MONETARY COMPENSATION AND THE STOLEN GENERATIONS: A CRITIQUE OF THE FEDERAL LABOR GOVERNMENT’S POSITION

Dylan Lino*

I Introduction

More than two years on from the Federal Labor Government’s parliamentary motion of apology to the Stolen Generations – the Aboriginal and Torres Strait Islander people wrongfully separated by government action from their families as children throughout the 20th century – questions continue to be asked and evaluations made of the Government’s performance in Indigenous affairs. Has the apology’s noble sentiment, undoubtedly one of the high-water marks of reconciliation in Australia, been matched with meaningful progress and action? Much focus has been on the Government’s commitment, made most prominently in Kevin Rudd’s apology speech, to ‘closing the gap’ between Indigenous and non-Indigenous people in the areas of health, education and employment. In fact, this focus has been invited by the Federal Government itself: in February 2010, timed to commemorate the apology’s two-year anniversary, the Government delivered its second annual progress report on the advances made towards ‘closing the gap’. In light of the ongoing and dire problems of Indigenous disadvantage, such attention is certainly warranted. The focus of this paper, however, is different and much narrower: the Federal Government’s action, or more precisely, inaction, in relation to the provision of compensation to the Stolen Generations. In the wake of the apology, some positive federal initiatives specifically for the Stolen Generations have either been implemented or continued, including: the establishment of a working group of Stolen Generations members to assist in the development of healing services; the ongoing funding of the Bringing Them Home counselling program, Link-Up services and other programs; and, significantly, the establishment of a national Stolen Generations healing foundation. Yet the Government has ruled out the establishment of a national compensation scheme for the Stolen Generations and their families.

I begin this paper by placing the Federal Labor Government’s denial of compensation in its historical, social, ideological and policy contexts. I then proceed to an analysis of the main arguments advanced by the Government in rejecting compensation for the Stolen Generations. These have been put forward on a number of occasions by former Prime Minister Kevin Rudd and the Minister for Indigenous Affairs, Jenny Macklin. There is no indication from Prime Minister Gillard that the Labor Government under her leadership will take a different view. First, I offer a critique of the Government’s ‘closing the gap’ policy as a response to the Stolen Generations issue. This is followed by a consideration of the Government’s insistence that compensation can be sought through the courts. Analysed next is the argument that money can never sufficiently compensate the Stolen Generations for the harms they have endured. Lastly, I consider the possibility that negative and unintended social consequences may flow from the sudden influx of money into Indigenous communities resulting from the payment of compensation. None of these arguments put forward by the Federal Government, I suggest, offers a compelling case for refusing to compensate the Stolen Generations.

II The Denial of Compensation in Context

Over a decade ago, the widely publicised National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (‘Bringing Them Home Inquiry’) handed down its Bringing Them Home Report, which made 54 recommendations, a number of which were directed at the provision of monetary compensation. The Inquiry found that, in light of the gross violations of human rights visited
upon the Stolen Generations, at the core of which was the systematic racial discrimination underlying the removal policies and practices, international law mandated a response of reparations within which monetary compensation was a key component. This was in accordance with the ‘van Boven principles’. Accordingly, the Inquiry recommended the establishment of a National Compensation Fund.

At the time, the Federal Labor Opposition was broadly supportive of the call for compensation. By contrast, and as is well known, the Howard Government’s response to the Bringing Them Home Report, while containing some welcome funding and programs, was overly negative and antagonistic. Framed within the wider context of ‘practical reconciliation’, the Howard Government’s position on compensation was one of outright rejection. There were numerous reasons proffered by the Government: financial cost; a belief that the finding that gross human rights violations occurred was inaccurate; the circumvention of judicial process for the assessment of legal liability would be ‘inappropriate and improper’; the responsibility for child removals was primarily that of the States; and the provision of services to the Stolen Generations is the ‘appropriate and compassionate’ response. As will be seen, there are strong echoes of some, though not all, of the Howard Government’s rhetoric in the Rudd Government’s rejection of compensation.

Ideological undercurrents also need to be considered in relation to both the current Labor and former Coalition governments’ refusals to compensate the Stolen Generations. These refusals have come amidst – and in relation to the Howard Government were often complicit in – intellectual and ideological battles over the historical narratives about Australia’s past – commonly known as the ‘history wars’. In light of pronouncements by a number of Coalition politicians and conservative commentators in the wake of the national apology to the Stolen Generations, it is evident that the less triumphalist vision of history officially sanctioned by the apology remains contested. Beyond their intersections with the history wars, government refusals to compensate have come at a time when neoliberal antipathy to the welfare state remains influential in Western liberal democracies such as Australia. Specifically in the area of Indigenous affairs, there have emerged in recent years prominent critiques of Aboriginal welfare, most notably those advanced by Noel Pearson, which have, not without reason, been hostile to what Pearson has referred to as ‘passive welfare’. The reach of these critiques has extended not only into public debate and government policy on unemployment benefits for Aboriginal people but also into other areas of Indigenous affairs, including the provision of compensation to the Stolen Generations. While the Labor Government has not explicitly appealed to the discourses surrounding ‘passive welfare’ and ‘mutual responsibility’ in rejecting compensation for the Stolen Generations, it is clear from current government initiatives that reinforce hostility towards the unconditional provision of money to Aboriginal people (such as Government involvement in the Cape York welfare reform trial and the continuation of income management in the Northern Territory Emergency Response) that such discourses form part of the Federal Government’s calculus in Indigenous policy-making.

