

Submission

Territories Stolen Generations
Redress Scheme
2020

ANTAR



About ANTAR

ANTAR is a national advocacy organisation working for Justice, Rights and Respect for Australia's First Peoples. We do this primarily through campaigns, advocacy, and lobbying.

Our current national campaigns include:

- Constitutional Recognition and Equality – for Constitutional change to recognise Australia's First Peoples and remove discriminatory elements from our founding document; and
- Advocating for treaty and agreement-making processes across Australia.

We also engage in national advocacy across various policy and social justice issues affecting Aboriginal and Torres Strait Islander communities, including anti-racism campaigns, native title, languages and cultures, economic and community development, remote communities' services and infrastructure, health, and human rights.

ANTAR is a foundational member of the Close the Gap Campaign Steering Committee, the Change the Record Campaign Steering Committee, and the Redfern Statement Alliance. ANTAR has been working with Aboriginal and Torres Strait Islander communities, organisations and leaders on rights and reconciliation issues since 1997. ANTAR is a non-government, not-for-profit, community-based organisation.

Introduction

Thank you for the opportunity to provide some comments to inform the consideration of the proposed *Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021 and Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021.*

ANTAR commends the Federal Government for introducing the Stolen Generations Redress Scheme for the First Nations Peoples of the Australian Capital Territory and the Northern Territory. Compensation for the generations of Aboriginal and Torres Strait Islander peoples, both children and their parents and families, is long overdue after the already all too slow formal Apology given in 2008.

ANTAR bases its comments throughout this submission on the views and positions of the many Aboriginal and Torres Strait Islander peoples, organisations, partners and friends we have worked with, and for, over the last 25 years. It is our hope that an adequate Redress Scheme will go at least a small way towards healing. Of course there is no compensation that can be given that will reverse the immense hurt and destruction caused by the policies of previous Federal, State and Territory governments over the first eight decades of Australia's Federation. It is a shameful blight on Australia's history and must never be repeated.

At the time of writing this submission, and as the Federal Government considers its Redress Scheme through the Senate Standing Committee, according to the 2020 Family Matters Campaign Report 'Aboriginal and Torres Strait Islander children represent 37% of the total population of all children that have been removed from their parents – a staggering 20,077 children – but represent only 6% of the total population of children in Australia.'¹

¹ [The Family Matters Report 2020](#)

We are at real risk of creating a new Stolen Generation and this should be at the forefront of Government efforts to avoid the abuses and damage of the past.

Next year will be the 25th anniversary of the Australian Human Rights Commission's seminal report into the Stolen Generations - the *Bringing Them Home* Report.² This seminal report noted that:

For individuals, their removal as children and the abuse they experienced at the hands of the authorities or their delegates have permanently scarred their lives. The harm continues in later generations, affecting their children and grandchildren.

Redress must have healing and reconciliation at the heart of its purpose and to do so must consider the intergenerational trauma and continuing implications for the policies that caused so much pain. Ultimately, Aboriginal and Torres Strait Islander communities must be listened to in relation to any changes and improvements needed for the proposed redress scheme.³

We commend the critical work of the Healing Foundation and suggest that the recommendations of the *Make Healing Happen* Report (2021)⁴ be considered and adopted in full. Particularly, the Report's 'Action 1. Redress for Stolen Generations survivors and their descendants', and three priorities listed under this action should form the basis of the intent and design of the scheme. As the Report states:

A universal, safe and culturally appropriate scheme for redress for Stolen Generations survivors is needed to overcome the fragmented and unequal access to redress through existing schemes.

When considering First Nations' priorities in respect of compensation, it is of critical importance that a holistic and culturally relevant approach is followed to allow a space and process for the voices of the victims.

² [The Bringing them Home Report \(1997\)](#)

³ [Stolen Generation redress scheme won't reach everyone affected by the policies that separated families](#)

⁴ [Healing Foundation - Make Healing Happen Report \(2021\)](#)

Anything less has the potential to contribute to the harm and distress that has been the result of the policies that have led to the Stolen Generations.⁵ The scheme should look to include the consideration of the loss experienced in regards to the disconnection forced between First Nations peoples and their lands and cultures.

