REPORT OF PROCEEDINGS BEFORE

GENERAL PURPOSE STANDING COMMITTEE NO. 3

INQUIRY INTO REPARATIONS FOR THE STOLEN GENERATIONS IN NEW SOUTH WALES

At Sydney on Tuesday 22 March 2016

The Committee met at 1.20 p.m.

PRESENT

Ms J. Barham (Chair)

The Hon. B. C. Franklin The Hon. C. Houssos The Hon. M. S. Mallard The Hon. S. Mitchell The Hon. S. Moselmane Reverend the Hon. F. J. Nile **CHAIR:** Welcome to the final hearing of the General Purpose Standing Committee No. 3 Inquiry into Reparations for the Stolen Generations in New South Wales. Before I commence I acknowledge the Gadigal people who are the traditional custodians of this land. I pay respect to the elders past and present of the Eora nation and extend that respect to any Aboriginal people present today and to all Aboriginal people across the State. This inquiry is examining a number of important issues for members of the stolen generations including implementation of the New South Wales Government's response to the Bringing Them Home report and potential policies and legislation to make reparations to members of the stolen generation and their descendants. Given the importance of this inquiry we have encouraged people to come forward to share their story. We have extended the closing date for submissions to 31 March. If people are aware of people who are not aware, please let them know about the opportunity for submission.

Before we commence I make some brief comments about the inquiry and the procedures for today's hearing. In accordance with the broadcasting guidelines, while members of the media may film or record Committee members and witnesses, people in the public gallery should not be the primary focus of any filming or photography. I also remind media representatives that they must take responsibility for what they publish about the Committee's proceedings. It is important to remember that parliamentary privilege does not apply to what witnesses may say outside their evidence at the hearing. I urge witnesses to be careful about any comments they may make to the media or to others after they complete their evidence as such comments would not be protected by parliamentary privilege if another person decided to take action for defamation. The guidelines for broadcasting are available from the secretariat. There may be some questions that a witness is unable to answer unless they had other information available to them. Those questions can be taken on notice and will be followed up by the secretariat for the witness to provide an answer within 21 days. Witnesses are advised that any messages to Committee members should be delivered via the secretariat. Finally, mobile phones should be switched off or to silent for the duration of the hearing.

CORRECTED

EDWARD SANTOW, Chief Executive Officer, Public Interest Advocacy Centre, affirmed and examined:

CHAIR: I welcome our first and only witness for today, Mr Ed Santow from the Public Interest Advocacy Centre. Do you have an opening statement?

Mr SANTOW: I do. By way of background, the Public Interest Advocacy Centre, or PIAC, has done an enormous amount of work in this area since the early 1990s, particularly in relation to stolen generations, stolen wages and work on Indigenous justice. The proposed tribunal which was appended to PIAC's submission was a result of extensive and broad consultation. I am happy to take questions about that in due course. The need to provide reparations has always been important for the stolen generations. It is now urgent as well, and there are four main reasons for that.

Firstly, it is absolutely clear that members of the stolen generations and their families have suffered terribly. They deserve and need redress. Secondly, it is now almost 20 years since the Bringing Them Home report recommended very specific action. Over the past two decades there have been countless calls for action and the time for words has clearly passed. If all that this Committee produces is another report recommending further action and that report gathers dust, waiting many more years for implementation, then I fear the Parliament and the New South Wales Government will have let down members of the stolen generations yet again.

Thirdly, most tragically, as this Committee has already heard, members of the stolen generations are getting older and they are dying. It is truly unjust to expect them to continue to wait decades to have these terrible wrongs addressed. And, finally, this is not simply a historical issue. The echoes of this tragic period in our history still resonate with young Aboriginal people today and indeed with PIAC's young Aboriginal clients, many of whom have multiple and complex problems—for instance, housing problems, discrimination, unnecessarily harmful contact with the police and an inability to obtain the basic building blocks necessary to function in modern Australia like getting a birth certificate or a driver's licence. It is for those reasons that I submit on behalf of PIAC that there is a very urgent need to act.

CHAIR: On behalf of the Committee I thank you for your continued advocacy and also the staff who have done so much great work. We will now proceed with questions.