Crucially, the refusal to compensate must be seen in the context of the motion of apology passed by the Federal Parliament in 2008. As Melissa Nobles observes about official apologies generally, ‘an apology says, now that you’ve apologized, what are you going to do next to rectify the matter?’ if largely symbolic, measures that ‘can play a distinct role in advancing political claims’, they ‘not only publicly ratify certain reinterpretations of history, but they also morally judge [and] assign responsibility’. An assignment – and acceptance – of responsibility was undeniably a key feature of the national apology, being necessarily implied by the act of repentance itself, but also expressly articulated in the apology’s wording. In his speech, then Prime Minister Rudd explicitly acknowledged that ‘the laws that our parliaments enacted made the stolen generations possible. We, the parliaments of the nation, are ultimately responsible’.

Though it is generally accepted that the apology does not make the Federal Government legally liable to compensate, it has been pointed out by people from both sides of politics (with varying agendas) that the acceptance of responsibility signalled by the apology logically raises a moral imperative to back up the words with compensation. As Noel Pearson has stated: ‘[w]hich is more sincere: to say “we will not apologise to the Stolen Generations and we won’t pay compensation”’, or “we will apologise but we won’t pay compensation”?’ Richard Bilder observes that ‘apology alone is rarely enough. While apology may often comprise a component of settlement, the eventual resolution of the matter will typically require more concrete forms of reparation’. This is not to devalue in any way the hugely...
important act of apologising; but it is to recognise that apology and monetary compensation are complementary elements of reparation. So much is made clear in international law under the van Boven principles, upon which the Bringing Them Home Report relied. Consequently, there remains a fundamental asymmetry in the Rudd Government’s position on the Stolen Generations.

Finally, in the absence of a national scheme to compensate the Stolen Generations, a number of developments have occurred at the state government level and in the courts as alternatives to concerted national action. The courts were the first avenue to be explored, and recent reports suggest that the litigation path continues to be travelled. However, though litigation has played an important role in keeping the issue of compensation in the public spotlight, it has been a largely unsuccessful strategy, with only one decision, the South Australian case concerning the late Bruce Trevorrow, finding in a claimant’s favour.

In addition to legal action taken by individuals, State governments have implemented a number of initiatives through which compensation has been made available to Stolen Generations members. The most significant of these is the $5 million Tasmanian legislative scheme (established in 2006 and concluded in 2008) aimed specifically at compensating members of the Stolen Generations through the provision of ex gratia payments. In 2003, Tasmania also established an ex gratia redress scheme, still in operation now, for people who were abused as children while in State care, including Stolen Generations members. Similar schemes have been introduced in Queensland and Western Australia (both of which have had very high numbers of Indigenous applicants), and now in South Australia, with the possibility of a scheme being introduced at the federal level. There have also been New South Wales and Queensland schemes directed at redressing the issue of Indigenous ‘stolen wages’ in those States, which is related to, though discrete from, the Stolen Generations issue. Lastly, there have recently been efforts by the minor parties at the federal level – so far unsuccessful – at establishing national compensation schemes. Thus, the Federal Government’s refusal to compensate the Stolen Generations needs to be considered against an ongoing procession of civil claims and what seems to be an increasing recognition by Australian governments that harms committed by their predecessors, particularly those committed against children, many of whom were Indigenous, are deserving of redress.

### III Analysis of the Government’s Position

#### A Reconciliation, Practically?: The Commitment to ‘Closing the Gap’

In rejecting the possibility of a national compensation scheme for the Stolen Generations, the Federal Labor Government has advanced as one of the main reasons its efforts to make ‘restitution’ through its ‘very strong focus on closing the 17 year gap in life expectancy between Indigenous and non-Indigenous Australians within a generation’. This commitment, notably enunciated by Kevin Rudd in his apology speech and reiterated since, includes halving within a decade the gaps in the Indigenous infant mortality rate, Indigenous employment outcomes, and Indigenous children’s literacy, numeracy and reading achievements. The Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, has stated that the ‘closing the gap’ initiative is the Government’s priority in Indigenous affairs:

> We have to decide where we will put the necessary Federal Government money and we think the place has to be in addressing the terrible levels of disadvantage in housing, in health, in education, in making sure that people are participating in the economy.

To consider first the ‘closing the gap’ policy itself, we might say that it is more an exercise in rhetoric than a substantive change in policy or funding commitments. As was noted in the Australian Parliamentary Library’s Budget Papers 2008–09, notwithstanding some ideological differences between the current Labor and former Coalition governments, most notably in relation to the apology, ‘the programs and level of funding supported in the recent [2008–09] budget are not very different from those of the previous government.’ While subsequent developments, such as the National Partnership Agreement on Remote Indigenous Housing, have involved substantial additional investment in social and welfare initiatives, the commitment to ‘closing the gap’ can nevertheless be seen as a broad continuation of the Howard Government’s ‘practical reconciliation’ agenda. The latter, while committed to essentially the same target of overcoming Indigenous disadvantage, had become stigmatised for what it had not committed to: an admittedly symbolic, though undeniably meaningful and important, act of apology to the Stolen Generations. Thus, the terminological shift was, in a post-apology world, a politically necessary measure that was aimed at distancing the Labor Government from
its predecessor while still continuing many of the same projects and following a similar agenda. Kevin Rudd alluded to as much in his apology speech when he appealed to the need for ‘practical’ measures and for ‘the great symbolism of reconciliation [to be] accompanied by an even greater substance’. Overcoming Indigenous disadvantage was in fact not only pursued by the Howard Government but has ‘been central to Indigenous policy in all governments since the 1970s.’

