nevertheless, through the Commonwealth Government's control of the Northern Territory pursuant

documented. A key⁵ basis for such removals in each Nation was a policy⁶ of assimilation.⁷ The underlying idea was that by removing Aboriginal children from their families the government could break the child's connection with their family, Indian/Aboriginal culture and traditional land and ultimately they would be assimilated into white society.⁸ In recent times the abuse that occurred in the Aboriginal/Indian institutions where the students were detained and, more generally, the damage caused by the forced removal of Aboriginal children from their families have been brought to light.⁹ The response in Australia and Canada to such revelations has, however, been extremely different.

In Australia a number of unsuccessful court actions have been brought against the Commonwealth government seeking redress for the damage caused by this assimilation policy.¹⁰ It is beyond the scope of this article to address the reasons for the lack of successful

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- to *Constitution Act 1901* (UK) s 122 and its co-ordination of State and Commonwealth Aboriginal affairs, from this date the Federal Government played a primary role in promoting this policy of assimilation.
- ⁵ Assimilation was not the sole impetus in Australia for the removal of Aboriginal children from their families. Further matters that prompted this policy included pressure from pastoralists for the governments to provide them with cheap labour (particularly farmhands) and to dispossess Aboriginal communities and thereby facilitate the expansion of European settlement in Australia. See further J Cassidy, 'In the Best Interests of the Child? The Stolen Generations – Canada and Australia' (2006) 15(1) *Griffith Law Review* 111.
- ⁶ Given the removal of Aboriginal children occurred from the beginning of European settlement, removals pre-dated the period when official Aboriginal policy was one of assimilation. Thus removals also occurred during the 'protectionism/segregation' phase of Aboriginal policy. Nevertheless even during this period, the idea was to segregate children of mixed parentage from Aboriginal communities so that the children might accept western ways of living. See for example, the *Aborigines Bill 1905* (WA), Second Reading speech, Western Australia Parliament, Parliamentary Debates, Hansard, Vol 28, 1905, 432. See further A Buti, 'Unfinished Business: The Australian Stolen Generations' [2000] *MurUEL* 40, [3].
- ⁷ In regard to Australia, see <http://slq.qld.gov.au/ils/100years/assimilation.htm>; *Cubillo & Gunner v The Commonwealth* [2000] FCA 1084 (*Cubillo 2*) in particular [1146]. See also *Cubillo 2* [2000] FCA 1084, [158], [160], [162], [226], [233], [235], [251] and [257]; *Williams v The Minister No 2* [1999] NSWSC 843, [88]. In regard to Canada, see RCAP, above n 2, 335. See further RCAP, above n 2 and Aboriginal Healing Foundation, above n 2. In regard to the United States, see the discussion of federal government policy in, *inter alia*, Kennedy Report, above n 3; Adams, above n 3, chap 1 'Reform'; Marr, above n 3; Getches, above n 3, chap 4; Cohen, above n 3.
- ⁸ In regard to Australia, see <http://slq.qld.gov.au/ils/100years/assimilation.htm>; *Cubillo & Gunner v The Commonwealth* [2000] FCA 1084 (*Cubillo 2*) [172]-[179], [190] and [1146]; Bain Attwood, *The Making of the Aborigines* (Sydney: Allen & Unwin, 1989), 16-17; HREOC, above n 1, 9; Kaye Healey (ed) *The Stolen Generation* (Balmain: Spinney Press, 1998) 17, 23 and 32. See also *Cubillo 2* [2000] FCA 1084, [158], [160], [162], [226], [233], [235], [251] and [257]; *Williams v The Minister (No 2)* [1999] NSWSC 843, [88]. In regard to Canada, see RCAP, above n 2, 335. See further RCAP, above n 2 and Aboriginal Healing Foundation, above n 2. In regard to the United States, see the discussion of federal government policy in, *inter alia*, Kennedy Report, above n 3; Adams, above n 3, chap 1 'Reform'; Marr, above n 3; Getches, above n 3, chap 4; Cohen, above n 3.
- ⁹ In regard to Australia, see in particular HREOC, above n 1. In regard to Canada, see in particular RCAP, above n 2. In regard to the United States, see in particular, Kennedy Report, *ibid*; Adams, *ibid*.
- ¹⁰ See for example, *Kruger v The Commonwealth* (1997) 190 CLR 1, 36; *Williams v The Minister* (1994) 35 NSWLR 497; [[2000] Aust Torts Rep 64, 136; *Cubillo & Gunner v The Commonwealth* [1999] FCA 518 ('*Cubillo 1*'); *Cubillo 2* [2000] FCA 1084; ('*Cubillo 3*') [2001] FCA 1213. Note these unsuccessful actions were brought against the Commonwealth government. In *Trevorrow v South Australia* [2007] SASC 285, an action recently succeeded against a State government, the government of South Australia. The government has, however, appealed against this decision.

litigation in Australia. The author has suggested elsewhere¹¹ that the Australian courts in such cases can be justifiably criticised for refusing to follow the lead of the Canadian Supreme Court, particularly in the area of fiduciary duties.¹² They have instead placed before litigants a plethora of ill-conceived judicial hurdles that effectively deny the stolen generations access to justice.¹³

While it may be surmised that the lack of legal success was the reason why the former Howard Liberal/National coalition government refused to apologise for this past policy of assimilation¹⁴ and merely passed a motion of sincere regret,¹⁵ the impetus for such lay in a refusal to acknowledge any responsibility for the past. As discussed below, the federal Liberal government's policy on this matter was that essentially this happened in the past and the then government should assume no responsibility today.¹⁶ Its policy bordered on a denial of the stolen generations.¹⁷ Reflective of this government's Aboriginal policy generally,¹⁸ its response was certainly not one based on reconciliation, much less an acknowledgement of responsibility. The government vigorously defended claims in the courts and made no attempt to negotiate a compensation package for Aboriginal persons who were removed from their families, including those who were abused while being detained. The government's failure to address the plight of the Australian stolen generations seems to have stemmed from a belief that there was no moral, much less legal, obligation to address this historical injustice. While the current federal Labor government steered the Parliament towards a formal apology to the stolen generations of Australia on 13 February 2008, it has rejected the suggestion that this be coupled with a compensation package. This, combined with a

¹¹ See for example J Cassidy, 'The Stolen Generation: A Breach of Fiduciary Duties? Canadian v Australian approaches to fiduciary duties' (2003) 34:2 *University of Ottawa Law Review* 175; Cassidy, above n 5.

¹² See, for example, O'Loughlin J rejected claims of breaches of fiduciary duties on the basis that a fiduciary duty could not exist where a claim was also made in tort (*Cubillo 2* [2000] FCA 1084, [1299]) and because there had been no economic loss by the plaintiffs, only physical and psychological damage: *Cubillo 2* [2000] FCA 1084, [1307]. These principles have been rejected by the Canadian Supreme Court in numerous decisions, including *Frame v Smith* (1987) 42 DLR (4th) 81, 136; *Norberg v. Weinrib* [1992] 2 SCR 226, 277; *M.(K.) v. M.(H.)*, (1992) 96 D.L.R. (4th) 289, 327. See further J Cassidy, above n 5.

¹³ For example, O'Loughlin J asserted that the Commonwealth could not be held vicariously liable because of the 'independent discretion rule': *Cubillo 2* [2000] FCA 1084, [1122], [1123] and [1133]. O'Loughlin J believed that the relevant statutory regime granted the Directors an independent discretion as to whether an aboriginal child should be removed from their family and placed in care: *Cubillo 2* [2000] FCA 1084, [1122], [1125]-[1126], [1129]-[1130] and [1132]. This consequently prevented the Commonwealth being vicariously liable for any breach of the duties by the Directors within the statutory frameworks: *Cubillo 2* [2000] FCA 1084, [1123]. See further Cassidy, above n 5.

¹⁴ Commonwealth Government, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge* (2002), 10.

¹⁵ Prime Minister John Howard, *Motion of Reconciliation* <www.pm.gov.au/media/pressrel/1999/reconciliation2608.htm>.

¹⁶ John Howard, 'Confront Our Past, Yes, But Let's Not Be Consumed By It' *The Age*, (Melbourne), 19 November 1996.

¹⁷ Commonwealth Government, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge* (2002), 10.

¹⁸ Which has included the abolition of Aboriginal and Torres Strait Islander Commission ('ATSIC'), the elected representative body of Australian Aboriginal peoples and the imposition of 'shared responsibility agreements' in regard to funding for Aboriginal communities.

seemingly deliberate policy of silence on the issue, suggests the Rudd Labor government equally embraces the notion that the government shares no responsibility for the past.

It will be seen that, to date, the United States courts have not had the opportunity to consider the legal consequences of the government's conduct of the Indian Boarding Schools. Perhaps because of the absence of legal cases seeking redress, there has been very little public or political momentum for a federal government apology for the removal policy, much less to compensate for the terrible effects, including intergenerational effects, of the Indian Boarding Schools. As discussed below, the United States government's response to the plight of those who attended the Indian Boarding Schools, where they were so often abused, has been limited to *ad hoc* unsuccessful attempts by a handful of parliamentarians to seek a government apology for the assimilation policy underlying the Indian Boarding Schools.

By contrast, in Canada, the plaintiffs in the leading Canadian cases¹⁹ were ultimately successful under at least one of their heads of claim; whether that was the Crown's liability for breaching fiduciary duties, the duty of care or non-delegable duties.

More importantly in regard to the focus of this article, the Canadian federal government responded to the revelations of the Aboriginal residential schools with an acknowledgement of responsibility and 'apology.' On 7 January 1998 the government delivered its *Statement of Reconciliation: Learning from the Past* in which the federal government acknowledged its role in the development and administration of Aboriginal residential schools and asserted that it was 'deeply sorry' to those persons who suffered through the schools. It will be seen that this was part of a broader compensation and reconciliation package implemented over the six years that followed, including alternative dispute mechanisms for resolving former students' claims and the establishment of the Aboriginal Healing Commission, and culminated in a recent historic \$4b settlement of the claims of the Canadian stolen generations. The underlying Agreement of 8 May 2006 constitutes the largest legal settlement in the history of Canada. More recently, on 11 June 2008 the Prime Minister, Stephen Harper made a formal apology in parliament to the former students of the Aboriginal residential schools.²⁰

This article considers the governmental responses to the plight of the stolen generations in Australia, United States and Canada. Obviously a major focus of the article is the 8 May 2006 Agreement, settling the relevant claims in Canada. Ultimately, the article suggests that while the federal Canadian governments have not been without criticism, their responses to the Aboriginal residential school experience are worlds apart to that in Australia and United States. While it could be cynically suggested that the Canadian government's policy was a reaction to successful litigation, aspects of its response predated such cases. Moreover, unlike the Australian approach, the Canadian government's stated reasons lie in an acknowledgement of responsibility for the past and the need to address such if the country is to grow in a harmonious manner. Following the lead of the Canadian government, this article

¹⁹ See for example *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228; *Blackwater v Plint (No 3)* (2003) 235 DLR (4th) 60; *Blackwater v Plint (No 4)* (2005) 258 DLR (4th) 275; *M(FS) v Clarke* [1999] 11 WWR 301; *A(TWN) v Canada* (2001) 92 BCLR (3d) 250.

²⁰ *Hansard*, House of Commons, 11 June 2008.

takes as its premise the need to acknowledge historical injustice²¹ and suggests the refusal to do so in Australia and United States not only prevents the victims of this policy from healing,²² but also does not provide the foundations for a healthy modern Nation. As the Australian Council for Aboriginal Reconciliation ('CAR') has stated, reconciliation can only occur once the past is acknowledged and compensation provided for past wrongs.²³ Once this premise is accepted, it is asserted that the Canadian responses provide a model that should be utilised by the Australian and United States governments to provide a foundation for justice for the survivors of the Aboriginal residential schools and more generally, Aboriginal/Indian reconciliation.

2. The Common Policy

This part of the article provides an overview of the historical development of the removal of Indigenous children in Australia, United States and Canada. As noted above, common to all three countries was the implementation of an assimilationist policy that involved the removal of Indigenous children from their families and placing them in institutions. By removing the children from their families the governments believed they could break the child's connection with their Indian/Aboriginal culture and traditional lands and ultimately the children would be assimilated into white society. As detailed below, another commonality in this policy of forced removal and detention was neglect and abuse.

2.2 Australia

Before turning to the governmental responses to the stolen generations, it would be remiss not to briefly reiterate the factual context of this common policy of assimilation. The Human Rights and Equal Opportunity Commission ('HREOC') found that forcible removals of aboriginal children began in the very first days of European occupation in Australia.²⁴ As in each of the Nations, in Australia Aboriginal schools were initially established by missionaries throughout the 1800's with some financial support from relevant governments.²⁵ However, the removal of Aboriginal children quickly became part of official government policy. In Australia, in the lead up to federation, the policy was originally effected by the State

²¹ There is a wealth of literature regarding the case for the recognition of historical injustice, including Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethic* 4; Duncan Ivison, *Postcolonial Liberalism* (Cambridge: Cambridge University Press, 2002); Daniel Butt, 'Nations, Overlapping Generations and Historic Injustice' (2006) 43(4) *American Philosophical Quarterly* 357. It is beyond the scope of this article to engage in this broader debate.

