



Premier of Queensland

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29 JUN 2010

Senator Guy Barnett
Chairperson
The Senate Standing Committee on
Legal and Constitutional Affairs
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I thank you for your letter of 21 April 2010 concerning the Inquiry into Review of Government Compensation Schemes being conducted by the Senate Standing Committee on Legal and Constitutional Affairs.

The attached submission has been collated by the Queensland Department of Premier and Cabinet working with the Department of Communities, in response to your request. The submission outlines four recent processes used by the Queensland Government to facilitate discretionary payments and compensation payments to individuals.

I trust that it will assist your committee in its deliberations.

Yours sincerely

ANNA BLIGH MP
PREMIER OF QUEENSLAND

*Encl

INQUIRY INTO GOVERNMENT COMPENSATION SCHEMES

QUEENSLAND GOVERNMENT SUBMISSION TO SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

1. INTRODUCTION

This submission has been prepared in response to the request from the Senate Standing Committee on Legal and Constitutional Affairs to contribute to their inquiry into government compensation schemes. The terms of reference for the inquiry are “to explore the administration and effectiveness of current mechanisms used by federal and state and territory governments to provide discretionary payments in special circumstances, or to provide financial relief from amounts owing to governments, namely:

- state statutory schemes relating to children in care;
- payments made under 'defective administration' schemes, such as the Commonwealth Scheme for Compensation for Detriment caused by Defective Administration;
- act of grace and ex gratia payments; and
- waiver of debt schemes.”

The *Financial Accountability Act 2009* (Qld) provides that “special payments” can be authorised by the accountable officer of a department from departmental accounts. Special payments are defined to include ‘ex gratia expenditure and other expenditure that is not under contract’.

The Financial and Performance Management Standards 2009 is made pursuant to the *Financial Accountability Act 2009* (Qld). It imposes obligations regarding the records which must be kept about special payments. Individual departments may have policies or practice manuals which provide guidelines surrounding “special payments”.

The submission focuses on four recent processes set up by the Queensland Government to facilitate compensation and discretionary payments made to individuals. The submission also includes the learnings arising from the Government’s experience with these processes.

The first three processes discussed below relate to compensation for historical government controls over the wages of Aboriginal and Torres Strait Islander people. A table relating to these documents has been attached to the submission.

The fourth process relates to payments made to acknowledge the harm suffered by individuals while in institutions that were covered by the terms of reference of the Forde Inquiry.

2 - PROCESSES

Wages and Savings Processes

Queensland has undertaken three processes which involve compensation for historical government controls over the wages and savings of Aboriginal and Torres Strait Islander people.

The three processes are:

1. the Compensation for Underpayment of Award Wages (UAW) 1975 – 1986 Process (“the UAW process”);
2. the Reparations Process (which offered reparations payments to Aboriginal and Torres Strait Islander people who had been subject to historical controls over their wages and savings under the Queensland “Protection Acts”); and
3. claims made by former mission workers who were not paid Award Wages for work they undertook on church-controlled mission settlements after 1975 was conducted as a settlement process (“the Mission Workers process”).

The UAW process and the Reparations process were administrative processes. However, these schemes differed in that the UAW scheme was implemented to address possible liabilities of the State arising from *Bligh and Ors v State of Queensland* (1996) HREOCA 28. The Reparations Process, by contrast, was not based on established legal liability but was designed as a measure to provide reparations to persons who had been subject to historical government controls over their wages and savings.

The Mission Workers process was conducted as a settlement process. This was also implemented to address possible liabilities of the State arising from the Full Federal Court decision *Baird v State of Queensland* [2006] FCAFC 162.

The three processes are discussed in more detail below.

2.1 Compensation for Underpayment of Award Wages

An Administrative Process intended to resolve potential claims for racial discrimination through failure to pay Award Wages to former workers on communities administered in the period 1975 to 1986 directly by the Queensland Government.