Though it is worth noting that the general failure of Australian governments to significantly curb Indigenous disadvantage in recent decades has never been unsuccessful for want of rhetoric, it is not the purpose of this paper to debate the prospects of success for, or the arguably worthy goal of, the Rudd Government’s ‘closing the gap’ commitment. What is necessary, in this context, is to consider the appropriateness of that commitment as a response to the Stolen Generations issue. According to Alexander Segovia, there is a tendency internationally for governments responding to gross violations of human rights to privilege social programs, such as those that are part of the ‘closing the gap’ initiative, over reparations. This, says Segovia, is based on political considerations – particularly the greater electoral appeal of social programs – but also on a misunderstanding of the nature of reparations programs, the objectives of which are wrongly conflated with those of policies aimed at overcoming disadvantage. On this issue Pablo de Greiff, who expresses scepticism about ‘the effort to turn a program of reparations into the means of solving structural problems of poverty and inequality’, is particularly incisive. He states:

[social programs] do not target victims specifically, and what they normally try to achieve is to satisfy basic and urgent needs, which makes their beneficiaries perceive such programs, correctly, as ones that distribute goods to which they have rights as citizens, and not necessarily as victims.

It is evident that the ‘closing the gap’ policy, however laudable, cannot be seen as an adequate response to the demands of justice and reconciliation the Stolen Generations issue requires.

The substitution of a reparations approach – which is aimed at addressing the specific and unique harms suffered by those Aboriginal and Torres Strait Islander people wrongfully separated from their families as children – with a general policy aimed at overcoming disadvantage for all Indigenous Australians is premised on a fundamental confusion about what justice requires in the circumstances. This much has been acknowledged by Mick Dodson in relation to reconciliation generally and Lowitja O’Donoghue in respect of the Stolen Generations specifically. As Antonio Buti has observed, in the context of the Stolen Generations, a commitment to overcoming disadvantage erroneously privileges distributive justice at the expense of specific reparative measures grounded in a restorative justice model. While there is clearly an urgent need to address Indigenous poverty and structural inequality simply in recognition and fulfilment of Aboriginal peoples’ citizenship rights, there is an equally urgent and separate need to compensate, as a matter of restorative justice, the distinct harm suffered by the Stolen Generations and their families. These facts are recognised by the Bringing Them Home Report and by international law.

Of course, the ‘closing the gap’ commitment must also be considered against the Government’s mandate, asserted above by Jenny Macklin, to prioritise where funding goes. De Greiff notes that ‘questions about what can and cannot be afforded at public expense are always questions about priorities. … The question is about what is deemed urgent, and this is always a matter of politics.’ Despite the significant amount of goodwill shown towards Aboriginal people by the Labor Government’s apology, clearly there are political considerations that, in the Government’s mind, militate against the provision of compensation. Working against compensating the Stolen Generations are some hard economic realities: not only those inherent in the formidable challenge of combating deep and structural Indigenous disadvantage, but also the broader context of a government working to stave off recession. In addition, and as has been noted earlier, there are still a considerable number of people (with predominantly conservative political affiliations, but probably also within the general populace) who are uncomfortable with many of the narratives surrounding the Stolen Generations (particularly regarding the wrongful nature of the removals) that have emerged since Bringing Them Home and become more dominant since the apology. There is also the taint of a ‘handout’ that virtually any form of compensation to Aboriginal people erroneously attracts. Segovia observes that, ‘when … a balance of political forces favorable to reparations … does not exist, governments will wield technical and economic arguments as an excuse to obstruct the provision of resources for reparations.’ In order to overcome these political encumbrances to the provision of compensation to the Stolen Generations, it may
be necessary for further awareness-raising and truth-telling strategies, such as a truth and reconciliation commission, to be implemented, though the apparent post-apology reversion to ‘practical’ measures of reconciliation makes this an unlikely possibility.

At the same time, the urgency of the need to compensate the Stolen Generations should not be allowed to be obscured by realpolitik but should, rather, form a central part of the political equation for a government who says it is committed to reconciliation. If, despite its to-date clear rejection of Stolen Generations compensation, the Labor Government has in fact left some room to reverse its position – and Jenny Macklin’s positioning of ‘closing the gap’ as simply a higher priority than compensation, combined with several other factors, indicates that this may be the case – the Government should reconsider its priorities. As the 2008 Senate Inquiry into then Senator Andrew Bartlett’s Stolen Generation Compensation Bill 2008 (Cth) (‘2008 Senate Inquiry’) concluded: the issue of reparations for the stolen generation needs to be addressed as a matter of urgency. … Many members of the stolen generation are now elderly – to put it bluntly, time is running out to recompense them. The committee considers that governments are under an obligation to resolve this issue as a priority.

These facts were brought into sharp relief with the untimely death of Stolen Generations member Bruce Trevorrow only months after his success in the Supreme Court of South Australia. The need to compensate the Stolen Generations is made more acute by the tragic health conditions, succinctly captured in woefully low life expectancy rates, which are a statistical reality for Indigenous Australians – conditions that, ironically, the Federal Labor Government is trying to improve.