²² As HREOC noted, the 'first step in any compensation and healing for victims of gross violations of human rights must be an acknowledgement of the truth and the delivery of an apology': *Bringing them Home; Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), 284. See also Sarah Pritchard, 'The Stolen Generations and Reparations' (1997) 4(3) *UNSW Law Journal Forum* 28, 28-29.

²³ See CAR, *Australian Declaration Towards Reconciliation* (2000), *Roadmap for Reconciliation* (2000) and *Reconciliation: Australia's Challenge* (2000).

²⁴ HREOC, *Bringing them home: A guide to the findings and recommendations of the National Inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (1997), 4.

²⁵ Antonio Buti, *Separated: Australian Aboriginal Childhood Separations and Guardianship Law* (Sydney: Institute of Criminology, 2004), 58.

Parliaments through legislation enacted in the 1800's, such as the *Aboriginal Protection Act 1869* (Vic) and *Aboriginal Orphan Ordinance 1844* (SA). By 1911 essentially all States had legislation in place for the forcible removal of Aboriginal children from their families.²⁶ In 1911 the federal Parliament also began implementing its own removal policy in the Northern Territory, enacting the *Aboriginals Ordinance 1911* (Cth).

In Australia the focus was particularly on Aboriginal children of mixed parentage.²⁷ Thus, whilst this policy predated 1937, in that year it was resolved at the first conference of the Commonwealth and State Aboriginal Authorities that the 'destiny of the natives of Aboriginal origin, but not of full blood, lies in their ultimate absorption by the people of the Commonwealth and it therefore recommends that all efforts be directed to that end'.²⁸ Thus the removal of Aboriginal children was effected under legislation and pursuant to a government policy of assimilating part-Aboriginal children. Under the legislation the removals were formally instigated by senior government officials, such as the Governor,²⁹ Minister,³⁰ Board for the Protection of Aborigines,³¹ Department Head,³² Chief Protector of Aborigines,³³ Director³⁴ or Commissioner of Natives,³⁵ and effected by less senior employees, such as Native patrol officers. That the removals were often effected through such patrol officers in conjunction with missionaries does not undermine the degree of government's involvement in effecting what was a formal government policy. The removed children were then often detained in 'Aboriginal institutions'. While some such institutions

²⁶ Healey, above n 8, 11.

²⁷ Healey, above n 8, 19, 23-24 and 33; Buti, above n 25, 49. The children were referred to as 'half-caste', 'quadroons' or 'octoroons' based on the perceived percentage of Aboriginal/European blood; such being effectively determined on the child's complexion. It had been suggested that 'full blood' Aboriginal persons would die out. See the discussion of the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra on 21 to 23 April 1937 where the conference was unanimous that 'full blood' Aboriginals would ultimately die out: Healey, above n 8; L Lippmann *Generations of Resistance: Aborigines Demand Justice* (2nd ed, Melbourne: Longman Cheshire, 1992), 24. See also HREOC, above n 1, 32. See further from Julie Cassidy, 'The Stolen Generations - Canada and Australia: The Legacy of Assimilation' (2006) 11(1) *Deakin Law Review* 131.

²⁸ Resolution passed at the first Conference of Commonwealth and State Aboriginal Authorities (21-23 April 1937). Whilst this policy and the focus of part-Aboriginal children predated this point, this resolution was an historical watershed in this regard. See also the Report of the Administrator dated 28 February 1952 to the Secretary, Department of Territories in Canberra, quoted by O'Loughlin J in *Cubillo 2* [2000] FCA 1084 at [226]. See also the discussion of the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra on 21 to 23 April 1937 in Healey above n 8, 23-24.

²⁹ See, for example, *Aborigines Protection Regulations 1871* (Vic). See further www.foundingdocs.gov.au/places/vic/vic71.htm.

³⁰ See, for example, s 31 *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld).

³¹ See, for example, *Aborigines Protection (Amendment) Act 1940* (NSW).

³² See also Buti, above n 25, 61-62 and 158.

³³ See, for example, s 7 *Aboriginal Ordinance 1918* (Cth); *Aborigines Act 1905* (WA); *Aborigines Act Amendment Act 1911* (WA); *An Ordinance for the Protection, Maintenance and Upbringing of Orphans and other Destitute Children and Aborigines Act 1844* (SA); *Northern Territory Aboriginals Act 1910* (SA); *Aborigines Act 1911* (SA).

³⁴ See, for example, s 18 *Aboriginals Preservation and Protection Act 1939* (Qld); *Aboriginals Ordinance 1953* (Cth).

³⁵ See, for example, *Native Administration Act 1936* (WA).

were run by Church/missionary organisations, they were nevertheless officially classified by the government as ‘Aboriginal institutions’ and in turn received government funding.³⁶

The relevant legislative framework governed the movement of Aboriginal persons by determining who could live on and leave Aboriginal reserves and the detention of Aboriginal children in Aboriginal Institutions. Breaches of such regulations constituted an offence under this so-called ‘protectionist’ legislation. It is important to note that in time, the legislative removal powers were not premised on neglect,³⁷ much less required a court order.³⁸ Parental consent was not required. In this regard it is relevant to note that such legislation often displaced legal guardianship of Aboriginal children.³⁹ For example, under the *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) whether the child’s parents were living or not, legal guardianship of all Aboriginal children was placed with the Chief Protector of Aborigines.⁴⁰ Even in States such as New South Wales that did not have a legislative regime for the removal of Aboriginal children prior to federation, this policy was conducted without legal powers by, *inter alia*, threatening the child’s parents and promises of material benefits such as rations.⁴¹ It seems that parental consent to the removal of part-Aboriginal children was not even raised as an issue until the 1940’s.⁴² In essence, after a number of incidents where Aboriginal children were forcibly removed from their families during the 1940’s, the policy of forced removals began to be criticised by the public.⁴³ While it seems that in the 1950’s efforts were made in given cases to obtain parental consent to the removal of Aboriginal children, it also appears that the parents were not provided with a choice and forced removals continued to be authorised.⁴⁴ The HREOC Report, *Bringing Them Home*, found that forcible removals continued until the 1970’s.⁴⁵

³⁶ See for example the discussion of the relevant Aboriginal Institutions in *Cubillo 1* [1999] FCA 518 at [25] - [28]; *Cubillo 2* [2000] FCA 1084 at [1], [10], [12], [514], [744] and [1156].

³⁷ See for example *Aborigines Regulation 1899* (Vic). Under the *Aborigines Act 1934* (SA) Aboriginal children were effectively deemed neglected within the terms of the *Maintenance Act 1926* (SA).

³⁸ See also *Aboriginal Protection and Restriction of the Sale of Opium Act 1897* (Qld) and *Aborigines Act 1905* (WA); *Aborigines Protection Regulation 1909* (WA); *Northern Territory Aboriginal Act 1910* (SA); *Aborigines Act 1911* (SA).

³⁹ Even where actual legal guardianship was not conferred under the terms of the legislation, legislation often nevertheless placed the custody, care and control of the removed child with the government or its instrumentalities. See, for example, *Aborigines Act 1897* (WA) under which custody and control of the child was placed with the Aborigines Department.

⁴⁰ Under *Aboriginals Preservation and Protection Act 1939* (Qld) this role was taken over by the Director of Native Affairs.

⁴¹ Peter Read, *The Stolen Generations: The Removal of Aboriginal Children in New South Wales, 1883 to 1969* (Sydney: Government Printer, 1982), 2. Legislation was not passed in New South Wales until 1909: *Aborigines Protection Act 1909* (NSW).

⁴² *Cubillo 2* [2000] FCA 1084 at [201]. See also the discussion of the New South Wales Aborigines Protection Board and the first Conference of Commonwealth and State Aboriginal Authorities, held in Canberra on 21 to 23 April 1937 in Healey, above n 8, 23, 28 in regard to the need to remove Aboriginal children with or without their parents’ consent.

⁴³ See the discussion in *Cubillo 2* [2000] FCA 1084 at [201]-[214].

⁴⁴ See the discussion in, *inter alia*, *Cubillo 2* [2000] FCA 1084 esp [218], [220] and [221].

⁴⁵ HREOC, above n 1, 250.

The term 'stolen generation'⁴⁶ is now commonly used in Australia to describe those children who were forcibly removed from their families under this policy. The HREOC Report, *Bringing Them Home*, concluded that between one in three and one in ten Aboriginal children were forcibly removed from their families and communities between 1910 and 1970.⁴⁷ In turn it has been estimated that in the course of the 1900s, 40,000 Aboriginal children were removed from their families.⁴⁸

2.2 United States

In the United States, as in Canada, a partial impetus for this education policy was the fulfilment of education clauses the United States had included in treaties with Indian Nations, entered into throughout the treaty-making period of the 1790's - 1870's.⁴⁹ While the Indian Boarding Schools were created in so-called satisfaction of these treaties, the Indian children who attended the schools included those from Indian Nations whose treaties did not include such education clauses.⁵⁰ Thus no distinction was drawn between treaty and non-treaty Indian children. Rather the Indian Boarding Schools were again a part of a broader policy focused on the assimilation of all Indian children, not just those children covered by treaty obligations.⁵¹

As in each of the subject nations, Indian schools were initially conducted by missionaries.⁵² In the early 1800's the federal government involvement was primarily the distribution of funds to missionary organisations involved in the effort to 'civilize' the Indians, including the provision of schooling for Indian children.⁵³ Concerned with the separation of church and state, the use of denominational schools gradually decreased, no funding being provided to such by 1901.⁵⁴ The preference was federally run off-reservation boarding schools.⁵⁵ By 1879 the Bureau of Indian Affairs was running several non-reservation boarding schools,⁵⁶ including the Carlisle Indian Training and Industrial School in Pennsylvania.⁵⁷ The Carlisle Indian Training and Industrial School had been founded by Captain Richard Henry Pratt, a leading proponent of assimilation through education, and would come to be the federal model for Indian Boarding Schools.⁵⁸ After 1900 the Indian school system, including the off-

⁴⁶ Apparently Read coined this term: Read, above n 41.

⁴⁷ HREOC, above n 1, 4. It has been stated that between 1919 and 1929 one third of all Aboriginal children were removed from their families and between 1950 and 1965 one in five children were separated from their families: Healey, above n 8, 12.

⁴⁸ Healey above n 8, 12.

⁴⁹ Cohen, above n 3, 678-679. See further Marr, above n 3, Part 1.

⁵⁰ Cohen above n 3, 680; Daniel M. Rosenfelt, 'Indian Schools and Community Control' (1973) 25 Stanford Law Review 489, 495.

⁵¹ See also Adams, above n 3, chap 1; Cohen above n 3, 680.

⁵² Cohen, above n 3, 139.

⁵³ Cohen, above n 3, 680.

⁵⁴ Adams, above n 3, 66. See also Marr, above n 3, Part 2.

⁵⁵ Adams, above n 3, 55.

⁵⁶ Cohen, above n 3 680.

⁵⁷ See further Adams, above n 3, 51.

⁵⁸ See further Marr, above n 3, Part 1.

reservation boarding schools, rapidly developed.⁵⁹ By the 1920's nearly half of those Indian children being schooled were attending off-reservation Indian boarding schools.⁶⁰ The students came from a variety of tribes and in turn a variety of states, including Alaska, and thus could be detained in schools far from their families.⁶¹

Again the policy underlying the schools was the assimilation of Indian children into mainstream non-Indian American society by breaking their ties with the tribal unit and replacing traditional Indian culture and heritage with white American culture.⁶² As the Commissioner of Indian Affairs asserted in 1889, '[t]he American Indian is to become the Indian American'.⁶³ Education was to play an important part in this assimilation program, replacing Indian language and culture with English and white American history.⁶⁴ The schools were run in a military style and there was a strict policy of English language only as such was considered the foremost requirement for assimilation.⁶⁵ If students spoke in their native tongue they were severely punished.⁶⁶ Off-reservation Indian Boarding Schools were particularly favoured as through such the children could be separated from their families and taught the values of a civilised way of life.⁶⁷ Moreover, once the students were enrolled in distant boarding schools, the parents lost decision-making power over the welfare of their children.⁶⁸ Ultimately, the belief was that through education it was thought that the children could skip a number of evolutionary stages and become civilised Americans.⁶⁹

The policy was effectuated through the *Appropriations Act, 1892* and successive legislation that made it compulsory for Indian children to attend the schools. Moreover, *Appropriations Act, 1893* sought to enforce compliance by denying rations to any families whose children did not attend school. Indian agents were advised that they could enforce the federal regulation through the withholding of annuities and rations, but also by sending parents to jail.⁷⁰ While theoretically such forced attendance ended under the *Appropriations Act, 1894* in practice attendance was still compulsory.