If reparations are going to be effective in addressing the historical, and present, injustices inflicted on members of the Stolen Generations, the framework of the reparations process and content should be informed by the victim's cultural values, and administered in such a way that promotes healing-informed practices.

Past Schemes & Evidentiary Issues

In the past, Australia has used a range of justice theories to inform the reparations process offered to members of the Stolen Generations. Highlighted and discussed by Australian politician and author, Anthony Buti, these theories include:

- Corrective justice involving the wrongdoer repairing wrongful losses, often in the form of monetary compensation;
- Distributive justice involving allocating resources to a person or group according to some predetermined distributive criteria, often based on concepts of welfare, equality and egalitarianism; and
- Restorative justice which looks at redressing the wrong committed, but it also goes further than classic corrective justice in that it not only seeks to repair the loss or injury, but also to reconcile the wronged with the perpetrator, which is capable of empowering the victim and performing important symbolic functions for a society stained with past injustices.⁶

The application of these theories has been made in the form of apologies, state schemes of monetary compensation, healing and education programs, welfare,

⁵ [The government's Stolen Generations redress scheme is piecemeal and unrealistic](#)

⁶ Buti, Antonio, "Reparations, Justice Theories and Stolen Generations" [2008] UWALawRw 7; (2008) 34(1) University of Western Australia Law Review 168

and litigation, but they have unfortunately continued to fall short of the needs and desires of the Stolen Generations.

Previous schemes, such as the Tasmania scheme in 2006, which allocated \$5 million in compensation for applicants to the scheme, can assist in indicating a procedural benchmark for how the current proposed scheme can operate.

For Tasmania, the Act did not set out detailed procedures, rather, the Assessor was given discretion to determine the scheme's processes. The approach adopted was non-adversarial and informal, with the simplicity of the application process being quite helpful. It required the Office of the Assessor to obtain any necessary reports and documentation, rather than requiring applicants to provide these themselves, which may have been difficult and burdensome. As recommended in this scheme by Chiara Lawry, a previous advisor of the Department of the Prime Minister and Cabinet, in order to ensure potential applicants are not dissuaded from accessing the scheme, the informal nature of Tasmania's application process should be replicated when prepared at the Commonwealth level.⁷

In terms of evidentiary issues that arise for applicants, Ms Lawry has identified that victims who did not hold documentation to support their claims as members of the Stolen Generation, can seek assistance from their community and be recognised as an applicant with communal recognition. Sadly, in a number of applications in that Scheme, pre-existing communal recognition could not be established because children had been removed entirely from their Aboriginal community at a young age. In the Assessor's report, it was noted that 'the Aboriginal community took a very fair approach to this issue.' While Ms Lawry commends this fairness, she states that it remains an unsatisfactory predicament that applicants are reliant on communal recognition to establish their Aboriginality where there is no documentary evidence to support their applications, when their removal may preclude them from being able to gain such recognition.⁸

⁷ Lawry, Chiara - "Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations" [2010] AUIndigLawRw 24; (2010) 14(2) Australian Indigenous Law Review

⁸ Ibid.

We propose that an appropriate way in which to combat this issue may be to allow a simpler threshold for eligibility in light of the lacking records to assist applicants to be able to access the scheme . There are many who will be unable to provide documentation of their removal from their families, as that evidentiary material has been destroyed, lost, or never existed in the first place.

It should not matter what legislative instrument was used to remove these children, legally or otherwise, to be considered a member of the Stolen Generations. The intention behind the removal is what is important, and the ongoing impacts on those children, their families and their communities to date, and into the future. Appreciating and understanding the ongoing effects of such intergenerational trauma upon Aboriginal and Torres Strait Islander communities is part of 'trauma informed practice', which must be considered in this redress process. For many in these communities, the significant pressure to produce evidence, whether for Native Title or in this instance compensation for members of the Stolen Generations, compounds the effects of intergenerational trauma. To require communities to demonstrate their 'proof' without sufficient consideration of the impact of historical attempted genocide represents a form of ongoing trauma.⁹ Where many members of the stolen generations do not hold evidentiary material of their displacement, unfair does not begin to encapsulate the result if those peoples are unable to claim compensation through this redress scheme.

