



Office of the President

17 September 2021

Senator Claire Chandler
Chair
Senate Finance and Public Administration Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: fpa.sen@aph.gov.au

Dear Chair

SUBMISSION TO THE INQUIRY INTO THE TERRITORIES STOLEN GENERATIONS REDRESS SCHEME BILLS

1. The Law Council of Australia (**the Law Council**) is grateful for the opportunity to provide input to the Senate Finance and Public Administration Legislation Committee (**the Senate Committee**) in relation to its inquiry into the Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021 (**the Facilitation Bill**) and the Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021 (**the Consequential Amendments Bill**).
2. It welcomes the announcement of a Stolen Generations Redress Scheme in the Northern Territory, Australian Capital Territory and Jervis Bay Territory.¹ The scheme is an important step forward in recognising the harm caused by the forcible removals of children from their families and culture in these territories, as well as the complex and specific needs of survivors in any path towards healing.
3. The scheme has the opportunity to provide, as the Healing Foundation has recognised, 'long overdue', 'practical support' for survivors to enable them to operate 'more from places of strength rather than places of distress'.² Noting that the Australian history of forcible child removals must be understood as 'having included gross violations of human rights', the Law Council considers the scheme an important reflection of the responsibility that rests with the Australian Government under international law to provide effective remedies and just reparations to survivors.³

¹ See Law Council of Australia, *Closing the Gap: additional funding a step in the right direction* (Media Release, 6 August 2021) <<https://www.lawcouncil.asn.au/media/media-releases/closing-the-gap-additional-funding-a-step-in-the-right-direction>>.

² 'Reparations for Stolen Generations Survivors', ABC News (Dan Bouchier in conversation with the Healing Foundation CEO Fiona Cornforth, 13 August 2021) <<https://healingfoundation.org.au/2021/08/16/transcript-the-healing-foundation-ceo-fiona-cornforth-with-dan-bouchier-abc-news-tv-afternoons/>>.

³ Human Rights and Equal Opportunity Commission, 'Part 4 – Reparation: Chapter 14 – Making Reparation', *Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (April 1997) <<https://humanrights.gov.au/our-work/bringing-them-home-chapter-14#a>>

4. It now considers the details of the scheme that have been set out to date, including in the proposed pieces of legislation.
5. The Law Council acknowledges the assistance of the Victorian Bar in providing the majority of the information and views that form the basis of this submission, as well as its Indigenous Legal Issues Committee.

The Facilitation Bill

6. Subsection 4(4) of the Facilitation Bill explicitly provides that a payment under the scheme is 'absolutely inalienable'. Further, the Law Council understands that subsections 4(1) and 4(2) ensure that a redress payment does not affect a person's eligibility for, or entitlement to, any pension, benefit, payment, or service under a law of the Commonwealth, and is not to be considered compensation or damages for the purposes of the *Social Security Act 1991* (Cth), the *Veterans' Entitlement Act 1986* (Cth) or other stipulated laws.
7. It considers these subsections to be appropriate, noting that it is only fair that members of the Stolen Generations who are currently, or may in future be, in receipt of Centrelink or other Commonwealth-administered social welfare support should not be disadvantaged because they have also received a redress payment. This is in keeping with the purpose of a redress payment, as discussed below.
8. However, the Law Council is concerned that redress payments may be included for the purposes of determining the value of a person's assets under the range of legislation set out under subsection 4(3) of the Facilitation Bill.
9. As a general principle, it considers that it is inappropriate for redress payments to be assessed as part of an assets test. This is because the purpose of a redress payment is to recognise the harm of forced removal and facilitate healing,⁴ which ought to be a standalone purpose and not impede the assessment of a person's eligibility for other types of government payments or assistance.
10. Prima facie, it seems to make little sense for the Facilitation Bill to make a distinction between the treatment of redress payments in income testing versus assets testing. However, the Law Council remains conscious of unintended consequences in making a prima facie judgment on the inclusion or exclusion of this subsection, and notes that in the timeframe available it has been unable to consider this issue further or make comparisons with other schemes. It recommends that the Senate Committee seek further advice from the Australian Government on this issue.

The Consequential Amendments Bill

11. The Law Council understands that the Consequential Amendments Bill proposes amendments to the *Bankruptcy Act 1966* (Cth), *Social Security Act 1991* (Cth), *Social Security (Administration) Act 1999* (Cth) and *Veterans' Entitlement Act 1986* (Cth), that are necessary to achieve the objective, provided in the accompanying bill above, that receipt of the payment does not adversely affect income testing for other Commonwealth payments or benefits. The Law Council offers no amendments to this Consequential Amendments Bill at this time.

⁴ Explanatory Memorandum, Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021, 1, [4].

Further Elements of the Proposed Scheme

Reliance on Delegated Legislation

12. The Law Council notes that neither the Facilitation Bill nor the Consequential Amendments Bill set out the specific details of the scheme, including the amount that is to be paid to survivors. It is unclear whether the Australian Government intends to introduce a Bill with these details, or leave these details to be prescribed through regulations in accordance with section 6 of the Facilitation Bill – that is, prescribed through delegated legislation.⁵
13. While the Australian Government has announced that it intends for the ‘one-off redress payment to recognise the harm caused by forced removal’⁶ to be ‘\$75,000’⁷ and the ‘one-off healing assistance payment’⁸ to be ‘\$7,000’,⁹ there is no legal protection to uphold this promise until it is legislated.
14. It is the general position of the Law Council that significant matters, such as those dealing with substantive policy issues rather than matters that are purely technical or administrative in nature, should be included in primary legislation rather than delegated legislation.¹⁰ It considers it an important responsibility of the Australian Parliament to safeguard against the unnecessary delegation of unfettered law-making authority to the Executive.¹¹
15. In this regard, the Law Council notes that the details of comparable redress schemes, including the amounts that redress entailed,¹² and other important considerations such as how members of the relevant cohort of survivors were to be identified or determined,¹³ were not delegated.
16. The Law Council recommends that the key details of this scheme should be outlined in the primary legislation. Given the sheer volume of delegated legislation – approximately ‘half of the law of the Commonwealth by volume consists of delegated legislation rather than acts of Parliament’¹⁴ – it is not guaranteed that regulations will receive the proactive and necessary scrutiny.

