



public interest
ADVOCACY CENTRE LTD

Restoring Identity – Stolen Generations Reparations in South Australia

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre (PIAC) is an independent, non-profit law and policy organisation that works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on public interest issues.

PIAC identifies public interest issues and, where possible and appropriate, works co-operatively with other organisations to advocate for individuals and groups affected. PIAC seeks to:

- expose and redress unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate on issues affecting legal and democratic rights; and
- promote the development of law that reflects the public interest;
- develop and assist community organisations with a public interest focus to pursue the interests of the communities they represent;
- develop models to respond to unmet legal need; and
- maintain an effective and sustainable organisation.

Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Services Program. PIAC also receives funding from the Industry and Investment NSW for its work on energy and water, and from Allens Arthur Robinson for its Indigenous Justice Program. PIAC also generates income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

PIAC's work on Stolen Generations

PIAC's Indigenous Justice Program aims to:

- identify systemic wrongs by the state and its agents affecting Indigenous Australians and to advocate for the elimination of those wrongs;
- enhance access to remedies for wrongs committed against Indigenous Australians by the state and its agencies;
- improve access to essential services by Indigenous communities; and
- strengthen the capacity of Indigenous Australians to engage in public policy making and advocacy.

Currently the Indigenous Justice Program's policy work and litigation focus on discrimination, policing and 'stolen wages'. PIAC's work on 'stolen wages', which focuses on the repayment by state governments of monies that were put in trust for Aboriginal people from their work, often as young children, includes representing clients before the Aboriginal Trust Fund Repayment Scheme (NSW), managing a stolen wages referral scheme and co-ordinating a national stolen

wages campaign. Through its work on stolen wages, PIAC has ongoing contact with many members of the Stolen Generations.

PIAC's work on the Stolen Generations

PIAC has been heavily involved in Stolen Generations work since the early 1990s. This has included policy and advocacy work as well as conducting litigation against the State of NSW on behalf of individual members of the Stolen Generations. PIAC consulted with Aboriginal and Torres Strait Islander Stolen Generations groups across the country to produce the briefing paper *Providing Reparations: A Brief Options Paper* in 1997, and expanded this work with the countrywide consultation in 2001, *Moving Forward*, in which over 150 individuals and groups were consulted to determine a framework for appropriate reparations for the Stolen Generations. This consultation became a conference in 2002, and then a report, *Restoring Identity*, released in 2002 and updated and re-released in 2009.

Restoring Identity contains a draft Stolen Generations Reparations Tribunal Bill, which was introduced into the Federal Senate by Senator Bartlett in 2008. This bill was re-introduced by Senator Siewart in 2010.

The Stolen Generations Reparations Tribunal Bill 2010 (SA) (the SA Bill)

The process

PIAC commends South Australia on taking such a positive step towards reconciliation and reparations by introducing the SA Bill into the Legislative Council. The consultation process for the SA Bill, including the opportunity for submissions to the Aboriginal Lands Standing Committee is also commendable, as an informed process is important to ensure that the proposed Tribunal will appropriately address the needs of members of the Stolen Generations in South Australia.

PIAC recommends that a clear public timeframe by which the Committee must report to Parliament on the outcome of the submission process be established, to ensure that the process maintains momentum. PIAC also encourages the Committee to conduct public consultations in South Australia on this issue, to ensure a wide range of views is canvassed.

Recommendation 1

That a clearly outlined timetable for public consultation and reporting on the SA Bill be established and publicly advertised.

The Bill

PIAC notes that the SA Bill has many similarities to the Stolen Generations Reparations Tribunal Bill (the PIAC Bill) contained in the report *Restoring Identity* (2002, 2009). Naturally, PIAC supports this approach, especially given that PIAC drew on its many years of experience in this

area and consultations with Aboriginal and Torres Strait Islander peoples across Australia in drafting the PIAC Bill.

Some of the particularly positive aspects of the SA Bill are:

- the Tribunal acting as a forum for sharing and acknowledging experiences of forced removal;
- the ability to provide varying types of reparations in the form of funding for projects and communities, as well as ex gratia payments and compensation to individuals; and
- the inclusion of descendants and those who suffered harm as a result of others being forcibly removed, which shows the recognition of the intergenerational trauma that has been inflicted upon Aboriginal and Torres Strait Islander people as a result of previous policies.

The rest of the submission will focus on some of the differences between the PIAC Bill and the SA Bill, and some suggestions for improvements to the SA Bill.

Membership and powers of the Tribunal

We note that there is no prescribed number of members of the Tribunal (who are called ‘Deputy Presidents’ in the SA Bill), and that although they are required to be either legal practitioners of at least seven years standing, or magistrates, there is no provision about their background, specifically in relation to whether they are of Aboriginal or Torres Strait Islander descent.