As to the NSW scheme, it was proposed that to be classified as a member of the Stolen Generations in NSW, you need to have been taken from your family under the *Aborigines Protection Act 1909* (NSW), and its many amending Acts. This Act established the Aborigines Protection Board, which became the Aborigines Welfare Board (the Board). That same Act also established the two main Indigenous homes in NSW, being the Cootamundra Girls Home and Kinchela Boys Home in Kempsey. The Board was given the power to remove

⁹ Hassing, Cedric; Quayle, Cleonie --- "Trauma Informed Practice: Working With Communities Affected By Intergenerational Trauma And Managing Vicarious Trauma" [2019] NativeTitleNlr 8; (2019) 1 Native Title Newsletter 15

Indigenous children from their parents, after ‘charging’ them as being ‘neglected’, and making the child a ward of the State.¹⁰

Over the years, it needs to be remembered that the NSW government also utilised other statutory instruments to remove Indigenous children from their families. The *Child Welfare Act* 1939 became another instrument for the government at the time to continue its Stolen Generations policy of assimilation by removing children from their families, irrevocably damaging family and cultural ties. As this Act was not specifically drafted to remove Indigenous children only, contention exists as to whether or not those removed under this particular legislation have the right to claim to be Stolen Generations, which causes injustice and harm to all Aboriginal children who were removed, but not removed under the *Aborigines Protection Act* 1909.¹¹

In some cases, children were removed under both Acts, to be ‘committed to the care of the state of NSW, to be dealt with as a ward committed to the control of the Aborigines Welfare Board and/or the Child Welfare Department.’ Hayley Aldrich, Expert Lawyer with Carroll & O’Dea Lawyers, notes that in the eyes of many, for these children to be regarded as members of the Stolen Generations depends on which of the departments ran the institutions that they were placed in. When it comes to the NSW Stolen Generations Reparations Scheme, these children do, however, fare better than those children who were dealt with solely under the *Child Welfare Act*.¹² Therefore, any Aboriginal child removed from their family or community, whether lawfully or unlawfully, under any Act should be considered an applicant in this proposed redress scheme for the Territories.

Holistic Approaches

Members of the Stolen Generations, including those who were unable to apply through the NSW redress scheme, have sought alternate means of obtaining compensation through paths such as litigation. Ms Aldrich has opined that

¹⁰ Aldrich, Hayley, "The Stolen Generations group action: an alternative model to redress a traumatic past" [2017] Precedent AULA 44; (2017) 141 Precedent 22

¹¹ Ibid.

¹² Aldrich, Hayley, "Australia: The NSW Stolen Generations Reparations Scheme – Appropriate or disproportionate?" [2020] Mondaq.

although litigation has not been proposed as the preferable route to compensation, the class action brought on behalf of members of the Stolen Generation have been able to reach individual settlements negotiated through the Crown, without interference of the courts and perhaps most important, can allow benefits of a personal nature to the victims. Their settlement conferences are facilitated so that claimants are able to talk about their trauma and experiences with representatives of the Crown, their own legal representatives, and family members, allowing a place of safety to create an environment where survivors speak for themselves. In many of these circumstances, Ms Aldrich advises that some claimants have never told their partners or children about the abuses they suffered, and so the settlement conference can be the first time that family members hear these stories, making for a very emotional day. Claimants being able to talk to their families about secrets they have held for years is a positive impact to have emerged from this process. Many claimants stated that they have found the conference to be an important part of their broader healing process, and that the whole experience is something that will change their lives for the better. This idea of the 'healing process' is essential to any aspect of reparation.¹³

This approach can promote trauma-aware and healing-informed practices, where members of the Stolen Generations can be in charge of their own healing and tell their own individual stories in a safe environment that can be accessed by the public, or kept private.