The truth is that ‘closing the gap’ is a long-term project, a fact acknowledged by the intergenerational nature of the Government’s commitments. (Indeed, recent research suggests that the Government may have underestimated just how long-term the ‘closing the gap’ project is.) Implicit in the Government’s commitments, many of which are targeted at Indigenous children, is the hard fact that significant improvements are unlikely to be made in the lives of the current generation of Aboriginal and Torres Strait Islander people. Thus, those Stolen Generations members still alive today will essentially see little of the benefit from the ‘closing the gap’ campaign. Clearly, this even further undermines the adequacy of ‘closing the gap’ as a response to the Stolen Generations issue. But it also means that the Government cannot afford to wait until the ‘gaps are closed’ before turning to what may be a lower-prioritised (if unannounced) intention to eventually compensate the Stolen Generations. If the Government waits too long, the option of rectifying the injustices inflicted upon the Stolen Generations will be closed forever.

B The Litigation Path

A fortnight after the apology, Kevin Rudd made it clear that, if members of the Stolen Generations wanted compensation for the harms visited upon them by governments, they would have to seek it through litigation. He stated: ‘since the [Bringing Them Home] report came out years and years ago, it has been open for any individual, Aboriginal person affected by that to engage their own legal actions through the courts’. In its submission to the 2008 Senate Inquiry, the Department of Families, Housing, Community Services and Indigenous Affairs (‘FaHCSIA’) quoted that statement as an accurate reflection of the Government’s position.

In insisting that the court system is a sufficient option for Stolen Generations members seeking compensation, the Federal Government has aligned itself with the position of the former Howard Government, which, as noted above, considered it ‘inappropriate and improper’ for legal liability to be assessed outside the courts. This kind of logic represents a reversion to a decidedly minimalist conception of the role of the state, which guarantees the protection of rights through a supposedly fair and impartial legal system. In a modern liberal democracy such as Australia, however, the invocation of this minimalist logic is ad hoc, and often seems to emerge as a fallback position when it is politically convenient to do so. In the context of compensation for the Stolen Generations, the sole reliance on the courts by the Federal Labor Government displays a lack of sensitivity that is incongruent with the sincerity and compassion shown to the Stolen Generations in the apology. It should be noted here, before moving into a substantive critique of this position, that compensation and redress schemes throughout Australia have often been implemented with a view to obviating the difficulties of litigation.

There are a number of negative symbolic implications that follow from the Government’s insistence on resolving issues
of compensation in the courts. The first is touched upon by the language of Kevin Rudd in his assertion that any individual may pursue claims through the legal system. As de Greiff notes, the disaggregation of victims that results from ‘leaving it to the courts’ can have effects that run counter to the objectives of healing. One element of this disaggregation is the necessary privileging of the claims of those victims fortunate enough to have access to the court system (though, in light of the general economic, health and educational position of Aboriginal people, the number may not necessarily be great). Another facet to the legal system’s individualisation of victims is its necessary reliance on case-by-case analyses and consequent production of different outcomes and awards (if any). These factors undermine ‘an important egalitarian concern’ in the context of gross human rights violations and result in a ‘hierarchy of victims’. Furthermore, the emphasis on the individual relates back to a fundamental assumption of legal systems themselves: ‘that norm-breaking behavior is more or less exceptional’. Yet such an assumption does not hold in situations such as that of the Stolen Generations where gross violations of human rights have occurred.

Conceptually, there is another reason that the courts are an unsuitable avenue for the resolution of Stolen Generations claims, particularly for a Government that has apologised for the removal practices and ostensibly remains committed to reconciliation. That reason is the adversarial nature of the Australian judicial process. In failing to provide a non-combative alternative through which the Stolen Generations can seek compensation, the Federal Government is implicitly pitting the Australian state against Stolen Generations members – a move that is diametrically at odds with the spirit and practice of reconciliation that the Government flagged its commitment to in the apology. Indeed, it may be argued that the Government’s insistence on litigation as the only means of resolving Stolen Generations claims results in a re-enactment of the dynamics inherent in the original practices of separation: the might of the state versus vulnerable individuals and their families. Moving from the theoretical to the concrete, government tactics in the Cubillo and Gunner case, which it has been suggested ran counter to the principle of the Federal Government as a ‘model litigant’, demonstrate just how combative and brutal Stolen Generations litigation can be for claimants. Not only are claimants required to relive the trauma of separation and often also of abuse; they may be subject to ‘humiliating and harrowing’ processes of cross-examination, which are aimed at discrediting witness testimony and character and which can actively work to re-traumatising already vulnerable claimants.

Leading on from this are some of the substantial practical difficulties experienced by claimants charged with proving in court that their removal and/or treatment in state care was unlawful. As mentioned earlier, there are perennial issues of cost, which are especially relevant in light of the layers of disadvantage generally experienced by Aboriginal people. Additionally, given the generally long periods of time between when a person was removed and when they institute legal proceedings, statutes of limitations work against Stolen Generations claimants. This is despite the fact that the commencement of legal proceedings at any earlier stage may not have been feasible – as Chris Cunneen and Julia Grix note, ‘[h]istorically, [Aboriginal people] have not been in a position to enforce their legal rights’. Even where the special circumstances of a case warrant a court exercising its discretion to extend the limitation period, the court may nevertheless refuse to do so (as was the case in the Cubillo and Gunner and Williams cases) on the basis that ‘overwhelming prejudice’ to the defendant would result from such an extension.