It was not until the 1950's that the federal government relinquished control of Indian schools, primarily contracting with the States to provide for Indian children's schooling.⁷¹ Thus during the 1950's a number of federal Indian Boarding Schools closed. Nevertheless, even during this period in the federal Bureau of Indian Affairs continued to retain control of some

⁵⁹ Cohen, above n 3, 681.

⁶⁰ Adams, above n 3, 59.

⁶¹ See for example the discussion in Marr of the Chemawa Indian School: above n 3, Part 3.

⁶² Cohen, above n 3, 139.

⁶³ Quoted in Cohen, above n 3, 139..

⁶⁴ Cohen, *ibid.* See further Marr, above n 3.

⁶⁵ Marr, above n 3, Parts 3-4.

⁶⁶ Marr, above n 3, Part 4.

⁶⁷ Cohen, above n 3, 140.

⁶⁸ Marr, above n 3, Part 4.

⁶⁹ Adams, above n 3, 19.

⁷⁰ Marr, above n 3, Part 4.

⁷¹ Cohen, above n 3, 177-178, 681.

schools due to a lack of sufficient public school facilities.⁷² The emphasis in such schools continued to be providing the Indian children with the skills and habits so that they might take their place in mainstream non-Indigenous American society.⁷³

In 1969 the Special Senate Subcommittee on Indian Education Report of the Committee handed down its report, *Indian Education: A National Tragedy, A National Challenge* ('Kennedy Report'). The Report was critical of all aspects of Indian education.⁷⁴ It detailed the poor diet and substandard overcrowded conditions in the boarding schools⁷⁵ that led to an excessively high degree of illness and death amongst the schools.⁷⁶ It also detailed the abuse that had occurred while the students were being detained,⁷⁷ including the excessive punishment for speaking their traditional language and the common occurrence of runaways.⁷⁸ The Report recommended 'increased Indian participation and control of their own education programs'.⁷⁹ In turn, with the federal government's Indian affairs policy shifting away from assimilation to self-determination, increasing control over Indian schooling was given to Indian communities.⁸⁰

2.2 Canada

In Canada the Aboriginal residential schools were first established in the 1600s,⁸¹ prior to confederation, as part of the Christian churches' missionary work.⁸² It was not until 1874 that the Canadian federal government began to play a role in the administration of the schools. As noted above, the schools were part of the government's policy of assimilation⁸³ and were advocated as the 'final solution of the Indian problem'.⁸⁴ The federal government's

⁷² Cohen, above n 3, 178.

⁷³ Cohen, above n 3, 177.

⁷⁴ Kennedy Report, above n 3, XI-XII.

⁷⁵ Kennedy Report, above n 3, XI-XII.

⁷⁶ See further the discussion in Marr, above n 3, Part 5.

⁷⁷ Kennedy Report, above n 3, XI-XII.

⁷⁸ See further Marr, above n 3, Parts 3-5.

⁷⁹ Kennedy Report, above n 3, XIII.

⁸⁰ See further the discussion in Cohen, above n 3, 193-195, 681-682, 692-696.

⁸¹ Aboriginal Healing Foundation, above n 2, 3. The first Aboriginal boarding schools were established in New France between 1620 and 1680 by the Recollets, Jesuits and Ursuline religious orders: IRSR, above n 2. See further IRSR, above n 2.

⁸² IRSR, above n 2.

⁸³ RCAP above n 2, 335. See further RCAP, above n 2 and Aboriginal Healing Foundation, above n 2. This was also spurred by the government's constitutional responsibility for Indians and their lands under the *Constitution Act 1867: A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 253; *M(FS) v Clarke* [1999] 11 WWR 301, 319. See also *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18 at [91] regarding the constitutional authority under *British North America Act 1869* s 91(24).

⁸⁴ Aboriginal Healing Foundation, above n 2, 7, quoting the Deputy Superintendent of Indian Affairs, Duncan Campbell Scott. See further RCAP, above n 2 and Aboriginal Healing Foundation, above n 2.

involvement was also spurred by its obligation to provide education for Indian children under the *Indian Act 1894* and in accordance with the terms of treaties with various First Nations.⁸⁵

In Canada no distinction was drawn between children on the basis of mixed parentage. Rather the legislative focus was on ‘Status’ Indian children.⁸⁶ Thus under the *Indian Act 1894* and successive legislation⁸⁷ the government could require attendance by Indian children at Aboriginal residential schools.⁸⁸ Despite the legislative focus on Status Indians, other Canadian Aboriginal children such as Inuit⁸⁹ and Metis⁹⁰ children were also removed from their families and detained in the institutions pursuant to this policy.

Under the *Indian Act 1894* and successive legislation⁹¹ the government could require attendance by Indian children at Aboriginal residential schools.⁹² ‘Truant officers’ were in turn empowered to take any Indian child into custody so as to convey them to a school ‘using as much force as the circumstances require’.⁹³ While some children were voluntarily placed in the schools by their parents, believing that the schools would provide their children with greater opportunities, others were forcibly taken without their parents’ consent or consent that had been obtained through duress, through threats of jail or fines by Department of Indian Affairs officials.⁹⁴

⁸⁵ RCAP above n 2, 335. See also IRSR, above n 2. For example, Treaty No 1 includes a pledge by the Crown ‘to maintain a school on each reserve hereby made, whenever the Indians of the reserve should desire it’. Similar clauses are included in Treaties No 2-11.

⁸⁶ That is, persons registered as Indians under the *Indian Act*. See further Cassidy, above n 2; Cassidy, above n 11.

⁸⁷ See *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [32]; *M(FS) v Clarke* [1999] 11 WWR 301, 305.

⁸⁸ IRSR, above n 2. By 1920 it was mandatory for all Indian children between the ages of 7 and 15 to attend school: *M(FS) v Clarke* [1999] 11 WWR 301, 305; *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [32]; IRSR, above n 2. Similarly, under ss 115,116 and 118 of the *Indian Act 1951* it was, *inter alia*, mandatory for Indian children between the ages of 6 and 16 to attend an Indian school: *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [34].

⁸⁹ In the 1950s, as greater incursions were made into the Arctic areas, Residential schools became more established in these areas and the number of Inuit children in such schools substantially increased: RCAP, above n 2, 351-352; Cassidy, above n 2, 161.

⁹⁰ As a consequence of many Metis living on reservations with Status Indians, some Metis children were also forced to attend the Residential schools. See RCAP above n 2, 351-352; Hansen and Lee, *The Impact of Residential schools and Other Institutions on the Metis People of Saskatchewan: Cultural Genocide, Systematic Abuse and Child Abuse*, A Report Written for the Law Commission of Canada (1999); Cassidy, above n 2, 161-162. See also Métis National Council <www.metisnation.ca>.

⁹¹ See *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18 at [32]; *Mowatt* [1999] 11 WWR 301, 305.

⁹² Office of Indian Schools Resolution of Canada, ‘Key Events’ www.irsr-rqpi.gc.ca. By 1920 it was mandatory for all Indian children between the ages of 7 and 15 to attend school: *Mowatt* [1999] 11 WWR 301, 305; *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [32]; Office of Indian Schools Resolution of Canada, ‘Key Events’ www.irsr-rqpi.gc.ca. Similarly, under ss 115,116 and 118 of the *Indian Act 1951* it was, *inter alia*, mandatory for Indian children between the ages of 6 and 16 to attend an Indian school: *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [34].

⁹³ *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [34].

⁹⁴ *Mowatt* [1999] 11 WWR 301 at 305; *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [34]; Office of Indian Schools Resolution of Canada, ‘Key Events’ www.irsr-rqpi.gc.ca. See, for example the evidence regarding the removal of EAJ and ERM in *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 259 and 276.

The schools where Canadian Aboriginal children were taken and detained are known as Indian⁹⁵ or Aboriginal⁹⁶ residential schools. The first Aboriginal residential schools were established in the 1600's,⁹⁷ prior to Confederation, as part of the Christian churches' missionary work.⁹⁸ It was not until 1874 that the Canadian federal government began to play a role in the administration of the schools. Eventually, the federal government was involved in the conduct of nearly every Aboriginal residential school. The courts have characterised the arrangement as a 'joint venture' between the respective Churches and the government.⁹⁹ Canada contracted with the Churches to administer the schools¹⁰⁰, while the government had the final say on the employment of the principal and had a supervisory role over the conduct of the schools. In 1969 the federal government assumed total responsibility for the Aboriginal residential schools.¹⁰¹ At this point the federal government ended the joint venture with the Churches and became the employer of those working at the schools.¹⁰² In many cases, however, the Churches continued to be involved in the schools through contractual arrangements with the government.¹⁰³ In these cases, control of the schools continued to be joint, even after the changes of 1969.¹⁰⁴

While the government had estimated that 90,600 former Aboriginal students are still alive,¹⁰⁵ as of 4 August 2008 94,758 applications for compensation have been made under the 8 May 2006 Agreement, discussed below.¹⁰⁶

3. Responses to the 'Stolen Generations'

⁹⁵ Note in this regard that in response to RCAP the Canadian government established within the Indian and Northern Affairs Department the Indian Residential Schools Resolution Unit, with responsibility to manage issues pertaining to these schools. In time the Unit became a new government Department, independent of the Indian and Northern Affairs Department: IRSR, above n 2.

⁹⁶ The author prefers the term Aboriginal residential schools as the children taken and placed in the schools were not all Status Indians, but also included Inuit and Metis children. See Hansen and Lee, above n 90. See also Métis National Council <www.metisnation.ca>.

⁹⁷ *Aboriginal Healing Foundation*, note 18 p 3. The first Native boarding schools were established in New France between 1620 and 1680 by the Recollets, Jesuits and Ursines religious orders: Office of Indian Schools Resolution of Canada, "Key Events", www.irsr-rqpi.gc.ca.

⁹⁸ Office of Indian schools Resolution of Canada, "The Residential school System Historical Overview", www.irsr-rqpi.gc.ca.

⁹⁹ *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18, [151]; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228, 246.

¹⁰⁰ *A(TWN) v Canada* (2001) 92 BCLR (3d) 250, 253.

¹⁰¹ RCAP, above n 2, 350.

¹⁰² RCAP, above n 2, 350.

¹⁰³ *Mowatt* [1999] 11 WWR 301 at 343-346; Office of Indian Schools Resolution of Canada, "Key Events" www.irsr-rqpi.gc.ca.

¹⁰⁴ *Mowatt* [1999] 11 WWR 301, 343-346.

¹⁰⁵ IRSR, above n 2.

¹⁰⁶ Bradford Morse, 'Reparations for State Imposed Assimilation of Children: Implications for Australia of the Canadian Indian Residential Schools Settlement' (Speech delivered at the Governance Organisations and Regional Development Conference, Deakin University, Melbourne, 21 August 2008).

3.1 Australia

Whilst the removal of part-Aboriginal children from their families had been documented in Australia for many decades, the policy was not really debated in the public domain until the findings of the *Royal Commission into Aboriginal Deaths in Custody*.¹⁰⁷ The Commission found that of 99 deaths investigated, 43 of the persons had, as children, been separated from their families and communities.¹⁰⁸ However, it was not until the revelations of the Australian Human Rights and Equal Opportunity Commission ('HREOC') Report, *Bringing Them Home*¹⁰⁹ that the general non-Indigenous Australian public became truly aware of the removal policy. The Report made 54 recommendations, including a government acknowledgment of the past policy of removals, a government apology¹¹⁰ and the payment of monetary compensation.¹¹¹ In light of the difficulties and costs involved in using the courts to provide such a remedy,¹¹² it was recommended that a National Compensation Fund be established, to be administered by a National Compensation Fund Board.¹¹³ It in turn recommended that a minimum lump sum be paid to all persons forcibly removed, while further compensation should be paid to persons who suffered particular harm or loss consequent to the forcible removal.¹¹⁴ The subsequent inquiry into the government's implementation of the HREOC recommendations, again recommended that the federal Parliament acknowledge the past practice of removing Aboriginal children and apologise for such.¹¹⁵ It also recommended the establishment of a Reparations Tribunal to provide compensation to members of the stolen generation.¹¹⁶ The need for a government apology and the payment of reparations to the stolen generations was subsequently reiterated by CAR.¹¹⁷

¹⁰⁷ *Report of the Inquiry into the Death of Malcolm Charles Smith of the Royal Commission into Aboriginal Deaths in Custody* (1989).

¹⁰⁸ See Healey, above n 8, 12. Note also the significance of the address of then Prime Minister, Mr Paul Keating, in Sydney on 10 December 1992 when he acknowledged, 'We took the children from their mothers' (reproduced: (1993) 2 *Aboriginal Law Bulletin* 4, 4.)