Precedent

Bligh and Ors v State of Queensland (1996) HREOCA 28 - successful claimants were found to have experienced racial discrimination through the failure of the State to pay them Award Wages and each was awarded \$7,000.

Principles

Eligible claimants were compensated for racial discrimination suffered through the failure of the Queensland Government to pay them award wages for work undertaken between 1975 (when the *Racial Discrimination Act* came into operation) and 1986 when award wages were paid.

It therefore had to be established that claimants:

- had worked for the Government during the period;
- the work that they performed attracted award wages; and
- they were underpaid by reference to the relevant award.

Eligibility

Eligible claimants were those who:

- had worked for the predecessor departments of Aboriginal and Torres Strait Islander Services in the period 1975 to 1986;
- were not paid Award Wages for work undertaken; and
- were alive on 31 May 1999.

Application and Assessment Process

Applicants or beneficiaries of deceased claimants applied for compensation by submitting an application form completed with assistance from representatives of an Indigenous service provider. The UAW Process staff established through search of Government records that the person :

- worked for the former department during the 1975 – 1986 period;
- worked in a capacity that was subject to an Award;
- was underpaid by reference to an Award; and
- survived to 31 May 1999.

Settlement Process

Eligible claimants were made an offer of settlement of \$7,000 and were advised that a condition for payment of the offer was the execution of a deed which waived their right any further compensation.

Independent legal advice was provided to each eligible claimant by legal staff employed by the Indigenous service provider.

Eligible claims for intestate deceased claimants were forwarded to the Public Trustee for settlement in accordance with the provisions of the Queensland Succession Act.

Outcome

The process operated for a period of approximately three years and 5,729 eligible claimants were paid a total of \$40.1 million.

2.2 Reparations Process

An administrative process intended to offer reparation payments to persons whose wages and/or savings were controlled under Queensland Government "Protection Acts" (1890s to 1980s).

Principles

Eligibility for reparations payments was based on Government controls over the wages and savings of individuals. Eligible persons therefore were those who could be demonstrated to have experienced these Government controls.

As the Queensland Government has extensive record holdings, these controls were demonstrated by assessors accessing Government records. Direct evidence of control over wages and savings in the form of financial records was not required – all that was required was that some evidence existed that the person was subject to these controls (eg by placement in a specific community at a particular time, by eligibility for the UAW process etc).

Consequently, reparation payments were not intended as compensation for amounts of money that claimants may have believed that they were "owed", but for the exercise of the controls.

Eligibility

Eligible claimants were those who:

- had their wages and savings controlled by the Queensland Government under the "Protection" Acts;
- were born before 1 January 1957; and
- were alive on 9 May 2002.

Application and Assessment Process

Claims were received from July 2003.

Applicants or beneficiaries of deceased claimants applied for compensation by submitting an application form completed with assistance from field staff trained by the Reparations Process.

Reparations staff established through search of government records and other available information (from the claimant and elsewhere) that eligible claimants:

- Were subject to Government controls over their wages and/or savings;
- Were born before 1 January 1957; and

- survived to 9 May 2002.

NB: Claimants were not required to provide records, staff searched Government records to find some evidence that established that the person was subject to controls over their wages and savings – a comprehensive history was not required. Opportunities were provided for claimants to provide additional information through contact with the reparations team on a freecall number.

Original Settlement Process

Eligible claimants were made original offers of settlement of \$4000 (for claimants born prior to 1 January 1952) or \$2,000 (for claimants born between 1 January 1952 and 31 December 1956).

Claimants were advised that a condition for payment of the offer was the execution of a deed which waived their rights to any further compensation.

Independent legal advice was provided to each eligible claimant by legal practitioners employed under contract by the Queensland Government.

Eligible claims for intestate deceased claimants were settled in accordance with the provisions of the *Succession Act 1981* (Qld). More than 20% of claimants were deceased.

The first round of this process concluded in 2006.

Re-Opening of Reparations Process

In 2008, the Queensland Government offered top-up payments of \$3,000 (to those eligible reparations claimants who had previously received \$4,000) and \$1,500 to those who had previously received \$2,000.