The typical elapse of time since the impugned events in Stolen Generations cases also poses immense evidentiary obstacles for claimants. Witnesses may be dead, difficult to locate or perceived by the court as fallible; claimants’ own evidence may be viewed as unreliable due to the temporally distant nature of the events in question; and records of the events will have often been lost or destroyed. The latter becomes especially problematic in light of the courts’ privileging of documentary evidence, which is alien to the oral tradition in Indigenous cultures. It has been noted that Bruce Trevorrow’s success in South Australia can largely be attributed to the (unusually) intact archive of legal and policy documents pertaining to Trevorroor’s removal. Yet as Ann Curthoys, Ann Genovese and Alexander Reilly point out, ‘Australiam legal history, as far as cases involving Indigenous parties are concerned, is about absence, about what is not available.’ It is not just that documentary evidence in relation to specific removals of Indigenous children has vanished with the effluxion of time; often the evidence simply never existed in the first place. Moreover, where evidence does exist, its content may not accurately reflect the realities and power relations surrounding acts of Indigenous child removal. Cunneen and Grix rightly note that ‘record keeping is integral to the project of colonisation: it is the tool
for describing, itemising and controlling the colonised.\textsuperscript{83} Claimants are therefore put ‘in a position whereby they must counteract the official version of history.’\textsuperscript{84} The consequence of this is that the weight of evidence is generally stacked heavily against claimants, and the balance of probabilities does not often tip in their favour.

Lastly, there is the judicial insistence on judging removal laws, policies and practices by the ‘standards of the time’.\textsuperscript{85} This approach was articulated by the High Court in Kruger,\textsuperscript{86} and followed in Cubillo and Gunner,\textsuperscript{87} Williams\textsuperscript{88} and Trevorrow.\textsuperscript{89} The logic underpinning such an approach is that it would be unfair to assess the actions of people and governments in the past against different contemporary standards, no matter how reprehensible those past practices appear today. Claimants are therefore charged with what may be an impossible task: proving that the clearly discriminatory removal policies and practices were unlawful, despite the ostensible ‘beneficial’ intent of the applicable protection laws.\textsuperscript{90} While the courts’ approach is arguably defensible in a narrow legal sense, it throws into sharp relief the inability of the legal system to adequately deal with the issues at hand. As Cunneen and Grix correctly observe, ‘[t]he reality of entrenched racial discrimination which these [protection] laws embodied has been obscured. Legal responsibilities and obligations are narrowly defined and do not coincide with broader questions of responsibility for historical injustices.’\textsuperscript{91}

It is a conception of responsibility in this broader sense which led to and underpinned the Federal Government’s apology. Inconsistently, however, this wider notion of responsibility remains absent from the Government’s position on compensation, in which it has reverted to strict legal definitions of liability. Yet the imperative to offer reparative compensation to the Stolen Generations need not be based on evidence that the removals were unlawful; compensation ought to emerge from the recognition that the removal policies and practices, even those authorised by law, were systematically discriminatory and enormously detrimental to the individuals and families concerned, to Aboriginal society generally, and to the social fabric of the nation as a whole.\textsuperscript{92}

One final note: these criticisms of the court process are not aimed at undermining the right of Stolen Generations members to engage in their own legal actions, or at discounting a claimant’s decision to pursue litigation. Rather, the intention is to show that the Federal Government’s failure to avail the Stolen Generations of other compensation options is wholly inappropriate and contrary to reconciliation.

C \hspace{1em} Money Can Never Compensate

It has been a feature of the Federal Labor Government’s rejection of establishing a compensation scheme for the Stolen Generations to proclaim that money can never compensate for the trauma, grief and loss sustained by the individuals and families subject to the removal policies. On the day the apology was made, and in justifying the Government’s position on compensation, Jenny Macklin stated that many Stolen Generations members ‘say no amount of money will bring back my mother, that what they want to do is make sure that the next generation, the children being born today, have the chances that they didn’t have.’\textsuperscript{93} In the FaHCSIA submission to the 2008 Senate Inquiry, the Government reiterated its position: ‘monetary compensation [can] never make up for the loss, grief and trauma experienced by Aboriginal people as a result of past removal policies, laws and practices.’\textsuperscript{94}

That harms such as those sustained by the Stolen Generations can never be undone or fully redressed by any form of action is a correct, though ultimately commonplace, assertion. Crucially, it is an assertion that is regularly made by governments when they are taking (as opposed to refusing to take) some form of action to redress the harms in question. Indeed, Kevin Rudd’s apology carried the following caveat:

\begin{quote}
I know that, in offering this apology on behalf of the government and the parliament, there is nothing I can say today that can take away the pain you have suffered personally. Whatever words I speak today, I cannot undo that.\textsuperscript{95}
\end{quote}

That same essential fact – the impossibility of ever making up for certain kinds of loss and suffering – has been almost universally acknowledged by Australian governments when introducing schemes aimed at compensating victims. Government statements to that effect were made in relation to the Tasmanian Stolen Generations scheme;\textsuperscript{96} the Queensland\textsuperscript{97} and Western Australian\textsuperscript{98} redress schemes; the Queensland ‘stolen wages’ scheme;\textsuperscript{99} and the 2001 Commonwealth prisoner-of-war scheme.\textsuperscript{100}

In light of the reparative actions taken by state governments and the Federal Labor Government itself in relation to, inter
al, the Stolen Generations issue, what then to make of the Government’s refusal to compensate the Stolen Generations, partly on the basis of money’s inadequacy to redress the harm? Fundamentally, the Government’s approach to compensating the Stolen Generations misconceives of the purpose of compensation in the circumstances. Unlike in situations that involve losses of a purely financial character, in instances where the harms and losses are emotional, psychological, cultural and physical, restitution is not possible by any means – victims cannot be restored to the status quo ante.\textsuperscript{101} However, an acknowledgment of this fact does not justify an abandonment of compensation, for compensation has other important objectives and functions.