¹⁰⁹ HREOC, above n 1. The relatively recent release of the film *Rabbit-Proof Fence* also served to heighten the public awareness both in Australia, Canada and the United States. The film was written and produced by Christine Olsen and is based on the 1996 book of the same name, authored by Doris Pilkington Garimara. The author tells the story of how in the 1930's her mother, Molly, a child then aged 14, her sister, Daisy, then aged 8, and their cousin, Gracie, then aged 10, were taken from their families on the instruction of the Chief Protector of Aborigines and sent to the Moore River Native Settlement, 2,400km south of their homes. The girls escaped the authorities and used the rabbit proof fence that then crossed Australia to track their way back to their homes, near Jigalong, on the edge of the Gibson Desert.

¹¹⁰ Recommendations 5 and 6: HREOC, above n 1, 284-292.

¹¹¹ HREOC, above n 1, 303-307.

¹¹² HREOC, above n 1, 305.

¹¹³ Recommendations 16 and 17: HREOC, above n 1, 310-311.

¹¹⁴ Recommendations 18 and 19: HREOC, above n 1, 312.

¹¹⁵ Senate Legal and Constitutional Reference Committee, Parliament of Australia, *The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home* (2000).

¹¹⁶ Senate Legal and Constitutional Reference Committee, *The Report of the Inquiry into the Federal Government's Implementation of Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home* (Canberra, AGPS, 2000).

¹¹⁷ See CAR, above n 23.

Despite these recommendations, to date, there has been no acceptance of any legal liability on the part of the federal government. As the discussion of the Australian case law indicates,¹¹⁸ the previous Howard federal government vigorously defended compensation claims in the courts and used every mechanism available to it to frustrate potential Aboriginal plaintiffs. In turn it is not surprising that this former government made no attempt to negotiate a compensation package for the Aboriginal persons who were removed from their families, including those who were abused while being detained.¹¹⁹ It will be seen that the recommendations of the *Royal Commission into Aboriginal Deaths in Custody*, the HREOC Report *Bringing Them Home* and CAR reconciliation documents¹²⁰ were largely ignored by this government.

The HREOC Report's recommendation of an acknowledgment of the past removal policy and a government apology received strong public support. The Australian public embraced the HREOC recommendation that there be a 'Sorry Day' and since 1998, 26 May has been embraced by the Australian public as a day of sorrow and Aboriginal reconciliation. Over half a million Australians signed 'Sorry Books' and participated in demonstrations across Australia, calling for a government apology. In regard to the latter, on 28 May 2000 approximately 250,000 people walked across the Sydney Harbour Bridge in support of Aboriginal reconciliation. All major political parties were represented in the walk, however the then Prime Minister, John Howard, refused to participate in the march.¹²¹

The State and Territory governments responded to the HREOC Report with resolutions apologising for such removals and the consequent hurt and distress. For example, in response the Queensland Parliament passed a resolution of regret and apology for 'past policies under which indigenous children were forcibly separated from their families.'¹²² The Victorian Parliament apologised 'for the past policies under which Aboriginal children were removed from their families and express[ed] deep regret at the hurt and distress this has caused and reaffirm[ed] its support for reconciliation between all Australians.'¹²³

Moreover, the Tasmanian government announced on 22 January 2008 a \$5m compensation package for members of the stolen generations in Tasmania.¹²⁴ \$5m was placed in a 'Stolen Generations Fund' created under s 10 of the *Stolen Generations of Aboriginal Children Act 2006* (Tas) out of which *ex gratia* payments were paid to members of the stolen generations or the children of a deceased person. Under s 5 of the Act claim could be made by persons who had been made a ward of the State under, *inter alia*, the *Infants' Welfare Act 1935* (Tas) or the *Child Welfare Act 1960* (Tas) or otherwise removed from their families for a period of

¹¹⁸ See, for example, *Cubillo 1* [1999] FCA 518.

¹¹⁹ One in six of the witnesses before the *Bringing them Home* Inquiry reported being physically assaulted while detained in Aboriginal institutions and one in ten asserted that they had been sexually abused: Healey, above n 8, 19.

¹²⁰ See CAR, above n 23.

¹²¹ See also Buti, above n 6, [1].

¹²² Queensland, *Parliamentary Debates*, Legislative Assembly, 26 May 1999, 1947-1982.

¹²³ Victoria, *Parliamentary Debates*, Legislative Assembly, 17 September 1997, 10.

¹²⁴ "\$5m 'giant leap' for stolen kids" *Mercury* (Hobart), 23 January 2008.

more than 12 months without the free consent of their parents or the child of such a deceased person. Payments were made to 106 claimants, including 22 children of deceased members of the stolen generation.¹²⁵ Under s 11 where the claimant was a child of a deceased member of the stolen generation the amount paid was \$5,000 each, with a maximum of \$20,000 per family, the remaining funds being divided amongst the applicants who were actually removed from their families. The other States and Territories have not, however, introduced any compensation packages for the stolen generations.

As detailed below, despite public protests, the Howard Liberal/National coalition repeatedly refused to apologise for this past policy of assimilation and merely passed a motion of 'deep and sincere regret that indigenous Australians suffered injustices under the practices of past generations'.¹²⁶ Thus there was no actual apology in terms of the word 'sorry' and the statement related to general past injustices, making no reference to the past wrongs affected under the government's policy of removing Aboriginal children from their families.¹²⁷

The then Howard federal government had indicated its opposition to an apology and in particular the payment of compensation to the stolen generations in its submission to the HREOC inquiry.¹²⁸ In regards to the latter, the government suggested that there would be difficulty in identifying who would be eligible for the compensation and that it would be difficult to quantify the relevant loss as there is 'no comparable area of awards of compensation and no basis for arguing a quantum of damages from first principles'.¹²⁹ Of course the courts are well versed in quantifying both economic and non-economic losses under common law principles.¹³⁰ In a press release soon after the tabling of the HREOC Report, the then Minister for Aboriginal and Torres Strait Islander Affairs, Senator John Herron, rejected the recommendation of a National Compensation Fund, asserting that the 'Commonwealth believes there is no practical or appropriate way to address' the issue of compensation.¹³¹

Again in its submission to the Senate Legal and Constitutional References Committee, 'Inquiry into the Stolen Generation', the then Howard federal government set out its reasons for rejecting the HREOC recommendations of an apology and reparations for the stolen generation.¹³² Key aspects underpinning the government's rejection included:

- the proportion of children affected was no more than 10 per cent and those numbers included those children who were not forcibly separated from their

¹²⁵ *Mercury* above n 124.

¹²⁶ Prime Minister John Howard, *Motion of Reconciliation* (1999) Prime Minister of Australia <www.pm.gov.au/media/pressrel/1999/reconciliation2608.htm>.

¹²⁷ See also Buti, above n 6, [34] and [41].

¹²⁸ Commonwealth Government, *Submissions to National Inquiry into Separation of Aboriginal and Torres Strait Island Children from their Families* (1996), 26-32.

¹²⁹ HREOC, above n 1, 305-306.

¹³⁰ See also Regina Graycar, 'Compensation for the Stolen Children: Political Judgements and Community Values' (1997) 4(3) UNSW Law Journal Forum 23, 24-25.

¹³¹ 'Bringing Them Home – Commonwealth Initiatives', (Press Release, 16 December 1997).

¹³² Submission to Senate Legal and Constitutional References Committee 'Inquiry into the Stolen Generations', Parliament of Australia, Canberra, 2000, 25-32 (Senator John Herron, Minister for Aboriginal and Torres Strait Island Affairs).

families or separated who were separated for good reason;

- the nature and intent of these past events were said to have been misrepresented by HREOC as the treatment of separated Aboriginal children had been lawful and benign in intent, reflecting accepted child welfare practices at the time;
- monetary compensation was inappropriate in the absence of legal liability to pay such;
- any such legal liability should be established through common law claims in the courts; and
- the financial implications of compensating survivors through a statutory scheme would be considerable, the government estimating a liability of \$3.9b or more.

CAR's subsequent recommendation of an apology and reparations for the stolen generations was also rejected outright by the Howard government.¹³³ In its response to the CAR Reconciliation Documents, the Howard government asserted that matters such as the recommended apology to the stolen generation could 'imply that present generations are in some way responsible for the actions of earlier generations...'¹³⁴ The federal government's policy on this matter was that essentially this happened in the past and the then government should assume no responsibility today.¹³⁵ The then Prime Minister, John Howard, asserted that the current generation could not be held accountable 'for the errors and misdeeds of earlier generations' and refused to endorse an actual apology.¹³⁶

In fact, the previous Howard federal government disputed that there truly is a stolen generation(s) in Australia. According to Brett, the Howard government, fuelled by the 'new right', sought to maintain and 'reinforce the idealized past of the Australian nation, and to see the history as one of a triumph of progress and peaceful settlement'.¹³⁷ There are many examples of this approach including the attempt to recast history by denying the extent of forced removals of children¹³⁸ and the then Prime Minister's derogatory reference to the stolen generation myth¹³⁹ being based on the 'black armband view of history'.¹⁴⁰

¹³³ Commonwealth Government, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge* (2002), 10, 17, 19 and 20.

¹³⁴ Commonwealth Government, *Commonwealth Government Response to the Council for Aboriginal Reconciliation Final Report – Reconciliation: Australia's Challenge* (2002), 10.

¹³⁵ John Howard, 'Confront Our Past, Yes, But Let's Not Be Consumed By It' *The Age* (Melbourne), 19 November 1996.

¹³⁶ Tony Wright 'Sorry' *The Age* (Melbourne), 2 February 2008.

¹³⁷ See also Judith Brett, *The Treaty Process and the Limits of Australian Liberalism* (2001) Australian Institute of Aboriginal and Torres Strait Islander Studies, 16 <www.aiatsis.gov.au/rsrch/smnrs/papers/brett/htm> .

¹³⁸ Commonwealth Government, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generations* (2000), ii-iii.

¹³⁹ See also 'Bringing home the delusions: The Government ignores the truth of the stolen generations', *The Australian* (Sydney), 4 April 2000.

¹⁴⁰ Howard, above n 135.

In its submission to the Senate Legal and Constitutional References Committee, 'Inquiry into the Stolen Generation', the then Howard federal government stated there was 'never a "generation" of stolen children'.¹⁴¹ This was based on the suggestion that the number of children who had been removed was no more than 10 per cent and those numbers included those children who were not forcibly separated from their families or who were separated for good reason.¹⁴² The then Minister of Aboriginal Affairs asserted that as most Aboriginal children were not taken from their families there was no stolen 'generation'.¹⁴³ Thus numerically there was no 'generation' affected by the policy.

Moreover, the use of the word 'stolen' was said to wrongly combine and confuse those children who were separated with and without their families consent and with and without good reason.¹⁴⁴ This view has also been reiterated in key court cases, such as *Cubillo* case,¹⁴⁵ the government's witnesses 'insisted that no child was removed without the consent of the mother of that child'.¹⁴⁶ The Commonwealth's position was that 'unless it was a case of neglect or harm, no child was removed without the consent of his or her mother'.¹⁴⁷ The government's witnesses in the *Cubillo* case 'insisted that no child was removed without the consent of the mother of that child'.¹⁴⁸

The government also denied the removal of Aboriginal children was effected under a federal government policy; preferring to blame the State government and non-government organisations.¹⁴⁹ This view has also been reiterated in the *Cubillo* case.¹⁵⁰

Further, HREOC's methodology in collecting the evidence regarding what the government expressly referred to as the 'so-called 'stolen generation' was criticised for failing to test the claims put before it and failing to reflect the views of those who administered the policy.¹⁵¹

The Rudd Labor federal government announced at the end of 2007 that it would make a formal apology to the stolen generations of Australia on 13 February 2008.¹⁵² The opposition Liberal party initially opposed the proposed apology, asserting, *inter alia*, there are more important issues for the federal Parliament to address,¹⁵³ but in the days leading up to the

¹⁴¹ Submission to Senate Legal and Constitutional References Committee 'Inquiry into the Stolen Generations', Parliament of Australia, Canberra, 2000, 25-32 (Senator John Herron, Minister for Aboriginal and Torres Strait Island Affairs).

¹⁴² Submission to Senate Legal and Constitutional References Committee, above n 141, 25-32.

¹⁴³ Wright, above n 136.

¹⁴⁴ Submission to Senate Legal and Constitutional References Committee, above n 141, 25-32.

¹⁴⁵ *Cubillo* 2 [2000] FCA 1084 at [5] and [28].

¹⁴⁶ [2000] FCA 1084 at [28].

¹⁴⁷ [2000] FCA 1084 at [5].

¹⁴⁸ [2000] FCA 1084 at [28].

¹⁴⁹ Submission to Senate Legal and Constitutional Affairs References Committee, above n 141, 25-32.

