

Date: 5 March 2019

The Hon. Sarah Mitchell, MLC
Minister for Aboriginal Affairs
GPO Box 5341
SYDNEY NSW 2001

Dear Minister,

Open Letter of Concern about the Narrow Scope of the NSW Stolen Generations Reparations Scheme

The NSW Young Lawyers' Human Rights Committee is concerned over the exclusion of some Stolen Generations people from the Stolen Generations Reparations Scheme ('**Reparations Scheme**').

We recommend that the NSW Government immediately rectify the eligibility criteria of the Stolen Generations Reparations Scheme so that members of the Stolen Generations are eligible for reparations regardless of which government agency (including the Child Welfare Department) was involved in their removal in pursuance of the NSW Government policy of assimilation.

NSW Young Lawyers

NSW Young Lawyers is a division of The Law Society of New South Wales. NSW Young Lawyers supports practitioners in their professional and career development in numerous ways, including by encouraging active participation in its 15 separate committees, each dedicated to particular areas of practice. Membership is automatic for all NSW lawyers (solicitors and barristers) under 36 years and/or in their first five years of practice, as well as law students. NSW Young Lawyers currently has over 15,000 members.

The Human Rights Committee

The Human Rights Committee ("HRC") comprises a group of over 1,200 members interested in human rights law, drawn from lawyers working in academia, for government, private and the NGO sectors and other areas of practice that intersect with human rights law, as well as barristers and law students. The objectives of the HRC are to raise awareness about human rights issues and provide education to the legal profession and wider community about human rights and its application under both domestic and international law. Members of the HRC share a commitment to effectively promoting and protecting human rights and to examining legal avenues for doing so. The HRC takes a keen interest in providing comment and feedback on legal and policy issues that relate to human rights law and its development and support.

Background

The Reparations Scheme currently provides an ex-gratia payment of \$75,000 to living and eligible Stolen Generations survivors who were removed by, committed to, or otherwise came into the care of the NSW

Aborigines Protection or Welfare Boards under the *Aborigines Protection Act 1909* (NSW), up until the Act was repealed on 20 March 1969.

The Stolen Generations Funeral Assistance Fund (“Funeral Assistance Fund”) provides a one-off payment of \$7,000 to Stolen Generations survivors who were living on 2 December 2016 and were removed by, committed to, or otherwise came into the care of the Aborigines Protection or Welfare Boards under the *Aborigines Protection Act 1909*, up until the Act was repealed on 20 March 1969. Stolen Generations survivors are automatically eligible for the Funeral Assistance Fund if they qualify for the Reparations Scheme.

The Reparations Scheme and Funeral Assistance Fund commenced on 1 July 2017 and will run for five years. A report titled “Unfinished Business: Progress Report to Parliament” (“The Progress Report”) is dated July 2018.¹

The Eligibility Criteria Excludes Numerous Aboriginal People Who Were Removed

The current eligibility criteria for the Reparations Scheme is unnecessarily and unjustly narrow. Aboriginal people who were removed by, committed to, or otherwise came into the care of the Child Welfare Department or the police (as opposed to the Aborigines Protection or Welfare Boards) are *ineligible* to apply for the Reparations Scheme.

There is not a rational basis for the Reparations Scheme eligibility criteria to exclude Aboriginal people removed by Child Welfare Department, as there is evidence that suggests the NSW Government pursued an Aboriginal assimilation policy using the Child Welfare Department in tandem with the Aborigines Protection and Welfare Boards.

Peter Read, an academic from the University of Sydney and expert on the historical records about the members of the Stolen Generations, writes that “Welfare Officers were instructed to hand over Aboriginal children of ‘lighter caste’ to the Child Welfare Department if they were to be committed.”² Kelly Godfrey from the Australian National University provides an assessment of this history of assimilation noting that “[a]ssumptions of Aboriginal inferiority were so deeply entrenched in white minds that light-skinned Aboriginal children were sent to the ordinary child welfare homes and were passed off as white.”³

To deny members of the Stolen Generations reparations on the basis of which NSW government agency removed them, when each of the agencies were implementing the same policy of assimilation, is unjust, arbitrary, and divisive.

¹ Aboriginal Affairs NSW, *Unfinished Business: Progress Report to Parliament* (July 2018) <<https://www.aboriginalaffairs.nsw.gov.au/pdfs/stolen-generations/Unfinished-Business-Digital-Version.pdf>>.

² Peter Read, *The Stolen Generations: the Removal of Aboriginal Children in New South Wales 1883 to 1969* (2006) <https://daa.asn.au/wp-content/uploads/2016/07/Reading-7_StolenGenerations.pdf>.

³ Godfrey Kelly, ‘The Lost Kooris’ (1995) 20(1) *Alternative Law Journal Aboriginal Law Bulletin* 26.