Perhaps most powerfully, monetary compensation – in particular, that given in the spirit of reconciliation, as opposed to in compliance with coercive judicial decree – provides victims with a concrete form of recognition of their suffering. Governments implementing compensation schemes frequently identify recognition of suffering as a rationale for the provision of such compensation.\textsuperscript{102} In apologising to the Stolen Generations, Kevin Rudd demonstrated an awareness of the importance that recognition can have, when he made clear that the apology was intended to ‘recognise the injustices of the past’.\textsuperscript{103} Yet the Government’s recognition remains incomplete: the symbolic act of recognition that was the apology has not been complemented by the provision of tangible recognition in the form of compensation. As noted earlier, the absence of tangible forms of recognition may work to diminish and cast doubt upon the sincerity of symbolic acts of recognition, which may come to be viewed as ‘cheap talk’ requiring the Government to sacrifice nothing.\textsuperscript{104}

A second important function of compensation is its capacity to, in some small way, improve the lives of survivors. Again, existing Australian compensation schemes, including those that have benefited the Stolen Generations, have acknowledged this fact.\textsuperscript{105} It is not about putting ‘a price on the life of victims or on the experiences of horror’ but rather about ‘making a contribution to the quality of life of survivors’.\textsuperscript{106} Of course, the Federal Government has committed to several measures which may also be viewed as improving Stolen Generations members’ lives, including continued funding for Link-Up and counselling services,\textsuperscript{107} and the ‘closing the gap’ initiative (but see the discussion in Part II(A) above). The benefit of monetary compensation, however, is that it allows recipients control over the specific nature of improvements to their quality of life.\textsuperscript{108} This is particularly significant and meaningful in light of the coercive nature of the separation of the Stolen Generations from their families, which visited profound disempowerment and lack of control upon the individuals and families concerned. Consequently, the value of the freedom that compensation would afford to Stolen Generations members in improving their own lives should not be underestimated.

It is therefore clear that, in mobilising an argument about the inadequacy of money to redress the harms suffered by the Stolen Generations, the Federal Government has failed to truly appreciate the proper aims of compensation. Money can never undo the deep and abiding hurt and loss experienced by a person wrongfully removed from their family; nor can it attempt to approximate – even imperfectly – that hurt and loss. What compensation can do, however, is to accomplish two very worthy tasks: the provision of an important and tangible form of governmental recognition to victims; and the improvement of the lives of Stolen Generations members. Both of these tasks are conducive to, and prerequisites for, healing and reconciliation.

**D More Harm Than Good: The Negative Social Effects of Compensation**

What if, contrary to what was argued above, compensation payments to the Stolen Generations would lead not to improvements in recipients’ quality of life but to the infliction of additional social harms? This was a concern raised by the Rudd Government, based on the experiences of compensation in Canada following the 2006 Indian Residential Schools Settlement, which is in the process of delivering compensation payments to survivors of the Canadian Indian residential schools system.\textsuperscript{109} While the Government acknowledged that the Canadian payments have positively impacted on many recipients and their families, it also referred to negative consequences: ‘increases in drug and alcohol abuse, pressure from family for money and encroachment by financial predators.’\textsuperscript{110} The Government emphasised that compensation in the Canadian context was at best a mixed blessing whose beneficial impacts were limited, and that such facts ‘may inform consideration about compensation in Australia.’\textsuperscript{111} It should be noted here that this argument does nothing to impeach the inherent value compensation retains in relation to recognising the suffering of victims and advancing the cause of reconciliation.
At the crux of the concern about the possible collateral harm that may flow from the payment of compensation to the Stolen Generations are particular notions about Indigenous people and their ability to manage money. These ideas have deep – and deeply paternalistic – roots, linked as they are with the ‘protection’ discourses and policies that emerged in the 19th century. Ideas about the inability of Indigenous people to manage their finances resulted in the ‘stolen wages’ policies that saw the wages, savings and welfare entitlements of Indigenous people held in trust funds throughout much of the 20th century. Such ideas are not so distant from, and in fact form part of the policy matrix surrounding, the removal practices and policies, which were grounded in discriminatory beliefs about the capacity of Indigenous people to look after their children. Indeed, many workers whose wages were withheld faced the ‘double injustice’ of also being members of the Stolen Generations.

Tragically, and ironically, these protection policies – which so heavily regulated the lives of Aboriginal people and on which Aboriginal people had in many ways become dependent – in some respects became self-fulfilling prophecies. As Peter Sutton observes, the demise of the protection regimes around the 1970s left a vacuum of social control, which was prematurely and inauspiciously filled with a formal government policy of self-determination that provided little in the way of resources and assistance for Indigenous people to become more self-reliant and overcome dependency on government. This, combined with a multitude of other factors, including the ongoing effects of dispossession and chronic underspending and government disengagement in Indigenous affairs, has seen the entrenchment of parlous levels of disadvantage in Aboriginal communities.