¹⁵⁰ *Cubillo* 2 [2000] FCA 1084 at [5] and [28].

¹⁵¹ Submission to Senate Legal and Constitutional Affairs References Committee, above n 141, 25-32.

¹⁵² Rudd to Apologise to Stolen Generation (26 November 2007) SBS World News Australia <http://news.sbs.com.au/worldnewsaustralia/rudd_to_apologise_to_stolen_generation_136382>; Wright, Murphy and Austin, 'Apology set to test Liberal Leadership' *The Age* (Melbourne), 31 January 2008.

¹⁵³ Gratton and Rood, 'Apology will Foster Victim Mentality: Opposition' *The Age* (Melbourne), 29 January 2008; Wright, Murphy and Austin, above n 152.

apology gave in principle support.¹⁵⁴ There was much controversy in regard to the wording of the apology. However, ultimately the word ‘sorry’ was included in the Prime Minister’s heart-felt apology.¹⁵⁵ Moreover, unlike the Howard government’s motion of regret for general past injustices to the Indigenous peoples of Australia, the apology specifically acknowledged that the removal policy was the ‘most outrageous of wrongs’ that caused ‘profound grief, suffering and loss’ to the stolen generations and their families and apologised for such. It acknowledged that the forcible removal of children of mixed lineage was affected pursuant to the ‘deliberate, calculated policies of the state as reflected in the explicit powers given to them under statute’. A comment clearly directed at the former Prime Minister, John Howard, Prime Minister Rudd reiterated that this was not a ‘black-archaic view of history; it is just the truth: the cold, confronting uncomfortable truth’. As the Canadian Law Reform Commission has noted, an acknowledgement of the past and accepting of responsibility are important features of any truly meaningful apology.¹⁵⁶ The Prime Minister also sought the acceptance of the apology from the surviving stolen generation. This is considered an important aspect of an apology as it empowers the victim to accept, refuse or ignore the apology.¹⁵⁷ The apology included a resolve that the ‘injustices of the past must never, never happen again’. To this end the Canadian Law Reform Commission has stated that it is also important that victims of abuse be assured through the apology that such will not happen again.¹⁵⁸

As discussed below in the Canadian context, the apology was a considerable step forward in Australia. However, the federal Labor government has been adamant that a compensation scheme will not be part of the apology process.¹⁵⁹ Unfortunately echoing the tones of the former federal government, Prime Minister Rudd has stated that any claims by members of the stolen generations for compensation based on the apology will be robustly defended.¹⁶⁰

The rejection of any compensation severely undermines the meaningfulness of the apology. As the Canadian Law Reform Commission has noted, a necessary element of any true apology is the provision of reparations through concrete measures.¹⁶¹ While monetary compensation in this context is largely symbolic, as the loss and trauma cannot be adequately

¹⁵⁴ The Opposition leader, Dr Nelson, has indicated that he will not support the apology if the phrase “stolen generations” is used: ‘Coalition to back “sorry”’, *The Age* (Melbourne) 6 February 2008.

¹⁵⁵ Parliament of Australia, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 ‘Apology to Australia’s Indigenous Peoples’ (Prime Minister Rudd).

¹⁵⁶ Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa, 2000), 83.

¹⁵⁷ Buti, above n 6, 42, quoting Martha Minow, *Between Vengeance and Forgiveness* (Boston: Beacon Press, 1998).

¹⁵⁸ Law Commission of Canada, above n 156, 83.

¹⁵⁹ ‘Sorry’ More Important than Compo to Stolen Generation: Elder (13 December 2007) ABC News 13 <<http://www.abc.net.au/news/stories/2007/12/13/2118056.htm>>; Labor can’t Promise Stolen Generations Compo Fund (2 August 2007) ABC News <www.abc.net.au/news/stories/2007/08/02/1995146.htm>; Gratton and Rood, above n 153; Wright, above n 136.

¹⁶⁰ Michelle Gratton and Tony Wright, ‘Rudd Rules out Compensation’ *The Age* (Melbourne) 2 February 2008.

¹⁶¹ Law Commission of Canada, above n 156, 83.

compensated and restitution cannot be affected,¹⁶² compensation is nevertheless important from the victim's perspective as it concretizes the responsibility of the government for the wrongful act.¹⁶³ Moreover, as discussed below in the Canadian context, monetary compensation can make practical difference to the financial well-being of the victim and/or their community.

Thus the previous Australian federal government's response to the revelations of the HREOC *Bringing Them Home* Report was certainly not one based on an acknowledgement of responsibility, nor the resolution of the legitimate claims of the stolen generations. This response was effectively based on a denial of the factual reality of this past government policy. While it is hoped that the apology from the current federal government will provide an impetus for future reconciliation, the above indications suggest otherwise.

3.2 United States

To the extent that the United States public is aware of the abuse that occurred in the Indian Boarding Schools, this can be traced back to the Report *Indian Education: A National Tragedy, A National Challenge* ('Kennedy Report').¹⁶⁴ The Report detailed, *inter alia*, the abuse and substandard conditions in the Indian Boarding Schools as part of its conclusion that the government had failed in virtually every aspect of the schooling it provided for Indian children.¹⁶⁵ While this Report led to substantial reforms in Indian education, public awareness of the abuse in the Indian Boarding schools is perhaps more accurately sourced in more modern texts detailing the basis of this assimilation policy and the abuse that occurred in the schools.¹⁶⁶

To date, the United States courts have not had the opportunity to consider the legal consequences of the government's conduct of the Indian Boarding Schools. The only relevant litigation has been the seemingly ill-conceived class action, *Zephier v United States*,¹⁶⁷ seeking \$25b in damages for the sexual, physical and mental abuse suffered by the plaintiffs, members of the Sioux Nation, during their detention at Indian Boarding Schools in South Dakota. The schools were managed by various churches and overseen by the Bureau of Indian Affairs ('BIA'). The claim was based on theories of strict liability, breaches of 'bad men' clauses¹⁶⁸ in Art 1 of the *Treaty between the United States and Different Tribes of Sioux Indians* (April 29, 1868) and breaches of fiduciary duties. Aypolt J upheld the government's

¹⁶² Buti, above n 6, [39] and [40].

¹⁶³ Pritchard, above n 22, 264.

¹⁶⁴ Kennedy Report, above n 3.

¹⁶⁵ Kennedy Report, above n 3, XI-XII.

¹⁶⁶ In particular, Adams, above n 3; Churchill, above n 3.

¹⁶⁷ No 03-768L, unreported decision of US Court of Federal Claims, 29 October 2004. See also: *Judge Dismisses \$25b BIA Boarding School Suit*, (November 8, 2004) Indianz.com <www.indianz.com/News/2004/005247>. As to criticism of the litigation, see: Boarding School Healing Project <<http://www.boardingschoolhealingproject.org>>.

¹⁶⁸ Under the 'bad men' clauses the United States effectively promised to protect the Sioux Indian peoples and their property from bad 'white' men. If an injury was caused by a white person, the United States promised to arrest and punish the offender and to compensate for any loss sustained.

motion to summarily dismiss the action, agreeing that the plaintiffs had failed to exhaust the administrative resolution process through the BIA, as expressly required in the Treaty.¹⁶⁹ The court also found that the alleged abuse constituted tortious actions that were expressly excluded from the Court of Federal Claims' jurisdiction under the *Tucker Act* (28 USC, s 1419(a)(1)).¹⁷⁰ Since the summary dismissal of the action it appears that this finding has not been appealed, nor has the claim been reinstated in the courts.

Perhaps because of the absence of legal cases seeking redress, there does not appear to be a political or public momentum seeking a federal government apology for the removal policy. As noted above, the United States government's response to the plight of those who attended the Indian Boarding Schools has been limited to the *ad hoc* unsuccessful attempts by a handful of parliamentarians to seek a government apology for the assimilation policy that underpinned the Indian Boarding Schools.

There has been some limited government acknowledgment of the consequences of this removal policy. Mr Kevin Gover, Assistant Secretary, Indian Affairs, Department of Interior, acknowledged in September 2000 the brutalisation, 'emotionally, psychologically, physically, and spiritually ... of the children entrusted to the BIA's boarding schools' and that 'the legacy of these misdeeds haunt us', continuing to have devastating intergenerational effects.¹⁷¹ The federal legislature, however, has not followed with a similar acknowledgement of responsibility and apology. While on 1 March 2007 Senator Sam Brownback and Mrs Jo Ann Davis introduced into the Senate and House of Representatives, respectively, a resolution apologising for 'the forcible removal of Native children from their families to faraway boarding schools where their Native practices and languages were degraded and forbidden', the resolutions were not passed.¹⁷² The resolutions were referred to the Committee on Indian Affairs where they have now been 'moth-balled' and undoubtedly will not be acted upon. However, at least the efforts of Senator Brownback and Mrs Davis have raised the issue of an apology in the legislature and will hopefully provide the impetus for a fresh move to ensure an acknowledgment of responsibility on the part of the federal government and some justice for the United States' stolen generations.

3.3 Canada

It was not until 1996 and the revelations of the *RCAP Report* that the non-Aboriginal Canadian general public became aware of the policy of removing Aboriginal children from their families and placing them in Aboriginal residential schools where they were often

¹⁶⁹ No 03-768L, unreported decision of US Court of Federal Claims, 29 October 2004. See the subsequent criticism of this conclusion in *Elk v United States* 70 Fed Cl 405 (2006) .

¹⁷⁰ No 03-768L, unreported decision of US Court of Federal Claims, 29 October 2004.

¹⁷¹ *Judge Dismisses \$25b BIA Boarding School Suit* (November 8, 2004) Indianz.com <<http://www.indianz.com/News/2004/005247>> .

¹⁷² See in regard to Senator Brownback's earlier attempts to have the same resolution passed in 2004: *Judge Dismisses \$25b BIA Boarding School Suit* above n 171. Mrs Jo Ann Davis had similarly unsuccessfully put an earlier resolution before the House on 4 January 2004.

abused.¹⁷³ Chapter 10 of the Report particularises information regarding the Aboriginal residential schools. It details the tragic legacy that the Aboriginal residential school experience has left with many of the former students.

The Report made a number of recommendations in relation to the Aboriginal residential schools. It recommended, *inter alia*, the establishment of a further public inquiry into the Aboriginal residential schools.¹⁷⁴ It also recommended the establishment of a national repository of records and video collections related to Aboriginal residential schools.¹⁷⁵ While initially rejecting the need for a further public inquiry,¹⁷⁶ as discussed below, under the 8 May 2006 Settlement Agreement the government has established a Truth and Reconciliation Commission to fulfil these recommendations.¹⁷⁷

From the outset the Canadian federal government responded to the *RCAP Report* by establishing the Indian Residential Schools Resolution Unit, which it created within the Indian and Northern Affairs Department.¹⁷⁸ In time the Unit became a new government department, independent of the Indian and Northern Affairs Department.

Moreover, as noted above, the government responded to the *RCAP Report* recommendations with a public acknowledgement of responsibility and an expression of sorrow to those persons who suffered through the Aboriginal residential schools.¹⁷⁹ On 7 January 1998, the Federal Minister of Indian Affairs, the Honourable Jane Stewart, announced at a public ceremony *Gathering Strength: Canada's Aboriginal Action Plan*. This outlined a four-point federal government strategy to address the legacy of the Aboriginal residential schools through:

- a government acknowledgment of responsibility for the Aboriginal residential schools;
- 'healing' projects;
- the development of alternative dispute resolution ('ADR') models; and
- the adoption of litigation strategies that complement the promotion of ADR.

¹⁷³ Note, it has been suggested that in some schools all children were sexually abused: 'Reports of Sexual Abuse may be Low, Expert Says,' *The Globe and Mail* (Toronto) 1 June 1990, A3 reporting the comments of Rix Rogers, special adviser to the Minister of National Health and Welfare, cited by RCAP, above n 2, 378. See further RCAP and Aboriginal Healing Foundation, above n 2.

¹⁷⁴ It also recommended that the commission of inquiry be comprised of a majority of Aboriginal commissioners. See RCAP, above n 2, Recommendations 1.10.1 and 1.10.2.

¹⁷⁵ RCAP, above n 2, Recommendation 1.10.3.

¹⁷⁶ See *Aboriginal Healing Foundation* above n 2, 17. The government was of the view that the RCAP, above n 2, had provided sufficient detail into the Aboriginal residential schools: Personal conversation with Mr Jack Stagg, Director, Office of Indian Residential Schools Resolution Canada, 22 August 2002.

¹⁷⁷ Under clause 7.01 of the 8 May 2006 Settlement Agreement a Truth and Reconciliation Commission will now be established. Under clause 3.03 \$60m will be allocated to fund the Commission. See further Schedule N.

¹⁷⁸ IRSR, above n 2.