Matter of Urgency

The Progress Report shows that these concerns have been known by the NSW Government for some time, however there does not appear to have been any formal change to the eligibility criteria.

The concerns were raised by the Stolen Generations Organisations who stated that:

We have significant concerns the criteria of the Reparations Scheme do not recognise the people who were removed from their families under assimilation practices by the Child Welfare Department, police or other people, rather than the Aborigines Welfare Board. **This has caused further trauma** to individuals and fractured family groups due to people being treated differently based on the circumstances of their removal, and the Reparations Scheme needs to address this. We are concerned the NSW Government's assimilation practices continued beyond 1969, and the Scheme should take account of this.⁴

In particular, the concerns over the eligibility criteria for the Reparations Scheme are reported as causing "further trauma", which surely would be directly against the intent of the scheme.

The Progress Report notes that the NSW Government is "aware of the concerns raised by survivors" and "Aboriginal Affairs is undertaking research to better understand the issues raised. The results of this research will be used to consider whether there is any further information that can be taken into account when assessing claims, to determine whether a person's situation fits within the intent of the Stolen Generations Reparations Scheme."⁵ The HRC understands that Aboriginal Affairs is now providing further information on all circumstances of removals to the independent assessor, which is a positive development. However, we submit that a change to the eligibility criteria is required to make clear to Stolen Generation survivors and their representatives that if they were removed by the Child Welfare Department in pursuance with the assimilation policy they are eligible for the Reparations Scheme.

Given the advanced age of many members of the Stolen Generations we submit that immediate action is required.

Reparations

In November 2017, the United Nations Human Rights Committee reviewed Australia's compliance with the International Covenant on Civil and Political Rights.⁶ The Committee recommended Australia "establish a national reparations mechanism, including compensation schemes, for victims of the stolen generation".⁷ The Special Rapporteur on the Rights of Indigenous People following her 2017 Australia visit also recommended that "the Government establish a comprehensive national mechanism to ensure that

⁴ Above n1, 3.

⁵ Ibid, 8.

⁶ *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), UN General Assembly, Treaty Series, vol. 999, p 171 (16 December 1966).

⁷ Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (9 November 2017).

adequate reparation, including compensation, is provided to the victims of the “Stolen Generations” policies.”⁸

The current operation of the Reparations Scheme fails to meet these recommendations. The Reparations Scheme does not include members of the Stolen Generations who were removed by, committed to, or otherwise came into the care of the Child Welfare Department, or removed by the police, whether before or after 1969. On this basis, the reparations mechanism is not available for *all* victims.

The Human Rights and Equal Opportunity Report Commission’s 1997 *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families: Bringing them home* (“Bringing Them Home Report”) outlines the legal basis for reparation. The Bringing Them Home Report states that “the Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.”⁹ That report also states that “systematic racial discrimination and genocide must not be trivialised and Australia’s obligation under international law to make reparations must not be ignored.”¹⁰

Further Eligibility Issues

The Progress Report notes further concerns of the Stolen Generations Organisation Representatives. We ask that the NSW Government heed the concerns of these representatives including the following issues (as summarised by the HRC):

- The Reparations Scheme include people who were removed in the years after 1969 if it was pursuant to the Aboriginal assimilation policy;
- The Funeral Assistance Fund amount be increased to cover the cost of funerals on *country*; and
- That funds be allocated so that Stolen Generations survivors who have passed away can be repatriated back to *country*.

Recommendations

The HRC recommends that the eligibility criteria in the Guidelines for the Administration of the NSW Stolen Generations Reparation Scheme be amended as soon as possible so that members of the Stolen Generations are eligible for reparations regardless of which government agency was involved in their removal in pursuance of the NSW Government practice of assimilation, so that people removed by or to the Child Welfare Department are included.

As an interim measure, we recommend that the Minister for Aboriginal Affairs, and the Independent Assessor, depart from the current Guidelines to ensure that interests of justice and equity are met and reparations are made in accordance with this recommendation for people removed by or to the Child Welfare Department.

⁸ Victoria Tauli Corpuz, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on her Visit to Australia*, UN Doc A/HRC/36/46/Add.2 (8 August 2017).

⁹ Human Rights and Equal Opportunity Report Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997), 231.

¹⁰ *Ibid*, 266.

If you have any queries, please contact the undersigned at your convenience. We look forward to receiving your response to this letter.

Sincerely,



Jenny Windsor
President
NSW Young Lawyers



Maria Nawaz
Chair, Human Rights Committee
NSW Young Lawyers

Cc: Gladys Berejiklian MP, Premier of NSW
Michael Daley MP, Leader of the Opposition
David Harris MP, Shadow Minister for Aboriginal Affairs
David Shoebridge MLC, Greens Spokesperson for Aboriginal Justice