Included in the grim statistics on Indigenous disadvantage are high rates of drug and alcohol abuse, low levels of literacy, numeracy and education, and low levels of financial literacy. Recent research suggests that, by virtue of the removal policies, the Stolen Generations are even more marginalised than other Indigenous people, experiencing lower rates of economic wellbeing, poorer health, and higher incidences of alcohol abuse. Considering these statistics (particularly those related to financial literacy and drug and alcohol abuse), and notwithstanding the guaranteed benefits compensation would have in terms of recognition and reconciliation, there is clearly a need to take seriously the risk that compensating the Stolen Generations may have adverse social effects. The failure to do so, as Sutton has noted, in relation to the introduction of the ‘self-determination’ policy is testament to the need to consider potential deleterious consequences flowing from otherwise admirable policies. Indeed, we might even draw an analogy with the child removal policies and practices themselves. In removing Indigenous children from their families, Australian governments, it might be conceded, more or less believed that what they were doing was in the best interests of the children concerned. Yet we know now that such a belief was discriminatory and profoundly misguided, to say the least. Turning to the issue of compensation for the Stolen Generations, there is a real risk that some recipients of compensation would spend their payment in harmful, or at least non-beneficial, ways. At the same time, it would represent a perverse turn of logic if the Stolen Generations were denied compensation on the basis that they had been rendered too disadvantaged by the very government policies in respect of which compensation is sought.

Critically, an appreciation of the possible negative ramifications of compensating the Stolen Generations does not mean that compensation should be refused; it simply means that there is a greater chance that the detrimental effects can be taken account of and avoided as far as possible. This was something that emerged in the Canadian context from the very research relied on by the Government. Conducted by the Aboriginal Healing Foundation, the research, titled The Circle Rechecks Itself, found that the negative social outcomes that sometimes resulted from the payment of compensation did not stem from problems inherent in the provision of compensation itself, but from the way the compensation scheme was implemented. A number of recommendations were made so that future compensation payments to residential school survivors would not encounter the same problems. They included, inter alia: the launch of media campaigns aimed at promoting positive ways of spending payments; the provision of financial workshops, financial counselling and training services to support recipients to get the most out of their payments; and the laying out of banking and purchasing options for groups (such as elders and the infirm) vulnerable to scams.

If, as the Government postulates, ‘the Canadian experience may inform consideration about compensation in Australia’, the lesson to be learned is that recipients of compensation payments require support so that they can maximise the benefits and minimise the harms associated with the payment of compensation. The Canadian research observes:
Aboriginal communities face an unprecedented influx of cash, having the necessary supports in place could prove to be the critical difference between constructive and destructive LSP [lump sum payment] outcomes.\textsuperscript{122}

This much is recognised by Indigenous people themselves, many of whom with financial literacy issues identify their own need for better education.\textsuperscript{123} It is also something that has been recognised by Australian governments. The Redress WA scheme, for example, offers financial counselling to recipients of payments under the scheme.\textsuperscript{124} More generally, the Federal Government has committed, as part of its ‘closing the gap’ policy, to improve financial literacy and money management skills amongst Indigenous communities via a range of initiatives.\textsuperscript{125} These and other Federal Government initiatives, including those aimed at curbing drug and alcohol abuse, are arguably one way that the ‘closing the gap’ policy, in concert with monetary compensation, could make a real and positive difference to the Stolen Generations.

\textbf{IV Conclusion}

Compensation for the Stolen Generations is not a dead issue, despite the Federal Government ruling it out as an option thus far. In the wake of the Trevorrow decision, and the recent unsuccessful appeal in that case by the South Australian Government,\textsuperscript{126} there are strong indications that Stolen Generations members will continue to pursue compensation in the courts, suggesting that compensation is what many people need to move forward.\textsuperscript{127} Furthermore, the Greens have tabled a revised version of Senator Bartlett’s Stolen Generation Compensation Bill in the Senate, which should be debated in the near future.\textsuperscript{128} If the Government is to persist in its opposition to establishing a compensation scheme for the Stolen Generations, the project of reconciliation, which had been revitalised by the Government’s apology, will continue to be undermined. ‘Closing the gap’, though an admirable undertaking, does not relieve the Government of its responsibility to provide reparations to the Stolen Generations, nor does the availability of litigation circumvent the need for a more appropriate and expeditious avenue through which compensation might be sought. Moreover, while it is true that money can never restore Stolen Generations members to their former position or reverse the harm they have suffered, it \emph{can} consolidate the progress made with the apology by offering a tangible form of recognition of their suffering. This is vital for the process of healing and conducive to the task of reconciliation. Provided that adequate safeguards and supports are put in place, compensation can also improve the lives of Stolen Generations members – a moral imperative in light of the indelible legacies of the removal policies.

\textsuperscript{*} BA LLB (UNSW). I gratefully acknowledge comments from Sean Brennan, Megan Davis, the AILR’s editors, and the two anonymous referees on earlier versions of this paper. Any remaining errors are my own.


\textsuperscript{3} Following the van Boven principles, the recommendation that reparation be provided to the Stolen Generations contained five elements: acknowledgment and apology; guarantees against repetition; measures of restitution; measures of rehabilitation; and monetary compensation. See ibid (recommendation 3) <http://www.humanrights.gov.au/Social_Justice/bth_report/report/ch14.html> at 15 February 2009. I note here the...
appropriatefulness of framing compensation within this more holistic call for reparation. For the sake of clarity, however, I use the term ‘compensation’ rather than ‘reparations’ so as to distinguish monetary compensation from the other forms of reparation.