¹⁷⁹ See Jane Stewart, Minister for Indian Affairs and Northern Development, *On the Occasion of the Unveiling of Gathering Strength – Canada's Aboriginal Action Plan, including the Statement of Reconciliation: Learning from the Past* (Speech delivered at Ottawa, Canada, 7 January 1998) <http://www.ainc-inac.gc.ca/ai/rqpi/apo/js_spea-eng.asp>.

These are considered in turn below.

3.3.1 Acknowledgement of Responsibility

As to the first of these initiatives, on 7 January 1998 the federal government delivered its *Statement of Reconciliation: Learning from the Past*. In this public statement the government acknowledged its role in the development and administration of Aboriginal residential schools and asserted that it was ‘deeply sorry’ to those persons who suffered through the schools. Whilst the document emphasises sorrow for those who suffered physical and sexual abuse, ‘the worst cases’, it also notes this ‘system separated many children from their families and communities and prevented them from speaking their own languages and from learning about their heritage and cultures’. The statement acknowledged that ‘policies that sought to assimilate Aboriginal people, women and men, were not the way to build a strong country’.

Some controversy existed in regard to the *Statement of Reconciliation: Learning from the Past*. It was suggested that the ‘apology’ should have been made by the then Prime Minister, rather than a relatively junior minister (albeit, Minister of Indian Affairs). The most controversial aspect was the language used in the *Statement of Reconciliation: Learning from the Past*. The perception of some Aboriginal persons was that it fell short of an apology. To this end, calls for a formal apology from the federal government continued after the Statement of Reconciliation. Nevertheless, however viewed, at the very least the document contained a strong statement of responsibility and sorrow for the consequences of this policy of assimilation.

The government subsequently recognised the importance of both ‘acknowledgment and apology.’¹⁸⁰ The Justice Department’s 2005 Report, *Healing the Past: Addressing the Legacy of Physical and Sexual Abuse in Indian Residential Schools*¹⁸¹ noted that both are important in building a basis for ‘healing and reconciliation at the individual and community levels. ... Offering an apology and acknowledgement of the wrongs of the past is an important first step to building the foundation for a new relationship with Canada’s Aboriginal peoples, one founded on trust and respect’. To this end the government extended an apology to Canada’s Aboriginal peoples generally and individual apologies to those affected by abuse in the schools.¹⁸²

In the 8 May 2006 Agreement, discussed in more detail below, between Canada and, *inter alia*, the Assembly of First Nations (‘AFN’),¹⁸³ the government acknowledged that it and

¹⁸⁰ Government of Canada, *Healing the Past: Addressing the Legacy of Physical and Sexual Abuse in Indian Residential Schools* (20 October 2005) Department of Justice
<www.justice.gc.ca/en/dept/pub/dig/healing.htm>.

¹⁸¹ Government of Canada, above n 180. .

¹⁸² Government of Canada, above n 180.

¹⁸³ On 20 November 2005 an ‘Agreement in Principle’ was entered into between the Canadian government, the Assembly of First Nations and various law firms representing clients through class actions. On 25 April 2006 the Minister of Indian Affairs and Northern Development, Mr Jim Prentice, announced that a final

certain religious organisations ‘operated Indian Residential Schools for the education of Aboriginal children and certain harms and abuses were committed against those children’ and thus it was desirable for the government to provide ‘a fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools’. It will be seen that Canada agreed to a \$4b settlement that compensates, not only victims of abuse, but all who attended the Aboriginal residential schools.¹⁸⁴

Most recently, on 11 June 2008 the Prime Minister, Stephen Harper made a formal apology in Parliament to Canada’s stolen generation for the federal government’s role in the forcible removal of Aboriginal children from their families and their consequent detention in Aboriginal residential schools.¹⁸⁵ Notably the apology used the word ‘sorry’. The apology discusses the history of the Aboriginal residential schools, noting from the outset that the ‘treatment of children in these schools is a sad chapter in our history’.¹⁸⁶ The apology acknowledged that the policy underlying the removal and detention of Aboriginal children was one of assimilation, based on assumptions of the inferiority of Aboriginal cultures and spiritual beliefs, and that this policy was ‘wrong and has caused great harm, and has no place in our country’.¹⁸⁷ The government apologised for the consequent damage caused through the removal policy, including intergenerational effects, and the appalling conditions and often abuse in the Aboriginal residential schools.¹⁸⁸ The Prime Minister’s apology was followed by similar statements by, *inter alia*, other Ministers.

The Prime Minister’s statement also addressed the importance of the apology. It noted that the lack of an apology was recognised as an ‘impediment to healing and reconciliation’.¹⁸⁹ In terms of accepting responsibility, the Prime Minister acknowledged that the burden of the Aboriginal residential school policy had wrongly been borne too long by the victims:¹⁹⁰ ‘The burden is properly ours as a government, and as a country’.¹⁹¹ The statement recognised that the victims of the Aboriginal residential school policy have been working on their own recovery for a long time, but now, through the apology, Canada is ‘in a real sense joining you on this journey’.¹⁹² The statement continued by asking for forgiveness ‘for failing them so profoundly’.¹⁹³ It reiterated that there is ‘no place in Canada for the attitudes that inspired the

agreement had been reached between all relevant parties. This was finalised in the 8 May 2006 Agreement. Final approval was delayed to some extent by the change in the Canadian federal government.

¹⁸⁴ As discussed below, these payments are called ‘common experience payments’ (‘CEP’s) paid out of a \$1.9b fund. In addition to CEPs paid directly to persons who attended Aboriginal residential schools, survivors and their families and communities will also benefit through the funding of the Aboriginal Healing Foundation, the provision of individual healing funds and through the establishment of the Truth and Reconciliation Commission. These matters are discussed below in more detail.

¹⁸⁵ Canada, *Parliamentary Debates*, House of Commons, 11 June 2008, [1515] and [1520] (Prime Minister Stephen Harper).

¹⁸⁶ *Parliamentary Debates*, above n 185, [1515].

¹⁸⁷ *Parliamentary Debates*, above n 185, [1515].

¹⁸⁸ *Parliamentary Debates*, above n 185, [1515]-[1520].

¹⁸⁹ *Parliamentary Debates*, above n 185, [1520].

¹⁹⁰ *Parliamentary Debates*, above n 185, [1520].

¹⁹¹ *Parliamentary Debates*, above n 185, [1520].

¹⁹² *Parliamentary Debates*, above n 185, [1520].

¹⁹³ *Parliamentary Debates*, above n 185, [1520].

Indian residential schools system to ever again prevail'.¹⁹⁴ Thus the apology included all the above discussed elements of a meaningful apology as identified by the Law Commission of Canada,¹⁹⁵ but unlike the Australian apology, appropriately coupled such with compensation.

3.3.2 Aboriginal Healing Foundation

As to the second of the above initiatives, on 31 March 1998 the Aboriginal Healing Foundation was established.¹⁹⁶ This is an Aboriginally run, non-profit organisation that operates at arm's length from the federal government.¹⁹⁷ The federal government initially granted \$350 million to the Foundation to provide funding for community based healing projects that 'address the legacy, including intergenerational impacts, of sexual and physical abuse suffered by Aboriginal people in Canada's Indian residential school system'.¹⁹⁸ The types of projects funded include healing services,¹⁹⁹ community services,²⁰⁰ prevention and awareness programs,²⁰¹ traditional activities²⁰² and training and education.²⁰³ A further five-year endowment of \$125m is provided for under clause 3.02 of the 8 May 2006 Agreement, discussed below.

The Aboriginal Healing Foundation has not been without controversy.²⁰⁴ Criticism was levelled at the limited life of the Foundation. The Foundation's mandate was originally limited to a ten-year period.²⁰⁵ While this has been extended by a further five years under the 8 May 2006 Agreement, and clause 8.01 provides for a further review as to its continuation after this period, the Foundation still has a limited life tied to this further five year endowment.²⁰⁶

Perhaps most importantly, its mandate is seen as too restrictive as, technically, it is prevented from funding projects that address language and cultural loss through the Aboriginal

¹⁹⁴ *Parliamentary Debates*, above n 185, [1520].

¹⁹⁵ Law Commission of Canada, above n 156, 83.

¹⁹⁶ *Aboriginal Healing Foundation* above n 2, Message from the President, Georges Erasmus.

¹⁹⁷ *Aboriginal Healing Foundation*, above n 2, 9.

¹⁹⁸ *Aboriginal Healing Foundation*, above n 2, Message from the President, Georges Erasmus.

¹⁹⁹ For example, healing circles, day treatment centres and sex offender programs: *Aboriginal Healing Foundation*, above n 2, 12.

²⁰⁰ For example, support networks and leadership training for healers: *Aboriginal Healing Foundation*, above n 2.

²⁰¹ For example, educational materials and sexual abuse workshops: *Aboriginal Healing Foundation*, above n 2.

²⁰² For example, support networks for Elders and Healers: *Aboriginal Healing Foundation*, above n 2.

²⁰³ For example, parenting skills and curriculum development: *Aboriginal Healing Foundation*, above n 2.

²⁰⁴ Generally this criticism is not documented in written form. See, however, *The Shingwauk Project* <http://www.shingwauk.auc.ca/TalkingCircle/TalkingCircle_forum_web_Cachagee.htm>. The bitterness felt by some is represented in the angry response of Gilbert Oskaboose, *The Aboriginal Healing Foundation: A Nest of Maggots*, Village of First Nations <<http://www.firstnations.com/oskaboose/nest-of-maggots.htm>>.

²⁰⁵ *Aboriginal Healing Foundation* <<http://www.ahf.ca>>. See *Aboriginal Healing Foundation* above n 2, 18 and 19.

²⁰⁶ See further Schedule M of the 8 May 2006 Settlement Agreement.

residential school experience.²⁰⁷ The Foundation's mandate is confined to addressing the consequences of physical and sexual abuse in the schools.²⁰⁸ Technically, the Foundation cannot fund projects aimed at compensating cultural and language loss.

The government has recently defended this limitation, asserting that it supports a number of initiatives to preserve and advance Aboriginal languages and culture.²⁰⁹ However, the Harper federal government recently removed the funding for the \$20m Aboriginal Language Initiative that is cited as the key alternative fund for the promotion of Aboriginal languages.²¹⁰

3.3.3 Alternative Dispute Resolution

As to the third and fourth of the *Gathering Strength* initiatives, the federal government has been concerned throughout this period to redirect Aboriginal residential school litigation away from the courts into ADR models.²¹¹ As the Justice Department's 2005 Report, *Healing the Past: Addressing the Legacy of Physical and Sexual Abuse in Indian Residential Schools*²¹² notes, any approach to providing redress to survivors must be sensitive to the 'needs of survivors, their families and their communities'. To this end the government has appreciated that the ADR model(s) used to resolve Aboriginal residential school claims needs to provide a forum in which survivor's 'personal and sensitive stories can be told and considered in a safe environment'.²¹³

By contrast, the process involved in establishing the factual basis for claims in the courts has clearly been personally gruelling to the plaintiffs. To require persons who are in many cases already suffering severe psychological disorders to prove their claims in the adversarial context of examination in chief and cross-examination cannot be an appropriate model for redress. Moreover, as the *Blackwater cases*²¹⁴ and *Cubillo cases*²¹⁵ indicate, the process of preliminary applications, trial(s) and appeals has meant that ultimately receiving a final determination has been a lengthy (seven years in the case of *Blackwater* and three years in the case of *Cubillo*) and costly legal exercise.

A further concern for the federal government was the potential congestion of cases in the courts. As of March 2001, more than 7,200 individuals had filed civil claims against

²⁰⁷ Aboriginal Healing Foundation above n 2, 19, 205. See also Assembly of First Nations, Annual General Assembly, Resolution no. 10/2002, 16, 17 and 18 July 2002.

²⁰⁸ See *Aboriginal Healing Foundation*, above n 2, 19, 205.

²⁰⁹ Government of Canada, *Healing the Past: Addressing the Legacy of Physical and Sexual Abuse in Indian Residential Schools* (20 October 2005) Department of Justice <<http://www.justice.gc.ca/en/dept/pub/dig/healing.htm>>.

²¹⁰ Government of Canada, above n 209.

²¹¹ *Aboriginal Healing Foundation* above n 2, 16.

²¹² Government of Canada, above n 209.

²¹³ Government of Canada, above n 209.

²¹⁴ *Blackwater v Plint (No 1)* (1998) 52 BCLR (3d) 18; *Blackwater v Plint (No 2)* (2001) 93 BCLR (3d) 228; *Blackwater v Plint (No 3)* (2003) 235 DLR (4th) 60; *Blackwater v Plint (No 4)* (2005) 258 DLR (4th) 275.

²¹⁵ See *Cubillo 1* [1999] FCA 518; *Cubillo 2* [2000] FCA 1084; *Cubillo 3* [2001] FCA 1213.