In view of the increased payments, the reparations process was also re-opened to new applicants, with the same eligibility conditions as applied to the previous offer.

Outcome

This process will conclude on 30 June 2010.

Finalisation of First Round of Reparations Process

In the first round of the Reparations Process, 8,761 applications were received of which a total of 5,553 were assessed as being eligible. Of these 4211 persons born before 31 December 1951 have been paid \$7,000 and 1342 persons born between 1 January 1952 and 31 December 1956 have been paid \$3,500.

In total, \$34.2 million will have been paid to these claimants.

Re-Opening of Reparations Process

1047 new claims have been made since June 2008. 39% of these are duplicates of applications received in the original process. 861 claims have been assessed, 220 of these claims are eligible.

In total, \$1.3 million will have been paid to these claimants.

NB: The Queensland Government originally allocated \$55.4 million total for payments in this process. Because many of the people who experienced controls over their wages and savings are deceased, and in recognition of the inter-generational disadvantages suffered as a result of these controls, the Queensland Government has established the Queensland Aboriginal and Torres Strait Islander Foundation.

The balance of the original Reparations allocation will be paid to the Foundation, which is managed by the Public Trustee advised by an appointed Board of Advice to provide educational opportunities to young Aboriginal and Torres Strait Islander Queenslanders.

2.3 Mission Worker Settlements

A settlement process intended to offer compensation to former workers on the Mission communities of Hope Vale, Wujal Wujal, Aurukun, Doomadgee, Mornington Island, Hammond Island and St Pauls who suffered racial discrimination through the non-payment of award wages in the period 1975 to 1986. These people were excluded from the UAW Process because they had not been employed or paid by the State and the State held no direct employment records.

Precedent

Baird v State of Queensland [2006] FCAFC 162. This was a Full Federal Court decision in a test case for a larger action involving 170 former Mission workers from Hope Vale, Wujal Wujal, Aurukun, Doomadgee and Mornington Island, which found that the State was liable for racial discrimination suffered by former mission workers through the provision of grants to the missions (their employers) that were calculated by reference to wage rates that were not award rates.

Following this decision, a settlement formula was developed in consultation with the legal representatives for the applicants in the original test case.

Principles

Eligible claimants were compensated for racial discrimination suffered through the failure of the Mission administration to pay award wages from funding

provided by the State for work undertaken between 1975 (when the *Racial Discrimination Act 1975 (Cth)* came into operation) and varying dates up to 1986 (depending on community circumstances) when award wages were paid.

It therefore had to be established that:

- the claimants worked for one of the Missions as a “mission worker” during the period;
- the work that they performed attracted award wages; and
- they were underpaid by reference to the relevant award.

Settlements were to be in accordance with the settlement formula applied for settlements in the test case.

Eligibility

Eligible claimants were those who:

- had worked for the one of the Missions as a “mission worker” funded by State funding (some of the missions also employed Church personnel from among the local people – and in Aurukun and Mornington Island, corporations had been established that employed many of the people – this employment was not funded by the State);
- the eligibility periods for workers were 1975 to 1978 (for Aurukun and Mornington Island) 1975 to 1983 (Doomadgee) and 1975 to 1986 (Hope Vale and Wujal Wujal);
- had worked in a capacity that attracted award wages;
- were not paid award wages for work undertaken; and
- were alive on 31 May 1999 (for consistency with the UAW Process).

Application and Assessment Process

A settlement process was developed to address the difficulties experienced by both parties because of the poor documentation available of work histories, employee histories etc.

Applicants or beneficiaries of deceased claimants apply for compensation by submitting a work history completed with assistance from their legal representatives.

Government staff search Government records to determine if there are any available records to establish that the person :

- worked for the former Mission during the relevant period;
- was a “mission worker” (ie the employment was funded by the Government grant to the Mission);
- worked in a capacity that was subject to an Award;
- was underpaid by reference to an Award; and
- survived to 31 May 1999.