Reverend the Hon. FRED NILE: One of the issues with the New South Wales Government's response to the Bringing them Home report was a lack of ongoing monitoring regarding its implementation. What strategies do you think could be implemented to help provide greater oversight and monitoring of initiatives and programs for the stolen generations, including this Committee's report and recommendations?

Mr SANTOW: That is a very good question. At the federal level we have the Australian Human Rights Commission and as part of that commission there is a specific commissioner as well as the president herself with responsibility for monitoring and making recommendations on specifically that issue. There is no corresponding body in New South Wales. I note that some other States and Territories do have a corresponding body—for example, Victoria. The Victorian Equal Opportunity and Human Rights Commission has responsibility for that specific issue. Instead, you have a patchwork of government departments and agencies and non-government organisations such as ours that all have different pieces of the puzzle and it is then quite a difficult job for individual parliamentarians to try and put that mosaic together. So I think it would be very helpful to have a central agency with responsibility in that area.

Reverend the Hon. FRED NILE: That could be one of our recommendations?

Mr SANTOW: Absolutely.

The Hon. BEN FRANKLIN: With regard to reparations, obviously financial reparations are only one form.

Mr SANTOW: Yes.

The Hon. BEN FRANKLIN: This Committee is looking at a range of others in terms of healing centres, further apologies and potential assistance in reunions et cetera. Is the Public Interest Advocacy Centre aware of the current class action that is going on against the State Government? If you are, do you feel that a

stolen generations tribunal is still needed? Also do you have any concerns about the process of the class action, and what the outcomes have been and will continue to be?

Mr SANTOW: I am certainly aware of the class action being led by Carroll and O'Dea but I am not in a position to comment on the detail. PIAC also runs class actions from to time and we are well aware of the value of them, but they simply cannot—and I do not think the Carroll and O'Dea class action purports to—benefit everybody who has been affected by the stolen generations directly. The first problem is, as important as that litigation may be, it will still leave a large number of people with their problems unaddressed. The second problem is that civil litigation is incredibly unwieldy, it is expensive for the litigants and the State, and it also asks an enormous amount emotionally from individual members—when it comes to giving evidence as a member of that class action it is a huge burden.

To give evidence in a civil litigation context is very different to giving evidence in a context that is essentially focused on, I guess, a therapeutic outcome as distinct from a litigious one. That very distinct focus is really important to remember and that heightens the need for some kind of statutory scheme to sit alongside civil litigation. Thirdly, the problem with civil litigation is that the remedies that a court can order tend to be much more narrow, as you rightly adverted to in your question, so it can give monetary remedies but it is much less well placed to offer the other remedies that this Committee and others have heard are absolutely central to the healing of the stolen generations members.

The Hon. BEN FRANKLIN: If a stolen generations tribunal was set up to focus on the financial element at this point, would PIAC contend that those who have already received financial compensation through their civil claim be precluded from claiming or being given further remuneration from the tribunal?

Mr SANTOW: It usually happens in the inverse sequence. Usually the expectation is that an individual will make a claim via the statutory scheme. If they are unhappy with whatever happens as a result of that scheme, then absolutely as a general principle of law they should be able to seek redress via civil litigation. In the event that someone follows the route of civil litigation—

The Hon. BEN FRANKLIN: That is obviously happening now.

Mr SANTOW: Exactly, although from bitter experience I also know that a class action generally takes many, many years—sometimes longer than the establishment of even a significant piece of legislation like this. In the event that someone pursues civil litigation, if they receive some kind of monetary award then clearly that is something that should be considered by the statutory scheme but that should not preclude them from going to the statutory scheme if the award is simply a nominal amount because of the evidentiary difficulties, for example, involved in pursuing civil litigation, or if the individual wants some other kind of remedy beyond the monetary one. I know the question is the monetary remedy, but I cannot emphasis enough how that is only a part of the remedial action.

The Hon. BEN FRANKLIN: I am so pleased to hear you say that because this Committee's focus has been much broader than financial.

Mr SANTOW: Yes.

The Hon. BEN FRANKLIN: Yet that has been, surprisingly, a much more minor part of all of the other things that people have been speaking about. Thank you.

