

15 April 2016



Ms Jan Barham MLC  
Committee Chair  
NSW Parliament

c/o: Sarah Dunn, Senior Council Officer  
By email: GPSC3@parliament.nsw.gov.au

Dear Ms Barham,

### **Post-hearing responses – Inquiry into reparations for the Stolen Generations in NSW**

On behalf of the Public Interest Advocacy Centre (PIAC), I am writing regarding the Legislative Council General Purpose Standing Committee No. 3 inquiry into reparations for the Stolen Generations in NSW.

Specifically, this letter sets out my answers to the questions on notice and supplementary questions set out in Ms Dunn's email of 30 March 2016.

I note also that today I received a letter from you with three further questions. I will endeavour to respond to those further questions as soon as possible.

#### **Questions on notice**

*The Hon. COURTNEY HOUSSOS: And also learning from the other examples, your submission talks about the Tasmanian system and more recently there has been the South Australian system. Do you have any feedback for us on that—positive or negative—from either of those systems, that we should be considering when considering our reparations?*

#### **Answer**

The South Australian system will be open for applications for a 12-month period, from 31 March 2016.

PIAC supports in principle the South Australian Government's decision to establish a reparations system. Nevertheless, PIAC has some concerns regarding the specific model proposed for South Australia, as evidenced in the Guidelines that recently became available. This Committee should be alert to these concerns so it can improve on the South Australian model when recommending its own model for reparations.

The South Australian model involves an Independent Assessor making an assessment as to the individual's eligibility under the scheme, and the level of harm experienced as a result of the individual's removal. The Assessor then makes recommendations to the Minister for Aboriginal Affairs and Reconciliation, who will make a final decision regarding the individual's eligibility and the amount of payment to be offered.

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The Guidelines state that no reasons will be given for the Minister's decision and that 'there is no process for review or appeal'.<sup>1</sup> Presumably, this is intended to make clear that there is no process for external merits review.

First, PIAC is concerned that claimants cannot seek merits review if they are unhappy with the Minister's decision.

The scheme provides an opaque decision-making model whereby individuals do not know what was considered in determining their claim with no avenue for reconsideration of the decision, even if factual errors have been made in the decision-making process. In addition, an individual may not know the nature and content of additional documentation that has been sought by the Assessor, in the making of decisions regarding the individual's application. While copies of personal information obtained and used within the assessment process may be provided upon request, it is unclear whether an individual will be provided with the opportunity to make additional submissions on the basis of this knowledge.

In this regard, the model that PIAC has proposed in NSW, a Stolen Generations Tribunal, would cater more appropriately for the complexity of decision making in this area. I also note that PIAC's model for a Tribunal incorporated the recommendation that Indigenous persons serve on the Tribunal. Within the South Australian scheme, it does not appear that there has been consideration of prioritising appointment of individuals who identify as Aboriginal or Torres Strait Islander as decision makers within the reparations process.

Secondly, PIAC is concerned that previous criminal history may be considered in a manner that is prejudicial to individual claimants under the South Australian model.

The Guidelines provide that Part 6 of the Application Form requires consent from an individual in order to permit the Independent Assessor to undertake a check of any criminal history, because 'any serious offending may be taken into account in the final decision of the Minister'.

The definition of 'any' criminal history may also apply to any history recorded while the individual was still a child. The meaning of 'serious offending' has also not been further specified in the Guidelines. In the Application Form, further detail is provided in Part 6 that the Independent Assessor may access 'any records of criminal convictions in my name in Australia'.

Criminal behavior is positively associated with poverty and disadvantage. The trauma experienced by members of the Stolen Generations has led to dysfunction and increased disadvantage. Considering a claimant's criminal history, especially given that it is likely to prejudice the individual's claim unfairly if they do have a criminal history, misunderstands the experience of Stolen Generations members and the links between their experience as children and their later experiences with the criminal justice system.

Moreover, if a payment or other remedial action were denied or reduced as a result of the claimant's criminal history, this would add further punishment beyond that already contemplated and meted out at sentencing. As a former penal colony, it is a very long-standing principle that, where a person has already been punished by the criminal justice system, they should not be further disadvantaged – especially where they may have sought to rehabilitate themselves.

Thirdly, PIAC is concerned that payments provided may be used by the State to repay debts. Part 6 of the Application Form will require consent to obtain details of any debts that the individual may have owing to the State Government so that these can be settled by being deducted from any Stolen Generation Reparations Scheme payment.

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<sup>1</sup> Government of South Australia, *Stolen Generations Reparations Scheme*, available at <http://www.statedevelopment.sa.gov.au/upload/aboriginal-affairs/stolen-generations-policy/Stolen-Generations-Guide-for-Applicants.pdf?t=1460676895353> (accessed 15 April 2016).

In PIAC's view, accounting for an individual's debts to the State in this assessment is likely to undermine the purpose for which the Scheme was created: 'to acknowledge the hurt experienced by members of the Stolen Generations, and to help with the process of recovery'.

Reducing the payment on the grounds of outstanding fines is likely to increase the hurt experienced by members of the Stolen Generations, as it likely would be interpreted as an opportunistic attempt to settle unrelated differences between the individual and the state.

Individual members will also have no reasons provided to explain any reduction in their anticipated claim.

Fourthly, the decision-making process regarding quantum of payments does not appear to be measurable and is highly discretionary. In this regard, the proposed NSW model of a sliding scale is far more appropriate.

Fifthly, eligibility for the South Australian scheme is limited to those individuals who were removed from their family as a child prior to 31 December 1975 without a court order.

In our proposed model for NSW, PIAC suggested that eligible claimants should also include a living descendant, relative or family member of a person who would have satisfied the relevant criteria. This accounts for the inter-generational trauma, and tangible impact, experienced by the Stolen Generations and their descendants and other family.