Some applicants had documentation that could support their employment history and this was also considered. Some applicants were able to provide further information during the settlement process that established their work history. Evidence provided during the court proceedings also assisted in documenting work histories. Other documents, including mission board minutes etc also assisted.

Settlement Process

Government officers and claimant's legal representatives attempted to establish the period of employment and the work performed by each claimant

A wages expert then calculated the wages underpaid by reference to historical awards

Meetings were held with claimants in their communities at which claimants were able to provide additional information in an informal setting or call upon others with whom they worked to support their claims.

Eligible claimants were made an offer of settlement through their legal representatives, based on the calculated underpayment with the formula used in the court settlement applied to arrive at the offer.

The applicants' legal representatives then discussed this offer with the applicants and the government legal team also assisted by providing information to these applicants on the underlying assumptions of the offer.

Applicants were advised that a condition for payment of the offer was the execution of a deed which waived their right any further compensation.

Independent legal advice was provided to each eligible claimant by their legal representatives.

A "cooling off" period was offered to those who wished to consider the offer. Further negotiations with claimants may have then occurred – with the offer able to be reconsidered by either party.

A deed of settlement was signed and payment made within 14 days. Eligible claims for intestate deceased claimants were settled in accordance with the provisions of the *Succession Act 1981* (Qld).

Outcome

A total of 758 matters have been settled to date.

Other Schemes – non wages schemes

2.4 Redress Scheme

In 2007 the Queensland Government provided up to \$100 million in funding for a Redress Scheme to complete the government's response to recommendations of the 1998-1999 *Commission of Inquiry into Abuse of Children in Queensland institutions* (Forde Inquiry). This inquiry found that unsafe, improper and unlawful care of treatment of children had occurred in institutions and centres covered by the Inquiry's terms of reference. It also found that breaches of relevant statutory obligations had occurred during the care, protection and detention of children in such institutions.

The Redress Scheme was an administrative scheme operated by the Department of Communities (Redress Services, Smart Service Queensland) to provide ex gratia payments to eligible applicants in acknowledgement of abuse or neglect suffered in institutions covered by the terms of reference of the Forde Inquiry during the period 1911 to 1999.

Principles

The scheme offered an alternative, non adversarial process to that of the normal legal process. Payments were not considered compensation but acknowledgement of past harm.

Key elements of the scheme were designed in consultation with former residents through a public consultation process from June – August 2007.

Application and assessment processes were designed to take account of the findings of the Forde Inquiry - claims of abuse or neglect were accepted based on applicant self report/self disclosure.

Eligibility criteria reflected the scope of the *Forde Inquiry* with only those institutions covered by the terms of reference of the Inquiry considered eligible for the purpose of the scheme. Eligibility did not extend to claims of abuse and neglect in other situations such as foster care.

Applicants offered a choice in payment levels - a Level 1 payment of \$7,000 to applicants who met the basic eligibility criteria and a Level 2 payment of up to \$33,000 to approved Level 1 applicants who considered they had suffered more serious harm.

Level 2 applications were assessed on a case by case basis by a panel of experts using information provided by applicants to support their claims of more serious harm.

Level 2 payments were made from the funds remaining within the \$100m allocation for the scheme after the finalisation of Level 1 applications.

Eligibility

Eligible applicants were those who:

- were placed in a detention centre or licensed government or non-government children's institutions in Queensland covered by the terms of reference of the Forde Inquiry; and
- had been released from care, and had turned 18 years, on or before 31 December 1999; and
- experienced institutional abuse or neglect.

Limitations applied to people who were placed in and removed from institutional care before one year of age (for example, adoption).

Eligibility did not extend to an executor or family member of a deceased person.

Application and Assessment Process

Applications were received from 1 October 2007 until 30 September 2008 – the original closing date of 30 June 2008 was extended to afford a greater opportunity for people to apply.

Applicants or their authorised agent applied by submitting an application form including a signed declaration of the abuse or neglect experienced and acceptance of the terms of the scheme.