Reverend the Hon. FRED NILE: Because of those problems with the class action are you aware that the Government is actually negotiating on a one-on-one basis and has apparently been successful in a number of cases?

Mr SANTOW: I cannot speak to that. I am certainly aware as a general principle the Government quite rightly seeks to ensure individual justice without delay whenever it can, and that sometimes means stopping a big piece of litigation may have that broader systemic impact. But that for me is just another reason in favour of establishing some kind of statutory scheme that will ensure that everybody who does not have the benefit of being part of this litigation will also benefit.

The Hon. SHAOQUETT MOSELMANE: In your opening statement you talked about the urgency of this matter. What do you see as the number one priority this Committee should address, particularly for those people who are getting on in age?

Mr SANTOW: PIAC's original position was that there should be a national approach to reparations for the stolen generations. I think it would be a mistake now to wait for that national approach. This Parliament can control what is happening in this State, so the first part of the answer is for this Parliament to move expeditiously to establish a statutory scheme. I think it should learn from similar statutory schemes that have had clearly some positives and some negatives—for example, the Aboriginal Trust Fund Repayment Scheme, commonly known as the stolen wages repayment scheme, which PIAC was instrumental in establishing and assisting people to participate in. I think that provides a very useful model that a stolen wages scheme could also benefit from. There is also another off-the-shelf model that we have provided, which was part of our submission, and we have drafted legislation. That would be another alternative. Obviously our primary submission is that something along those lines be implemented. There seem to be very few true impediments to establishing the scheme. There is a wealth of research. There have been many government and non-government inquiries. The need is absolutely clear. The solution is now absolutely clear, so I think the strongest advice would be to move quickly.

The Hon. SARAH MITCHELL: I want to take you to another section of your report where you talked about reform to the criminal justice system and its practices, and specifically your comments about bail determination. I thought the technicalities of breach of bail were interesting. I think it is a Canadian model that you cite, that personal circumstances be taken into account, including being taken from your family or being part of a family that had that history. It is a good idea and the Committee has talked about it. You also talked about proactive policing and the initial interactions that Aboriginals and Torres Strait Islanders have with police. I wonder if you could offer some more detail or insight into how that could be better improved. I know your submission addresses your concern with proactive policing. Do you have any ideas about what we could suggest to improve the relationship between police and some of the Aboriginal community?

Mr SANTOW: I want to be careful about what I say because there is some excellent policing that happens in this State and in Australia. Regrettably, there is also a wide variety of policing techniques and policing practices across different local area commands in New South Wales. The end result is that in Australia we have an incarceration rate of young Aboriginal and Torres Strait Islander people which is 25 times the non-Indigenous population. That is shameful. It is also something that is not improving. It is quite the opposite; it is deteriorating rapidly, notwithstanding the well-meaning focus of State, Territory and Commonwealth governments. Policing is a big part of that. In our work we see young Aboriginal area, riding a bicycle without a helmet. Police officers have choices in how they deal with that sort of behaviour. Really good local area commands with strong sensible leadership will tell more junior officer encounters a young Aboriginal or non-Aboriginal boy or girl who might be a committing a very minor offence as educational opportunities, essentially.

When the opposite is taken, the research is absolutely crystal clear, and that is that it breeds great hostility between Aboriginal people and police. Then that is compounded by some policies that this State Government, for example, has implemented in a way that perhaps needs rethinking. To give an example, the Suspect Target Management Plan, which is a crucial part of proactive policing, involves the NSW Police Force proactively checking up on people they have identified as being likely to commit crime. It is very important that young people, but particularly young Aboriginal and Torres Strait Islander people, are put on that Suspect Target Management Plan only for the strongest and most compelling reasons. We have clients who have been frequently disturbed out of their beds after midnight by police knocking on the door to check on them. Even if they were not hostile to police beforehand, that is the kind of behaviour that breeds contempt, and not just contempt for the police officers are bad—quite the opposite. What I am arguing is that our case book experience is clearly that there should be more careful consideration and implementation of policies like generally practical policing, but a specific example is the Suspect Target Management Plan.

CHAIR: To follow up on that, do you think that not just police officers but all Government employees interacting with Aboriginal people need to have a higher level of cultural awareness training and what is culturally appropriate behaviour?