Thankfully, in the NSW redress scheme, it is understood that claimants in these settlements who have already had their matters settled through the group action, and are eligible for the NSW scheme, will be able to have their applications for the reparations scheme fast-tracked, as the government has essentially already considered their individual case and is aware of the circumstances. Therefore, NSW is the only state within Australia where members of the Stolen Generations have been able to proceed with claims

¹³ Aldrich, Hayley, "The Stolen Generations group action: an alternative model to redress a traumatic past" [2017] Precedent AULA 44; (2017) 141 Precedent 22

through both a reparations scheme and the common law, via the current group action.¹⁴ This approach should also be taken for the Territories redress scheme so that those victims are able to receive compensations separately from their litigation settlements, and other applicable redress schemes.

As highlighted by Professor Honni Van Rijswijk, our Governments have largely failed the Stolen Generations in the past in terms of providing appropriate avenues for the adjudication of their trauma and injuries. In these contexts, testimonies by survivors of the Stolen Generations, from Link-Up in the 1980s, to recent online projects, has played an important role in making claims for extra-legal discursive justice. Ms Rijswijk has discussed the importance of testimony, and such open discourse is relevant to any reparations scheme. It cannot simply be just compensation, but an opportunity for claimants to be heard on their own individual experiences and trauma.¹⁵ Further to this, a consideration should be put to projects that provide opportunities for applicants who receive compensation to also tell their stories of their experiences in addition to receiving an individual apology from the Government, whether through recordings, in a conference where their family and Government officials participate, or a type of community form. A support framework would also be required to be implemented to ensure applicants are able to receive support to apply in time and correctly so there are no further obstacles to receiving compensation.

Community forums could be utilised to spread the word of the redress scheme, when and how to apply, and facilitate individual support to applicants if it is required with a more personal approach than simple announcements. These forums could also give community members the opportunity to voice how they want the redress process to play out in terms of how the compensation will be provided, discuss each applicant's priorities in the compensation context, and

¹⁴ 4 Aldrich, Hayley, "The Stolen Generations group action: an alternative model to redress a traumatic past" [2017] Precedent AULA 44; (2017) 141 Precedent 22

¹⁵ van Rijswijk, H --- "Interventions into the feeling of popular justice: Australia's Stolen Generations, the problem of sentimentality, and re-encountering the testimonial form" [2016] UTSLRS 40; (2016) Cultural Legal Studies Law's Popular Cultures and the Metamorphosis of Law (eds) C. Sharp and M. Leiboff 71

open a conversation for accompanying healing programs for applicants to access.

For example, the Kinchela Boys' Home Aboriginal Corporation appreciated that following on from the Healing Our Way Forum, the Federal Government was to support the holding of local forums held by Aboriginal communities to enable local communities to determine their own priorities and ways of healing so that the dialogue continues to be driven by Aboriginal people and by local communities. Community forums could allow a holistic approach to reparations encapsulating the van Boven Principles including aspects of restitution, compensation, rehabilitation, and satisfaction and guarantees of non-repetition, and give the ability for communities to approach redress in a way that is consistent with its own priorities in terms of the current redress scheme.¹⁶ No Australian government has seriously attempted to address all of these principles.

An important point raised by Professor Andrea Durbach is that the National Inquiry into the Bringing Them Home Report of 1997 recommended that reparations be extended to include not only the individuals removed but also family members, communities and descendants of those who were forcibly removed, 'who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land'.¹⁷ However, this approach has not been taken in any available redress schemes to date.