PIAC also has concerns regarding the availability of legal assistance for persons attempting to access the South Australian scheme. The Guidelines appear to indicate that individuals will be given the opportunity to obtain legal advice about the offer and Deed to assist in deciding whether to accept it. However, this is too late in the application process to be of greatest assistance.

PIAC submits that independent legal advice and information should be provided at all stages for potential complainants in seeking reparations of this nature.

The importance of this can be seen in the South Australian scheme, where an individual essentially has one opportunity to present all relevant information to the Assessor. Within the current model, no opportunity is provided for review, or reasons for decisions. Claimants compiling their claim and initial documentation without legal assistance will be disadvantaged in a very practical way.

Taking note of the experience with the NSW Aboriginal Trust Fund Repayment Scheme, PIAC recommends that a carefully-planned regime for legal assistance of claimants, including perhaps a pro-bono component, should be incorporated into the NSW model.

Finally, PIAC notes that an individual's acceptance of an offer under the South Australian scheme appears to preclude the individual from participating in any future litigation. Under the South Australian scheme, an individual accepting the offer is required to sign a Deed of Agreement discharging and releasing the Government from any future legal liability in relation to their removal.

In our submission to the current inquiry, while PIAC highlighted the difficulties faced by individuals in resorting to litigation, we also noted that there are situations where litigation is appropriate. PIAC's position is that involvement within a reparations scheme should not preclude an individual from resorting to civil litigation if the survivor so desires.

*The Hon. COURTNEY HOUSSOS: I might ask you to take this question on notice because there is a little more detail that we can provide to you that has been said publicly about the civil action.*

*CHAIR: We probably need to get some advice about asking any further questions about that. There is a bit of caution around that.*

*The Hon. COURTNEY HOUSSOS: If we could direct Mr Santow to the statements that are on the public record and if he could provide us with any further feedback as a result of reading those.*

*CHAIR: Yes, we will do that.*

**Answer:**

I note the comments I made in the hearing. In addition, I would add the following.

The statements made by Mr Waterhouse to the Committee on 6 November 2015 outline, in a general way, the process that the NSW Government has adopted to try and settle claims for tortious damages in a class action brought by Carroll & O'Dea Lawyers on behalf of certain members of the Stolen Generations. Specific details are not given because many claims are still to be resolved.

I understand that the Committee is considering the process as an example of the way in which monetary reparations might be facilitated. PIAC is not involved in the litigation. Accordingly, we do not have access to any further information about the process other than that generally described by Mr Waterhouse.

In the context of litigation, the process does appear to have merit. Wherever possible, especially where litigants may be vulnerable or disadvantaged, it is incumbent on the NSW Government to seek to resolve the dispute in a manner that is fair, just, economical and quick – noting that civil litigation is unavoidably time-consuming, emotionally burdensome and costly.

However, the offers of settlement that will be made in this process will necessarily be constrained by legal precedent. As Mr Waterhouse makes clear, the process is about settling a legal claim by providing compensation in a legal manner: 'it is not a matter of a policy decision; it is a matter of us being in receipt of a legal claim and dealing with the legal claim.'

I refer to Part 5 of our written submission, which sets out the limitations of relying on civil litigation to provide fair and just monetary reparations as understood by Recommendation 3 of the Bringing Them Home report.

PIAC notes that the class action appears limited to claimants who were former residents of Aboriginal children's homes that were under the control of the Aboriginal Welfare Board, namely Kinchela Boys' Home and Cootamundra Girls' Home. A reparations scheme would extend to individuals who are beyond the scope of this action.

Even assuming that the class action currently underway, and the NSW Government's process for engaging informally with class action members, has merit from the perspective of the Stolen Generations members within this particular class, such litigation cannot deliver justice and healing for Stolen Generations members more broadly. For this reason, PIAC encourages the Committee to adopt the more holistic approach to delivering reparations proposed in PIAC's written submission.

**Supplementary questions:**

1. *What are some of the difficulties members of the Stolen Generation experience when trying to access records about their family and history?*

The Stolen Generations experience a myriad of difficulties in attempting to access records about their family and history.

Some individuals were not aware that they were members of the Stolen Generations until later in their lives as a result of education and subsequent investigative inquiry.

The Bringing Them Home report discusses the problems in estimating the number of Indigenous children forcibly removed because government agencies did not always maintain proper, accurate records, including failing to record children's Aboriginality. Given the time that has passed since the first removals, many records that may have existed no longer exist, members of the Stolen Generations have died and so too have witnesses who may have been able to corroborate accounts. Notwithstanding the paucity of documentary evidence, the Bringing Them Home inquiry was able to:

conclude with confidence that between one in three and one in ten Indigenous children were forcibly removed from their families and communities in the period from approximately 1910 until 1970. In certain regions and in certain periods the figure was undoubtedly much greater than one in ten. In that time, not one Indigenous family has escaped the effects of forcible removal.<sup>2</sup>

Additionally, and as the Committee would be aware, Aboriginal and Torres Strait Islander peoples traditionally rely on oral methods to record important matters of history and connection.

2. *Based on funding and program changes at the Federal level, Bringing them Home workers are now referred to as Social and Emotional Wellbeing counsellors (SEWB) with a broader role than just working with members of the Stolen Generations.*
  - a. *Do you have any views on the impact of this change at the community and service delivery level?*

PIAC does not have comment to provide on this matter, as it is not an area of our expertise.

Yours sincerely

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**Edward Santow**  
**Chief Executive Officer**  
 Public Interest Advocacy Centre

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<sup>2</sup> Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997), Chapter 2, available at <https://www.humanrights.gov.au/publications/bringing-them-home-chapter-2>