Mr SANTOW: Yes. I think an understanding of motivations and experience of the people that you deal with in government is really important in order to be able to deal with that person effectively but also efficiently. It is much more costly for government if they do not properly understand the people that they are interacting with. We see clients like this every day of the week. A person is at a crossroads. They can turn left and end up having a fairly conventional law-abiding life, or they can turn right and end up incarcerated, which is not productive, so it is a double impost on the State. So it is not working but they also become yet another member of our very overcrowded prisons.

The Hon. SARAH MITCHELL: That was the point I was trying to make. We have raised this in other inquiries. Police are doing a lot of good work but the idea across government sectors and other witnesses we have heard from—health, education, policing, the criminal justice system—is how cultural awareness is playing out. In previous inquiries we have made recommendations to look at that across the public sector. It might be something this Committee needs to revisit.

Mr SANTOW: That is right. I can give you another example of our work. The Public Interest Advocacy Centre runs the Homeless Persons' Legal Service. We have more than 1,400 clients a year; it is a huge service. We have worked intensively with a particular local area command and the homeless population. Essentially, the work has been to understand the homeless people that are part of the beat in that local area command. I cannot speak highly enough of that particular local area command, from the leadership to the individual police officers on the beat, and how they have improved the way they deal with homeless people. They have been able to take a more humane approach, but also an approach that is far more efficient and frees up police time to focus on crimes that are serious and will cause individual members of the public distress as distinct from littering and that sort of thing.

The Hon. SHAYNE MALLARD: Is that derived from local leadership, or does that come from cultural attitudes in the police from the top down, or is it the local area commander? My experience is that it is the latter. A good local area commander will recruit and train officers in that command to be sensitive to homelessness or Indigenous issues.

Mr SANTOW: I think you are right. A good local area commander is an integral piece of the puzzle. I am sorry to give a complex answer which is that you really need all of those pieces in place.

The Hon. SHAYNE MALLARD: Goes to Goulburn?

Mr SANTOW: Yes.

The Hon. COURTNEY HOUSSOS: I have two questions. I thank you for your incredibly detailed submission. The bill is excellent and really useful for us. Other members have talked about how our inquiry is broad-ranging. We have looked at lots of things but I am going to ask you questions about monetary reparation because your submission, in particular, has dealt effectively with it. You note that no amount of money will suffice, and I think that that is a really important thing to note. But coming from that point, you specifically refer in your submission to the royal commission's scale. Do you think that it would be appropriate for a tribunal for the stolen generations to be using a similar kind of scale?

Mr SANTOW: The first thing I would say is I have enormous admiration for you as a Committee in trying to work this out. The ordinary approach in 90 per cent of human endeavour is you seek to quantify monetarily the loss and go from there. It is far more difficult to quantify financial loss in a situation like this. But I do want to emphasise that it happens every day of the week. For centuries we have had defamation law that seeks to quantify the loss to reputation, which is almost impossible to quantify, and yet we find a way to do it that is common sense, and accords with our values as a liberal democracy.

I think the royal commission's sliding scale up to \$200,000 has attempted to do just that and I think you could make some tweaks up and down in different ways, but essentially I think that that provides a good starting point for the Parliament in trying to quantify monetary loss.

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?

CHAIR: That could be a question on notice if you want to give detailed comments. That is an option.

Mr SANTOW: Thank you, Chair, I will start and see if I need to add something on notice. Certainly we are pleased that some other Australian jurisdictions have started the process. We are on the record and are making some proposals for change in respect of the South Australian mooted process, which is due to start at the end of this month. I think one of the biggest problems is where a statutory scheme has a very narrow time period. The individuals affected are some of the most vulnerable, some of the least connected to the sorts of media and other information delivery type forms that government would usually rely on. So it is very important that a longer period than that anticipated, particularly in South Australia, is adopted in New South Wales.

Ideally, we would say that there should be no end point, and I note that Reverend Nile has mooted the same suggestion. But if some process of finality is needed then I think a much longer period than South Australia would be preferable. I think, otherwise, ensuring very explicitly that evidentiary material can be put before the decision-making body in a non-lawyerly, non-meticulous way is very, very important because of the difficulties that, through the passage of time, there would be to present that sort of evidentiary material.