Canada.²¹⁶ This figure did not include those persons who were making claims through the class actions that were discontinued under the 8 May 2006 Agreement. This provided a further reason for the government to make attempts to redirect Aboriginal residential school litigation away from the courts into speedier ADR models.²¹⁷

To this end, in 1998 the AFN, the Federal Department of Indian Affairs and the Federal Department of Justice met to discuss establishing an ADR model(s) for the resolution of claims.²¹⁸ In turn, through 1998-1999 the federal government funded nine exploratory dialogues with claimants, Aboriginal leaders, church representatives and senior government officials in locations across Canada, designed to develop solutions to Aboriginal residential school issues.²¹⁹ In response to these dialogues the federal government launched a series of ADR pilot projects, designed to examine different ways claims could most appropriately be resolved.²²⁰

In furtherance of the initiative promoting ADR, in July 2001 the federal government began negotiations with the churches towards establishing an ADR model based on an agreed allocation of responsibility and an out of court settlement for all claimants where their claims were validated.²²¹ On the basis of the litigation that had at that point been determined, the federal government offered to pay two-thirds of the agreed compensation if the churches would pay the other third. The churches' initial response was that they were only willing to pay a small fraction, less than 1%, of the estimated cost to settle all claims.²²² Some churches expressed concern as to their continuing financial viability if they paid compensation to those who suffered abuse while detained in the Aboriginal residential schools.²²³ At the time the federal government estimated that the total compensation payable would be approximately \$1.2 billion.²²⁴

While negotiations with certain churches faltered,²²⁵ in November and December 2002 the federal government announced that it had reached an agreement in principle with the Anglican²²⁶ and Presbyterian Churches, respectively, as to how they would compensate those former students of the Aboriginal residential schools who had been physically and sexually

²¹⁶ IRSR, above n 2.

²¹⁷ *Aboriginal Healing Foundation* above n 2, 16.

²¹⁸ *Aboriginal Healing Foundation* above n 2, 16.

²¹⁹ IRSR, above n 2. See also Government of Canada, above n 209.

²²⁰ IRSR, above n 2.

²²¹ *Aboriginal Healing Foundation*, above n 2, 16.

²²² Personal conversation with Mr Jack Stagg, Director, Office of Indian Residential Schools Resolution Canada, 22 August 2002.

²²³ Government of Canada, above n 209.

²²⁴ Personal conversation with Mr Jack Stagg, Director, Office of Indian Residential Schools Resolution Canada, 22 August 2002. Given that the class actions that are to be discontinued under the 8 May 2006 Settlement Agreement involved claims for wrongful imprisonment, cultural loss and breaches of education clauses in treaties, the estimated amount of damages if these claims were successful would be significantly higher.

²²⁵ IRSR, above n 2.

²²⁶ See: *Residential Schools: The Living Apology*, The Anglican Church of Canada <<http://www.anglican.ca/ministry/rs/resources>>. The Anglican Church has agreed to pay 30% of damages. The Church will pay over the next 5 years \$25 million into a fund for this purpose.

abused.²²⁷ As noted below, ultimately all relevant churches, the Anglican Church, Presbyterian Church, United Church and, finally, the Catholic Church, agreed to a division of liability and thus the ADR model under the 8 May 2006 Settlement Agreement provides for 100% compensation, not the 70% basis described immediately below.

In the meantime, in light of this obstruction from the churches, in October 2001 the Canadian federal government decided to adopt a slightly different path by offering claimants with validated claims²²⁸ 70% of the agreed compensation in settlement.²²⁹ This 70% figure applied where both the federal government and a relevant church were involved in the conduct of a school. In these circumstances the claimant received the 70% amount from the government, but still had the opportunity of suing the respective church separately for the additional 30% of damages. Where, however, the federal government was solely responsible for the conduct of the School, the claimant was entitled to 100% of the agreed compensation.

In 2002 the federal government announced a new ADR framework would be introduced.²³⁰ This provided the framework for the ADR model under the 8 May 2006 Agreement; the latter, however, addressing some of the criticisms of the 2002-2003 model.

This ADR models are both based upon a binding adjudication that served the purposes of validating claims. Under the 2002-2003 model, here the subject incident of abuse occurred before 1 April 1969 Canada agreed to pay 70% of the amount of compensation determined by the adjudicator (unless an alternative share of liability has been negotiated with a church). If the abuse occurred after that date, Canada agreed to pay the full amount determined by the adjudicator. The acceptance of 100% liability after this date is particularly interesting given, as noted, even after this date the churches often continued to be involved in the conduct of Aboriginal residential schools.²³¹ For pre-1969 cases this meant there was a possibility that claimants would only receive 70% of the compensation as the church may refuse to pay the further 30%.²³² Importantly, under the 2006 ADR model, with the advent of an agreement with all relevant churches as to their respective share of liability, survivors will now receive 100% of their damages in all cases, not the previous 70%.

Both ADR models are based on a grid formula²³³ that takes into account the nature of the proven acts of abuse, the particular consequential harm to the victim, any aggravating factors, cost of any future care and loss of opportunity.²³⁴ The grid determines how many 'points' a victim accrues and this in turn determines the level of compensation. Any ADR model based

²²⁷ IRSR, above n 2.

²²⁸ That is, claims proven to the civil standard of proof, the balance of probabilities: Government of Canada, above n 209.

²²⁹ IRSR, above n 2. See also: Government of Canada, above n 209.

²³⁰ IRSR, above n 2.

²³¹ See further *M(FS) v Clarke* [1999] 11 WWR 301, 344-346.

²³² See the discussion in N Funk-Unrau and A Snyder, 'Indian Residential School Survivors and State-Designed ADR: A Strategy for Co-Optation?' (2007) 24(3) *Conflict Resolution Quarterly* 285, 294.

²³³ See Appendix II: Draft Compensation Framework, Draft Dispute Resolution Model for Indian Residential School Abuse Claims (2003).

²³⁴ See Appendix VIII: Draft Compensation Framework, Draft Dispute Resolution Model for Indian Residential School Abuse Claims (2003).

on a grid will not extend to the adjudicator the flexibility to order the appropriate amount of compensation in every case. While particularly under the 2006 model there is some flexibility in the level of compensation dictated by aggravating factors, ADR grids are quite de-personalised and do not necessarily accommodate human factors that might suggest a higher compensatory amount.

The 2002-2003 ADR model applied a compensatory table that differed in terms of compensatory amounts depending on the location of the Aboriginal residential school. One column applied to British Columbia, Yukon and Ontario, while the other (with lower amounts) applied to the rest of Canada.²³⁵ This was clearly inequitable. This monetary differential stemmed from the requisite negotiations with the courts in each of the jurisdictions in which the ADR model was to operate. The ADR model under the 8 May 2006 Agreement uses a single geographical grid.²³⁶

An important feature of the 2002-2003 ADR model was the inclusion in any compensatory award of a further 15% intended to cover the legal expenses of the adjudication. This has been criticised, not so much in terms of the model itself, but rather the amounts charged by lawyers assisting claimants. It was the perception of one adjudicator that lawyers representing claimants were ill-prepared and claimants should have utilised the available system of self-representation.²³⁷ It was asserted that the relevant lawyers nevertheless charged the claimants a considerable amount for their services and the 15% supplement was not sufficient to meet the relevant legal costs.²³⁸ While the 8 May 2006 ADR model continues to use the 15% supplement scheme, the AFN notes²³⁹ that the legal costs of effecting the settlement, discussed below, are totally separate from the common experience payments ('CEP') that all survivors receive whether or not they were physically or sexually abused.

The delays experienced by claimants under the 2002-2003 ADR model had also attracted criticism.²⁴⁰ It will be apparent that these delays can be quite considerable where level 4 or 5 compensation payments are thought by the adjudicator to be appropriate. The ADR model provided for under the 8 May 2006 Agreement includes mandatory timelines for the resolution of claims. These are designed to ensure payments are made within an expedited time frame. Survivors with continuing claims will have their actions heard under the 'Independent Assessment Process' ('IAP') that addresses these delays in two ways. First, under clause 6.03(1)(a)(i) Canada agrees that it will provide the resources to ensure that following a six-month start-up period, continuing claims will be screened into the IAP and will be processed at a minimum rate of 2,500 claims in each 12-month period. Second, under clause 6.03(1)(a)(ii) Canada agrees that it will provide the resources to ensure that each claimant will be offered a hearing date within nine months of their application being screened.

²³⁵ See Dispute Resolution Model for Indian Residential School Abuse Claims (November 2003).

²³⁶ See Schedule D.

²³⁷ Personal conversation with Professor Constance Backhouse, 15 January 2007.

²³⁸ Personal conversation with Professor Constance Backhouse, 15 January 2007.

²³⁹ Personal conversation with Ms Charlene Belleau, AFN, Indian Residential Schools Unit, 16 January 2007.

²⁴⁰ Funk-Unrau, above n 232, 292-294.

The primary criticism²⁴¹ of the 2002-2003 model was that the offer of compensation was confined to cases of sexual and physical abuse and wrongful confinement in the sense of solitary confinement when that was inappropriate in terms of both space and duration given the child's age.²⁴² The 8 May 2006 Agreement addresses the limited nature of previous compensation offers in three ways. First, the ADR system is to be significantly enhanced by a further \$800m to facilitate an expansion of compensatory acts. The categories of perpetrators have been expanded to include fellow students and employees acting outside the course of their duties. This addresses cases such as *B(E) v Order of the Oblates of Mary Immaculate In the Province of British Columbia*,²⁴³ where claims for compensation were unsuccessful because the actions of the perpetrators fell outside the scope of vicarious liability principles. The categories of compensatory harms and injuries have also been expanded to recognise, *inter alia*, loss of economic opportunity.

Second, as indicated above, with the advent of an agreement with all relevant churches as to their respective share of liability, survivors will now receive 100% of their damages in all cases, not the previous 70%.²⁴⁴ Under clause 15.01, awards made under the current ADR model, but after 30 May 2005, will be increased to reflect the new compensation scale under the IAP. Under clause 15.01, eligible IAP claimants may also request that any claim made under the previous ADR model be re-opened and reconsidered under the new IAP.

Third, the most major difference under the pre and post 8 May 2006 Agreement regime is that compensation will be extended to all survivors, not only those who suffered physical and/or sexual abuse, through the CEPs, discussed below. Thus the 8 May 2006 Settlement Agreement makes significant improvements to the ADR system and to the compensatory regime generally.

3.3.4 8 May 2006 Agreement

On 20 November 2005 Canada signed a historic 'agreement in principle' to provide for a multi-billion dollar settlement for the Aboriginal residential school experience. The Agreement was signed between the Honourable Frank Iacobucci, on behalf of Canada, Chief Phil Fontaine, on behalf of the AFN, and the legal teams representing Aboriginal clients in a number of major national class actions spanning Canada's provinces and territories.

This Agreement was subsequently formalised into a binding Agreement on 8 May 2006. Cabinet approval of the agreement was delayed to some extent by the change in the Canadian federal government. However, ultimately that approval was followed by the required court ratifications of the Agreement; the final court ratification occurring on 16 January 2007.

These court ratifications were necessary as the 8 May 2006 Agreement included the discontinuance of the relevant class actions. As the class actions involved claimants who attended Aboriginal residential schools in many provinces and territories, it was necessary for

²⁴¹ Funk-Unrau, above n 232, 294.

²⁴² See section 7 Draft Dispute Resolution Model for Indian Residential School Abuse Claims.

²⁴³ [2003] BCCA 289; (2005) 258 DLR (4th) 385.

²⁴⁴ See the discussion in Funk-Unrau, above n 232, 294.

the government, the AFN and representative class actions lawyers to work through the time consuming process of obtaining court ratifications in each of these relevant jurisdictions.²⁴⁵

The finalisation of the 8 May 2006 Agreement then required the approval of the survivors. Under clause 4.14, if 5,000 or more survivors did not agree to the settlement, it would not proceed. The approval process involved a mandatory 150 day period during which survivors could review the 8 May 2006 Agreement to decide whether it should be approved.²⁴⁶ During this period the AFN sought to contact every survivor through an extensive television, radio and newspaper notification program and a Community Outreach Plan where AFN representatives visited Aboriginal communities across the Nation to explain the terms of the Agreement.²⁴⁷ The approval period expired in August 2007 and the Agreement received the required approval, only 340 survivors electing to opt-out.²⁴⁸ Consequent to the requisite approval being achieved, implementation of the 8 May 2006 Agreement began on 19 September 2007.²⁴⁹

As noted above, the Agreement begins with an admission of legal responsibility on the part of the federal government: 'Canada and certain religious organizations operated Indian Residential Schools for the education of Aboriginal children and certain harms and abuses were committed against those children'. However, in stark contrast to the Australian approach, the acknowledgment of responsibility is coupled with the largest settlement package (approx \$4b) that has been entered into in Canadian history that has as its express aim²⁵⁰ the provision of a 'fair, comprehensive and lasting resolution of the legacy of Indian Residential Schools' and thereby the promotion of 'healing, education, truth and reconciliation and commemoration'.