In 2010, Dr Dylan Lino, senior lecturer at the University of Queensland, raised a sad truth that, in light of the intergenerational nature of the trauma suffered by members of the Stolen Generations, the Government's initiatives, programs and campaigns are unlikely to show significant improvements made in the lives of the current generation of Aboriginal and Torres Strait Islander people. Dr Lino advises that those Stolen Generations members still alive today will essentially

¹⁶ New South Wales. Parliament. Legislative Council. General Purpose Standing Committee No. 3, General Purpose Standing Committee No. 3 Reparations for the Stolen Generations in New South Wales Unfinished business Ordered to be printed 23 June 2016

¹⁷ Durbach, Andrea --- "The Cost of a Wounded Society': Reparations and the Illusion of Reconciliation" [2008] AUIndigLawRw 13; (2008) 12(1) Australian Indigenous Law Review 22

see little of the benefit from initiatives and campaigns directed to 'closing the gap' and reconciliation. These were comments made over 10 years ago, and many members of the Stolen Generations have been lost who will not be able to receive the benefits of this redress scheme.¹⁸ This means that the Government cannot afford any further delay in the compensation to those who remain of the Stolen Generations, or members of their families and communities.

The Healing Foundations Annual Report of 2019 highlights a report of the Australian Institute of Health and Welfare that children living in Stolen Generations households experience higher rates of disadvantage than children living with adults who were not removed. These issues of intergenerational trauma have flow on effects that impact not only the members of the Stolen Generations, but people who are close to them as well. In response to these findings, through the redress scheme, the Government may consider opening up the application criteria to include family and community members of members of the Stolen Generations, including deceased members, so they could also receive compensation.

Going forward

Forced removal of Aboriginal children is not only a part of Australia's past, but remains ever present. Despite Aboriginal activism to reclaim children, removals and placements outside of Aboriginal families continues, and the pace is accelerating ever further.

Placements such as forced adoption recently rejected are now being reconsidered, and removal of children from the care of their grandparents, a traditional Aboriginal family childcare arrangement, is once again under scrutiny, prompting the formation of Grandmothers Against Removals (GRMAR). Further, newborns are taken from mothers who test drug positive despite care being available within the mothers' extended family,¹⁹ which should be an

¹⁸ Lino, Dylan --- "Monetary Compensation and the Stolen Generations: A Critique of the Federal Labor Government's Position" [2010] AUIndigLawRw 2; (2010) 14(1) Australian Indigenous Law Review 19

¹⁹ Haebich, Anna --- "Neoliberalism, Settler Colonialism And The History Of Indigenous Child Removal In Australia" [2016] AUIndigLawRw 3; (2015/2016) 19(1) Australian Indigenous Law Review 20

important consideration before the drastic measure of removing a child from their loved ones is taken.

No definitive action has been taken to stop this treatment of Aboriginal children and families and to ensure that it never happens again. There is a vital need for positive action so that Aboriginal and Torres Strait Islander communities no longer be left to 'carry alone' the burden of injustice and the weighty responsibility of remembering 'properly',²⁰ through healing-informed practices to treat the ongoing trauma from the past, and continued, caused by tearing apart Aboriginal families.

The Redress scheme must be easily accessible without the process becoming a burden for the people that should qualify for the scheme. The lack of records is the problem of the Government and should not be a barrier to compensation.

Finally, we hope that a well designed and implemented Redress Scheme by the Federal Government for the First Nations peoples of the ACT and the NT will set the standard for those remaining jurisdictions that are yet to provide compensation and redress.

²⁰ Haebich, Anna --- "Neoliberalism, Settler Colonialism And The History Of Indigenous Child Removal In Australia" [2016] AUIndigLawRw 3; (2015/2016) 19(1) Australian Indigenous Law Review 20

Conclusion

Thank you again for the opportunity to provide a submission on this important consideration.

ANTAR offers our ongoing support to a process of redress and compensation that meets the expectations of Aboriginal and Torres Strait Islander peoples in the ACT and the Northern Territory. We would also welcome the opportunity to meet with the Federal Government, to discuss any of the points raised in this submission.

Sincerely

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With thanks:

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**ANTAR is proud to acknowledge and pay our respects
to First Nations Peoples as the traditional owners
of the lands on which we work across the continent.**