See ibid (recommendations 14–20).


Derisively called the ‘black armband version of history’.


compensation to the stolen generations would be “divisive”: Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 8, 40. Importantly, it should be acknowledged that even Pearson, and others such as Marcia Langton who have been unsympathetic in recent times to the ‘rights agenda’, have supported the payment of compensation. See Noel Pearson, ‘When Words Aren’t Enough’, The Australian (Sydney), 12 February 2008, 11; ABC Television, ‘Aboriginal Leaders Reflect on Historic Apology’, The 7:30 Report, 12 February 2008 <http://www.abc.net.au/7.30/content/2007/s2160984.htm> at 15 February 2009.


Nobles, above n 19, 143.

Ibid 2.

Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).


Trevorrow v South Australia (No 5) (2007) 98 SASR 136; South Australia v Lampard-Trevorrow [2010] SASC 56 (Full Court).


37 Senator Chris Evans advised on 16 June 2008 that, in relation to the Government’s response to the 2004 Senate report Forgotten Australians, which had recommended a national compensation scheme be established for people abused while in government care, ‘no decision has yet been made … but we are … talking through what an appropriate response would be.’ Commonwealth, Parliamentary Debates, Senate, 16 June 2008, 2150 (Chris Evans).


Jenny Macklin, quoted in ABC Television, ‘Govt Announces New Era for Indigenous Policy’, above n 25. 43


Ibid. 45

Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 171 (Kevin Rudd, Prime Minister). 46

Maddison, above n 25, 11. 47


Ibid 654 (note 13). 49


Ibid. 51

For quotes from Mick Dodson and Lowtija O’Donoghue see Durbach, above n 30, 30–1. See Antonio Buti, ‘Reparations, Justice Theories and Stolen Generations’ (2008) 34(1) University of Western Australia Law Review 168, 187. 52

See above n 5. 53

See above n 42. 54

De Greiff, above n 49, 466. 55

I say that compensation is ‘erroneously’ perceived as a handout because to conceive of compensation for harms suffered by Aboriginal people removed from their families as handouts is to entirely misconstrue the issue, which, as Dr Bill Jonas has acknowledged, should rightly be conceived of as ‘a plain matter of justice’. Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 8, 26. 56

Segovia, above n 47, 670. 57


Compensation was not entirely ruled out by the recent Senate Inquiry into the Stolen Generation Compensation Bill 2008 (Cth), and the inquiry also recommended the establishment of a working group to monitor the implementation of the Bringing Them Home recommendations (which included compensation to the Stolen Generations): see Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Stolen Generation Compensation Bill 2008, above n 11, 121–2. The membership of that committee was dominated by Labor Senators (five out of 10, with three Liberal Senators, one Democrat and two Greens). The Federal Labor Government had in fact prior to the Senate inquiry established a Stolen Generations working group, though whether it will monitor the implementation of Bringing Them Home recommendations remains to be seen. See FaHCSIA, Submission, above n 2, 2. 59

Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Stolen Generation Compensation Bill 2008, above n 11, 48. 60

Trevorrow v South Australia (No 5) (2007) 98 SASR 136. 61


Kevin Rudd, speaking on Channel 7’s Sunrise on 29 February 2008, quoted in FaHCSIA, Submission, above n 2, 1. 63

Ibid.
In the context of the former Howard Government, a number of commentators have pointed to the hypocrisy in that Government’s refusal to extra-judicially compensate the Stolen Generations while at roughly the same time providing ex gratia compensation payments to former Australian prisoners of war.


An interesting inversion of this individualisation of Stolen Generations members is evident in the Howard Government’s response to the Cubillo and Gunner case, the failure of which was used by the Howard Government as a basis for extrapolating a finding that there was no ‘sweeping general policy of removal and detention’. See Mark Metherell and Debra Jopson, ‘What Stolen Generation?: Howard Seizes on Ruling’ in Justin Healey, *Towards Reconciliation*, Issues in Society Volume 140 (2001) 35.

De Greiff, above n 49, 458.


100 Commonwealth, Parliamentary Debates, House of Representatives, 23 May 2001, 26 859 (Julie Bishop)

101 See generally de Greiff, above n 49.


103 Commonwealth, Parliamentary Debates, House of Representatives, 13 February 2008, 170 (Kevin Rudd, Prime Minister).

104 See above n 25. See also de Greiff, above n 49, 461.

105 See, eg, Bligh and Pitt, above n 97; Tasmania, Parliamentary Debates, House of Assembly, 4 March 2008, 18, ‘Premier’s Address’ (Paul Lennon, Premier).

106 De Greiff, above n 49, 466.

107 FaHCSIA, Submission, above n 2.

108 This needs to be considered against the possibility that the monetary compensation received is not used by recipients to improve their lives. I consider this issue in the next section.

109 For an excellent summary of the Indian residential schools system (which is in many ways analogous to the removal laws, policies and practices characterising the Stolen Generations) see Bradford W Morse, ‘Government Responses to the Indian Residential Schools Settlement in Canada: Implications for Australia’ (2008) 12(1) Australian Indigenous Law Review 41.

110 FaHCSIA, Submission, above n 2, 3.

111 Ibid.

112 See above n 38.

113 Kidd, Hard Labour, Stolen Wages, above n 38, 9.


128 See above n 39.