I note that the Australian Law Reform Commission in 2005 in its inquiry on evidence looked at that very specific issue of how Aboriginal and Torres Strait Islander people can be very much disadvantaged in the way in which they present evidence in a legal setting. So I would hope that the Parliament would take note of the learning from that report.

CHAIR: With regard to your experience with the stolen wages, we have heard from witnesses that they did not even know that was going on, and with this inquiry we have extended the submission date a number of times because we know that it is hard to get information out there—there are no direct channels. We have kept extending the date because we do want to have people involved. With the stolen wages, it was great that that happened but it finished at a time when I think a lot of people were probably just hearing about it. Do you know how many people did not have the opportunity with that and do you think that should also be open-ended, because the evidence is there of the moneys held by government and who has a right to claim? Should that be an open-ended program as well?

Mr SANTOW: It was certainly estimated that many more people in the event than applied for repayment through the ATFRS would do so. I do not have a specific figure on how many people missed out but it is highly likely that many people did miss out. I think that is a very strong reason for having a more open-ended process. There are ways in which government can make provision for an open-ended process, as time goes on, in a very accurate way that would satisfy the real concerns of Treasury, and that is, in seeing how many people apply over the course of time it becomes much easier to predict the total cost of the scheme. So I think some of the arguments against having an open-ended scheme can be addressed very effectively. That would be my recommendation.

Reverend the Hon. FRED NILE: In your submission you talk about a stolen generation fund, as to where that money would come from, and you have said that it is possible that money could come from churches that were involved in accommodating Aboriginal children. How do you think that would work in practice?

Mr SANTOW: I understand that in a similar vein the royal commission into institutional sexual abuse is considering that exact question. It simply comes from an understanding that some church and religious organisations were involved in this practice and we have heard that many want to be part of the solution, so ensuring that they can be part of that solution by being properly consulted in the establishment of any statutory scheme and, secondly, to participate in a way that is in accordance with the tenets of the faith of the relevant religious organisation and also allowing them to take responsibility in a way that many, I think, would wish to.

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. Could you further explain the truth and reconciliation section in relation to the bill—I think it is section 18—the importance of that and how it would function.

Mr SANTOW: There is a wealth of research, particularly in the area of what is known as transitional justice that deals with having a formal process that allows people to tell their story—often a tragic story—in a way that is healing just by telling the story. That provision—clause 18 of the bill—is designed to ensure that the statutory scheme would enable individual members of the stolen generations to speak freely and to tell their stories—I guess, for the benefit of telling the story, in itself. That part of what they say may not be specifically related to trying to prove that they are eligible for some kind of monetary redress. In a sense, it can be treated as a separate, distinct limb, and a separate, distinct benefit of having the statutory scheme. Perhaps the best known example of this around the world is the Truth and Reconciliation Commission in South Africa. The truth-telling element of the South African TRC was crucial to much of the success that it had.

Reverend the Hon. FRED NILE: Many of the witnesses have said that even telling their story to us was a healing thing for them.

Mr SANTOW: Absolutely. That has certainly been something that our clients have said to us in the past, as well.

CHAIR: We have also heard—I think this is happening in Tasmania; I hope that is correct—that people are receiving an individual, personalised apology. Rather than a collective apology, as has happened previously, the individualised apology is very important. Have you heard reference to that as being important?

Mr SANTOW: I am certainly aware that being treated not just as a member of a stolen generation but as a specific person who happens also to be a member of the stolen generations, and to have it reflected back to that individual that their particular situation matters, is very important. That has been found not just in Tasmania, but in jurisdictions around the world where similar issues have been addressed by governments. It has been a really important thing that people have learnt. Again, I highlight the experience of transitional justice in countries that have been recovering from civil war or war with another country.

The Hon. SHAOQUETT MOSELMANE: I have a question in terms of the establishment of a stolen generations fund that you have raised. Your proposal involves contributions being sought from major church organisations which accommodated Aboriginal children that were removed from their families. Can you elaborate on how you envisage this would work on a practical level?