In the PIAC Bill, the Tribunal was proposed to be of six members, at least half of whom must be Aboriginal or Torres Strait Islanders. This was an important aspect of the PIAC Bill, as the legacy of discriminatory government policies has frequently excluded Aboriginal and Torres Strait Islander peoples from participation in processes that affect them, even such positive processes as reconciliation and healing. While the SA Bill does not directly preclude Aboriginal or Torres Strait Islanders from being part of the Tribunal, the requirement to have at least seven years legal experience is likely to limit the pool of eligible Aboriginal and Torres Strait Islander candidates, as there are far fewer lawyers of Aboriginal or Torres Strait Islander descent.

We appreciate, however, that the reasoning behind requiring such a substantial amount of legal experience for the position most likely relates to ensuring the strength and legitimacy of the Tribunal and its decisions. A solution that would ensure appropriate cultural representation without compromising legal quality might be to add a quota of at least two Aboriginal and Torres Strait Islander members of the Tribunal, and that if sufficient Aboriginal and Torres Strait Islander legal candidates are not found to make up this quota, that they could sit as non-judicial, advisory members of the Tribunal.

Recommendation 2

That the Tribunal have a set amount of members, and a specific proportion of the Tribunal member positions (whether as judicial members, or non-judicial, advisory members) be set aside for Aboriginal and Torres Strait Islander peoples.

Ex gratia payments

PIAC commends the inclusion of a variety of modes of reparations under section 20. In the SA Bill, a claimant may receive individual monetary reparations from the Tribunal in one of two ways: either as compensation under section 20(b), which is “payable only to a claimant who can prove that he or she suffered abuse or neglect as a child following his or her forcible removal from his or her family”, or under section 21, an ex gratia payment for being taken, which includes a lump sum for the impact of the experience of being a member of the Stolen Generations (of no more than \$20,000) (section 21(1)(a)), and \$3,000 for each year of not residing with family as a child as a result of forcible removal (section 21(1)(b)).

While PIAC recognises the benefits of certainty that assigning a monetary amount to an ex gratia payment can bring to claimants, it is unclear from where the value of \$3,000 for each year of being away from family has been drawn. It is also unclear how the value of the impact of the experience of being taken will be assessed, in terms of distinguishing between someone who is entitled to the maximum of \$20,000, and someone who is entitled to less than that amount. While the Tribunal may make rules to clarify the operation of this under section 15, it would be more appropriate to have this process clearly set out from the beginning of the Tribunal, rather than relying so heavily on the gradual creation of precedent.

PIAC is also concerned that these ex gratia payments do not clearly correspond to the list of eligible claimants who are identified in section 19, and therefore descendant claimants and those who have suffered harm as a result of a family member being taken do not appear to be entitled to payment under section 21, limiting its availability. It would be more appropriate to refer to the categories established in section 19 in section 21, rather than the phrase “in recognition of the applicant’s experience of being a member of the Stolen Generations and the impact of that experience”, as that phrase does not have specific meaning in the context of the rest of the Tribunal.

Recommendation 3

- a) That clear guidelines for awarding amounts up to \$20,000 be established, and that the process by which the \$3,000 per year amount has been determined be clarified for applicants.*
- b) That the categories of applicants established in section 19 be set out in section 21.*

Evidentiary burden

PIAC is pleased to note that the Tribunal is not bound by the rules of evidence, and must act “according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms” (section 12(4)(b)), as well as having a wide-ranging power to summons persons and documents to assist its workings. However, it might be useful to specify in the SA Bill that the Tribunal can accept oral as well as written evidence, and how the onus of proving a claim will work in relation to claims without written evidence, to account for the passing of time (and the poor keeping of records) since the events of removal have occurred.

It would also be of assistance to enshrine in the SA Bill how the application process will proceed, how claims will be decided and that hearings may be conducted in a variety of ways, including by telephone, closed-circuit television or other means. In the experience of the Aboriginal Trust Fund Repayment Scheme in NSW, the absence of any legislative authority for both the Scheme and its guidelines made it harder for claimants to have certainty about the way in which the formal process for applications will operate, and how decisions will be made. Setting out a clear process and structure at the outset will be of great assistance to claimants, and will make the Tribunal work in a more efficient manner.

Recommendation 4

- a) *That the SA Bill specifies the power of the Tribunal to accept oral as well as written evidence, and the way in which the onus of proof will work.*
- b) *The process of applying to the Tribunal and varying manners of having claims heard should be outlined in the SA Bill.*

Powers of Tribunal

It appears that the Tribunal will sit alongside the District Court in the adjudicative hierarchy, as the Tribunal members are equivalent to judges of the District Court under section 11. This is commendable in terms of adding legitimacy to the process. PIAC also commends the right of appeal from the Tribunal to the Supreme Court under section 16, as this allows people who are dissatisfied with a Tribunal decision to seek appropriate and binding recourse. However, a key function of the Tribunal should also be the creation of precedent in its decision making. Therefore, PIAC recommends that all decisions should be made in writing and published to assist later applicants.

Recommendation 5

That all decisions of the Tribunal be made in writing and published.