⁵ Parliamentary Education Office, *Delegated Law* (website) <[⁶ Explanatory Memorandum, Territories Stolen Generations Redress Scheme \(Facilitation\) Bill 2021, 1, \[3\].](https://peo.gov.au/understand-our-parliament/how-parliament-works/bills-and-laws/delegated-law/#:~:text=Examples%20of%20delegated%20laws%20are,the%20particular%20area%20it%20covers.>”.
law/#:~:text=Examples%20of%20delegated%20laws%20are,the%20particular%20area%20it%20covers.>”.</p></div><div data-bbox=)

⁷ Prime Minister of Australia, *Stolen Generation Redress Scheme* (media release, 5 August 2021)

<<https://www.pm.gov.au/media/stolen-generations-redress-scheme>>.

⁸ Explanatory Memorandum, Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021, 1, [3].

⁹ Prime Minister of Australia, *Stolen Generation Redress Scheme* (media release, 5 August 2021)

<<https://www.pm.gov.au/media/stolen-generations-redress-scheme>>.

¹⁰ See, eg, Law Council of Australia, Submission to the Senate Standing Committee for the Scrutiny of Delegated Legislation, Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight (2 July 2020) <<https://www.lawcouncil.asn.au/resources/submissions/exemption-of-delegated-legislation-from-parliamentary-oversight>>.

¹¹ Ibid, citing Law Council of Australia, *Legislative Standards* (website) <<https://www.lawcouncil.asn.au/policy-agenda/human-rights/legislative-standards>>.

¹² See, eg, *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), s 16.

¹³ Ibid, ss 13 and 14.

¹⁴ ‘Chapter 15: Delegated legislation, scrutiny and disallowance’, *Odgers’ Australian Senate Practice*

(Australian Parliament, 14th ed, 30 June 2021)

<https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Odgers_Australian_Senate_Practice/Chapter_15>.

Payments Amount

17. The Law Council is concerned that the proposed one-off redress payment of \$75,000 plus the healing assistance payment of \$7,000 may be insufficient. It notes that other recently implemented Commonwealth redress schemes such as the National Redress Scheme for people who have experienced institutional child sexual abuse has a maximum payment of \$150,000.¹⁵ However, the Law Council also notes that the Stolen Generations Redress Scheme in New South Wales offers an ex gratia payment of \$75,000,¹⁶ while the South Australian Scheme offered between \$30,000 and \$50,000 in individual payments.¹⁷ The Law Council considers that inconsistency in payments between redress schemes in different jurisdictions at different times and for different types of trauma survivors is regrettable.

Scheme Timeframe

18. The Law Council considers that the proposed timeframe for the scheme may be too short. It understands that the scheme is to run for four years and will be open for applications between 1 March 2022 and 28 February 2026.¹⁸ The Law Council considers that a timeframe of six to eight years would be more appropriate. The National Redress Scheme for people who have experienced institutional child sexual abuse has a much longer period of operation of a notional 10 years, between 1 July 2018 and 2028.
19. Given the needs for survivors to learn about the scheme, receive information, advice and trauma-informed support, the Law Council considers that a notional window should be provided for between 2022 and 2030. Further, it considers a longer time period would ease concern about potential delays with the scheme, which may be either unforeseen or associated with the COVID-19 pandemic.

Scheme Review

20. The Law Council also considers it appropriate that there be legislated mandatory two-yearly reviews of the scheme's operation to assess its effectiveness and make appropriate improvements. Such reviews are legislated for the National Redress Scheme for people who have experienced institutional child sexual abuse under section 192 of the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth).

Support for Redress in other Jurisdictions

21. Finally, the Law Council notes that the scheme is not a national program, meaning that only survivors who fall within particular geographic boundaries will be eligible for this assistance and recognition. It notes that past and current redress schemes in Tasmania, South Australia and New South Wales, and the forthcoming scheme in Victoria. It considers that there should be strong encouragement from the Commonwealth to ensure that members of the Stolen Generations living in all other states have access to redress payments and assistance.¹⁹

¹⁵ *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (Cth), ss 4 and 16.

¹⁶ New South Wales Government Department of Aboriginal Affairs, *NSW Stolen Generations Reparations Scheme and Funeral Assistance Fund* (website) <<https://www.aboriginalaffairs.nsw.gov.au/healing-and-reparations/stolen-generations/reparations-scheme/>>.

¹⁷ Government of South Australia Department of the Premier and Cabinet, *Stolen Generations Reparations Scheme* (website) <<https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/reconciliation/stolen-generations-reparations-scheme>>.

¹⁸ Explanatory Memorandum, Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021, 1, [2].

¹⁹ Tom Stayner, "Time's Up": Queensland and WA urged to launch their own reparations for Stolen Generations survivors, *SBS News* (online, 5 August 2021) <<https://www.sbs.com.au/news/time-s-up-queensland-and-wa-urged-to-launch-their-own-reparations-for-stolen-generations-survivors/f8ad0b73-2fd9-419a-a404-48f738bbcc79>>.

Yours sincerely

Dr Jacoba Brasch QC
President