The Hon. BEN FRANKLIN: Reverend the Hon. Fred Nile asked that question.

CHAIR: He did.

The Hon. SHAOQUETT MOSELMANE: I must have missed it. What was the answer, by the way?

Reverend the Hon. FRED NILE: It was very good.

CHAIR: It was a very good answer.

The Hon. SHAYNE MALLARD: There was a relevant point in that question: what if there is a short-fall of funds? How would you envisage topping that up, if we are talking about the State?

Mr SANTOW: Clearly the State bears legal and moral responsibilities-

Reverend the Hon. FRED NILE: The church is only a proportion.

Mr SANTOW: Indeed. So it is more likely to be a problem in theory than in practice. In practice, working with Treasury there would be an estimate of the total amount of money that is needed. Then, in practice, how that is apportioned would need to be worked out in a consultative way—ideally, not in an adversarial way.

The Hon. SHAYNE MALLARD: Including Government in the mix.

Mr SANTOW: Indeed. Yes.

CHAIR: Mr Santow, I think the point is that, as you are aware, we are looking beyond the financial aspects, but the financial aspects are important. I would like to take you back to the New South Wales action plan, which was full of great actions but unfortunately did not get followed through with. I think the first question was around how we ensure that that does not happen again. Things like bail houses, which were recognised in the Bringing Them Home report and in the New South Wales report, would save a lot of people from going to jail. The Committee has had some discussions—not full discussions—about those sorts of actions. The idea is that there needs to be a Committee or some sort of statutory body in place that requires annual reporting so that this is never lost again. Would you support putting in place something that ensures that this is an ongoing program that is not lost?

Mr SANTOW: Absolutely. Perhaps that ties in quite nicely with the first question of Reverend the Hon. Fred Nile. The ideal way of doing that would be by having a holistic all-of-government approach. I think you would need a specific agency such as a State human rights commission to bring together all of that data and then show where the gaps are arising in a completely non-partisan way so that we do not have the kinds of problems we have now, where rates of juvenile incarceration of Aboriginal and Torres Strait people are not only not improving but actually getting much worse. Working off hard data is really important, and having a central agency that, as I said before, can put those pieces of the mosaic together, is very important.

I should add one other thing which really relates to a question from Ms Houssos. One of the experiences that the Public Interest Advocacy Centre had with the Aboriginal Trust Fund Repayment Scheme was that its success partly depended on a level of openness on the part of the State Government to work collaboratively with non-government organisations such as ours. I think that will be absolutely crucial in ensuring that any scheme like this would achieve its objectives. It would be a double tragedy if the State committed significant resources to a scheme such as this but you ended up with many people who did not know about it and/or many people who felt unhappy about the process. Part of the success can be guaranteed by working really collaboratively with civil society.

CHAIR: You were part of getting the extension of that program. Are you clear why it ended? Was it because money ran out or was there just a need for an end point, regardless of the fact that people did not know, or there were no options? Was there a hard and fast rule that it was going to end on this date? You did get it extended.

Mr SANTOW: That is correct.

CHAIR: Was it extended by a year or eight months or something?

Mr SANTOW: I am probably not the best person to ask why it ended. We did not want it to end. To be as fair as possible, I think there is a natural tendency to want to have things wrapped up. I think that is a natural tendency, and a good one. I think there are some areas, though, where that can probably cause more problems than it solves. That might have been the situation we found ourselves in with the Aboriginal Trust Fund Repayment Scheme.

Reverend the Hon. FRED NILE: It was too premature.

CHAIR: Mr Santow, thank you so much, again, for all the work that your organisation does, and for coming and being with us today. I think there are some questions that you might have taken on notice where you were willing to provide information. There may be some supplementary questions that will be made available within 21 days. I thank you, and everyone who works with you, for your real commitment.

Mr SANTOW: I would like to add one extra thing. The principal author of this submission is my colleague Sophie Farthing. She would have been sitting here with me but is currently on parental leave. That is why she cannot be here. It was a really wonderful piece of work on her behalf.

The Hon. BEN FRANKLIN: Please pass on our thanks to her, too.

CHAIR: Yes, pass it on and wish her well.

(The witness withdrew)

The Committee adjourned at 2.08 p.m.