There are numerous components to this compensation package. To many survivors and their families the most positive step forward made by the 8 May 2006 Settlement is the CEP payment. As part of the overall settlement package, Canada paid a \$1.9b fund into an interest bearing account, administered by the Trustee, to be used to compensate through CEPs, not only victims of abuse, but all who attended the Aboriginal residential schools. Clause 5.02 provides for the payment of \$10,000 for every person who attended one or more Aboriginal

²⁴⁵ Alberta: *Northwest et al v Canada (Attorney General)* [2006] AJ No. 1612; British Columbia: *Quatell et al v Canada (Attorney General)* [2006] BCJ No. 3231; Manitoba: *Semple et al v Canada (Attorney General)* [2006] MJ No. 498; Northwest Territories: *Kuptana et al v Canada (Attorney General)* [2006] NWTSC 1 (Unreported, Richard CJ, 15 January 2007); Nunavut: *Ammag et al v Canada* [2006] NUCJ 24 (Unreported, Kilpatrick J, 19 December 2006); Ontario: *Baxter et al v Canada (Attorney General)* (2006) 83 O.R. (3d) 481; Quebec: *Bosum et al v Canada* [2006] QCCS 5794 (Unreported, Tingley JSC, 15 December 2006); Saskatchewan: *Sparvier et al v Canada (Attorney General)* [2006] SKQB 533 (Unreported, Ball J, 15 December 2006); Yukon: *Fontaine et al v Canada (Attorney General)* [2006] QCCS 7305 (Unreported, Tingley JSC, 15 December 2006).

²⁴⁶ *Indian Residential Schools Settlement Agreement: Questions & Answers* (19 December 2006) Assembly of First Nations <<http://www.afn.ca>>.

²⁴⁷ *Indian Residential Schools Settlement Agreement*, above n 246.

²⁴⁸ IRSR, above n 2, *Indian Residential Schools Settlement Agreement*.

²⁴⁹ Minister of Indian Affairs and Northern Development, Chuck Strahl, 'Implementation Under Way for Indian Residential Schools Settlement Agreement' 19 September 2007; IRSR, above n 2, *Indian Residential Schools Settlement Agreement*.

²⁵⁰ As stated in the 'preamble' to the 8 May 2006 Agreement.

residential schools for one year or part thereof and a further \$3,000 for every year thereafter. The initial \$1.9b is subject to review under clause 5.06 and can be increased if it is insufficient to meet the CEPs. Under clause 17.01, the payments are payable to any survivors alive on 31st May 2005.²⁵¹ For persons who have since deceased, their estates may claim the CEP.

Under clause 5.04(9) CEPs were to be made by the Trustee as soon as practicable. To this end under the 8 May 2006 Agreement an advance early payment of \$8,000 was made to each survivor 65 years old and older who applied within the prescribed period that ended on 31 December 2006. The oldest recipient of the Advance Payment for the Elderly was 103 years!²⁵² This \$8,000 constituted a part payment of the recipient's lump sum payment, whether that is a CEP or compensation determined under the IAP. The process operated smoothly and payments were made expediently. For example, by 18 December 2006 of the approximate 13,400 eligible applicants, 12,955 applications had been received and 74% had been verified and processed.²⁵³ At this date \$76.3m in advance payments had been made.²⁵⁴ By early January 2007 all payments referable to applications under this early payment system had been made.²⁵⁵ In light of its success, the early payments system provided the model used for the application and payment of the CEP amounts.²⁵⁶ As of 4 August 2008 94,758 applications for compensation had been made and of these 845,531 had been processed.²⁵⁷ The deadline for CEP applications is 19 September 2011.²⁵⁸

There has been criticism of the CEP '10 + 3' model as a 'sell out' and/or that the \$8,000 Advance Payment for the Elderly is paltry. The first criticism is based on a misunderstanding that under the 8 May 2006 Agreement all claims are limited to the CEP amount.²⁵⁹ To the contrary, claims above this amount may still be maintained in the case of abuse through the IAP.

The second criticism fails to appreciate the significance of \$8,000 to elderly recipients. As a representative of the AFN Indian Residential School Unit has noted, CA\$8,000 is a substantial amount of money for persons whose only source of income is the old age pension.²⁶⁰ Further, when a number of members within a single community receive the Advanced Payment for the Elderly this had led a substantial injection of financial resources into the community, i.e. \$8,000 for every elderly person within that community. While this

²⁵¹ Under clause 17.02, in the case of the parties to the Cloud class action, CEPs are payable to any survivors (or their estates) who were alive on 5 October 1996.

²⁵² Personal conversation with Ms Charlene Belleau, AFN, Indian Residential Schools Unit, 16 January 2007.

²⁵³ *Assembly of First Nations Bulletin: Indian Residential School Settlement Update* (20 December 2006) Assembly of First Nations <<http://www.afn.ca>>

²⁵⁴ *Assembly of First Nations Bulletin: Indian Residential School Settlement Update* above n 253 .

²⁵⁵ Belleau, above n 252.

²⁵⁶ See further the statistical documentation of the Advance Payment for Elders on the Assembly of First Nations:< <http://www.afn.ca>> .

²⁵⁷ Morse, above n 106.

²⁵⁸ Strahl, above n 249.

²⁵⁹ Belleau, above n 252.

²⁶⁰ Belleau, above n 252.

has in turn led the AFN to be mindful of concerns in regard to (i) elder abuse, (ii) financial scams and (iii) in the case of large communities, to ensure investment is made into substantially profitable financial products, the financial impact has been significant at both the personal and community level.²⁶¹ These issues relevant to the community impact of the CEPs have recently been addressed at a national conference sponsored by the Assembly of Manitoba Chiefs.²⁶² The government has responded to such issues by establishing a Community Impacts Working Group to develop a national strategy to promote positive community benefits, while guarding against the positive negative impacts such as fraud and elder abuse.²⁶³

Under clause 5.03 of the 8 May 2006 Agreement, as noted above, this \$1.9b trust fund is to be placed in an interest bearing account and the expected interest of approximately \$80m will be re-invested into the fund. Under clause 5.03, if a surplus is left in the fund after the payment of all CEPs, each survivor will be entitled to an amount up to \$3,000 for a healing project of their own choosing, selected from a list of culturally sensitive healing options. Under clause 5.07 any balance left in the account after the individual healing fund is depleted will be paid to the National Indian Brotherhood Trust ('NIBTF') and the Inuvialuit Education Foundation ('IEF').

Under clause 4.11, the settlement package is to be administered by two levels of committees: a national administrative committee ('NAC') and three regional administrative committees ('RAC'). Under clause 4.11, the NAC will be constituted by seven members, comprising representatives of each of the parties to the agreement, including Canada, church defendants, AFN and representative plaintiff groups. The NAC is to, *inter alia*, ensure national consistency in the implementation of the settlement. It also has a direct and indirect appellate function. It acts as an appellate forum in regard to determinations of the RACs and CEP Trustee. It hears applications in regard to disputes as to document production etc before the Truth and Reconciliation Commission. It also provides the mechanism for applying for court reviews of IAP determinations. In turn, NAC decisions can be reviewed by the courts.

Under clause 4.12, the RACs, operating in three regional areas, will each be constituted by three members from the plaintiff representatives groups. The RACs have responsibility for the day-to-day operational issues pertaining to the implementation of the settlement.

As noted above, other features of the 8 May 2006 Agreement include the provision of further funding for the Aboriginal Healing Foundation and the establishment of a Truth and Reconciliation Commission. While the former has been sufficiently addressed above, a few points should be made about the role of the Truth and Reconciliation Commission. In accordance with the *RCAP Report* recommendations, clause 7.01 provides for the establishment of the Truth and Reconciliation Commission. Under clause 3.03, it has a base funding of \$60m.

²⁶¹ Belleau, above n 252.

²⁶² IRSR, above n 2, *Indian Residential Schools Settlement Agreement*.

²⁶³ www.manitobachiefs.com/reschool.

While the Commission has a five-year mandate, it is envisaged that its core operations, namely investigating and further documenting the impact of the Aboriginal residential schools, will take two years.²⁶⁴ Canada and the churches have agreed to provide all relevant documents for this investigation, subject only to the overriding privacy interests of individuals. In such cases, the Truth and Reconciliation Commission will still have access to the relevant documents provided that the privacy of the relevant affected persons is respected. Community truth telling processes may continue for a further three years and individual survivors will have no time limit on filing their own personal statements in the archives.²⁶⁵ In accordance with the RCAP recommendations, the Commission will establish a national archive and research centre, which will provide an educational resource on the Canadian Aboriginal school experience.

Truth and Reconciliation events will also be held in Canadian First Nations and Inuit communities and in major urban centres. These community events will be 'designed by community members with the assistance of the national commission with a view to individual and community empowerment, safety, creating and preserving a historical record, healing and establishing better relationships within and outside the communities'.²⁶⁶ Under clause 3.04, this aspect of the work of the Aboriginal Healing Foundation and Truth and Reconciliation Commission will be supplemented by a further \$20m commemoration fund. Under clause 7.02, this fund will be used for commemoration projects and activities within the directives set out in Schedule J.

A final, controversial aspect of the 8 May 2006 Agreement is the inclusion in clause 13.08 of sizeable payments to the class action lawyers. The National Consortium of Lawyers, for example, who represented the 'Baxter' class action²⁶⁷ are to be paid \$40m. Under Schedule V, a similar amount is to be paid to the Merchant Law Group, representing the Saskatchewan based class action. The class action lawyers assert that the amount of the payment is justifiable in light of the number of staff that have been allocated to the class actions over numerous years and the amount in contingency fees they would have derived if the class actions were successfully pursued in the courts. As noted above, the AFN is not concerned amount the amount of these payouts, as they are made independently of any CEP and IAP payments made to claimants under the 8 May 2006 Agreement.

4. Conclusion

One cannot help but despair at the difference in approach taken to the plight of the stolen generations by the Australian, United States and Canadian governments. In Australia, the *Cubillo* decisions are just part of a broader issue as to how/whether the stolen generations will obtain justice. The previous Australian federal government apparently wanted to deny these events happened and as the litigation in *Cubillo I* evidences, used every mechanism available to it to frustrate potential plaintiffs. Similarly in the United States it appears that

²⁶⁴ Assembly of First Nations Bulletin: Key Elements of the Settlement Package (November 23, 2005)
Assembly of First Nations <<http://www.afn.ca>>.

²⁶⁵ Assembly of First Nations Bulletin, [above](#) n 264.

²⁶⁶ Assembly of First Nations Bulletin, [above](#) n 264 '.

²⁶⁷ See further <http://www.thomsonrogers.com/classaction.htm>.

without successful court actions, nothing will be done to address the wrongs suffered by the survivors of the Indian Boarding Schools and their families.

By contrast, the Canadian government has apologised for the Aboriginal residential school experience. In litigation it has waived potential defences of statute of limitations and laches; defences that the Australian government has sought to utilise with great vigour. Similarly, in settlement negotiations, potential defences of statute of limitations and laches are not used by the Canadian federal government to reduce amounts of compensation offered.

Most importantly, the Canadian government has agreed to an historic compensation package that will appropriately take these matters out of the adversarial forum of the courts. Whilst the Canadian federal government has not been without criticism on this issue, it must be applauded for its efforts to meet a peaceful solution to a tragic past. While with the recent change in government there were fears that the negotiated agreement might not proceed, to the credit of the Harper government the Agreement has not been discarded, but rather approved by cabinet and subsequently the courts. Australia and the United States have much to learn from the reconciliatory policies of the Canadian government. The political responses in Australia and United States and Canada are simply incomparable. The failure to address the plight of the stolen generations of Australia and the United States evidences a major failing in Indian/Aboriginal policy in these two nations that needs to be addressed. Lessons can clearly be learned from the Canadian response. While, as discussed above, there has been criticism of the Canadian financial settlement and its ADR scheme(s), stolen generations litigation in both Australia and Canada has proven that the courts are inappropriate forums for the determination of such claims. The CEP payments have proven to be significant financially, especially when pulled within a community. Further, the acknowledgement of the wrong that underlies the payment of such compensation is symbolically important to the stolen generations. In regard to specific individual claims for further compensation, Australia and the United States should learn from the Canadian experience and implement a culturally sensitive ADR model for the resolution of future claims. In the broader context of the stolen generations and their families generally, these governments should also acknowledge the consequences of their deliberate policy of assimilation, namely the loss of language and culture. As noted above, in the context of the Canadian settlement the promotion of Indigenous language and culture has been indirect, through the funding of the Aboriginal Healing Commission. Australia and the United States should provide direct funding to support the continuation, and where necessary the resurrection, of language and custom.