Practical assistance to lodge an application was available from community based support services funded by the Department of Communities to assist former children in care.

Applicants could apply for Level 1 and Level 2 payments at the time of initial application or provide further instruction once an applicant's eligibility for a level 1 payment had been established.

Eligibility of applicants for a payment under Level 1 was established by staff of Redress Services - an applicant's placement in an eligible institution (ie: detention centre or licensed government or non-government institution covered by the terms of reference of the Forde Inquiry) was established through a search of departmental records and other available information. Where the applicant was placed privately by his or her family in an institution, confirmation of placement records was dependent on the verifications released by past providers.

Settlement process

Level 1 payments

Priority was given to applicants aged 70 years or over or those with a life threatening illness.

Eligible Level 1 applicants were made an offer of \$7000 and were advised that a condition for payment was the execution of a deed, releasing and indemnifying the State from any current or future legal claims relating to matters which fell within the scope of the scheme. At the time of offer applicants had the choice to :

- obtain legal advice, sign the deed and accept payment
- defer acceptance of the payment until completion of the level 2 application process
- reject the offer and exit the scheme.

Applicants were required to obtain independent legal advice (funded by the scheme) on the terms and conditions of the deed before accepting a payment. Applicants were provided with a list prepared by the Queensland Law Society of lawyers specialising in personal injuries matters who were willing to provide advice on the deed for the set fee of \$500.

Where an eligible applicant passed away prior to signing the deed, the Minister had discretion to contribute up to \$5,000 towards funeral expenses.

Payments commenced in December 2007 and were made progressively until December 2009.

Level 2 payments

Level 2 payments were determined by the panel of experts based on relative levels of harm and the amount of funds available for Level 2. Decision of the panel was final and no appeal of this decision was available under the scheme. Applicants were at liberty to seek independent legal advice in relation to any challenge to this decision outside the scheme.

Level 2 payments amount varied and ranged from \$6,000 to \$33,000. Not all claims were assessed as having suffered more serious harm to the extent needed to qualify for a Level 2 payment.

Successful applicants who signed a deed and received a level 1 payment were not required to obtain further legal advice or sign another deed.

Successful applicants who had deferred their Level 1 payment pending the outcome of their Level 2 application were provided with a combined payment offer (level 1 and level 2) and had the choice to:

- accept the payment, obtain legal advice and sign the deed; or
- reject the payment and withdraw from the scheme.

Payments for successful applicants who had signed a deed at Level 1 but passed away before completion of Level 2 process were made to the applicant's estate.

Payments commenced in August 2009. As at 27 May 2010, a small number of payments were outstanding for applicants with no known address.

From 1 June 2010, outstanding payments to people who signed a deed at Level 1 will be held on behalf of the claimants by the Department and managed as unclaimed funds.

Outcomes

The Redress Scheme attracted 10, 218 applications from people across Australia and overseas.

Level 1

Of the total applications received, 7,453 were assessed as eligible for a Level 1 payment (this includes applicants who passed away before receiving a payment).

Level 2

Of the 5,416 applicants who applied for a Level 2 payment, 3,492 were approved for a level 2 payment ranging from \$6000 to \$33000.

Administration costs of the scheme have been met from within the Department of Communities existing budget and were not drawn from the \$100 M allocated for the scheme. Administration costs include staffing, payment of the panel of experts and application assistance. The total cost to administer the scheme to date is \$7.6M.

3.0 LEARNINGS

3.1 Administrative Processes

Advantages

Administrative Schemes can be extremely effective, efficient and economic to administer where:

- They involve very large numbers of claimants.
- Applicants entitlements are specific.
- The State holds and has the expertise to access and analyse relevant records.
- Services are provided both locally and at the central processing area for claimants to seek and receive assistance with their claims, further information, details of documentation required etc.
- Open communication between claimants and administering team is maintained.

Disadvantages

Processes resulting in standard payments may result in complaints from claimants about “everyone being treated the same” and specific personal circumstances not influencing the amounts paid.

3.2 - Settlement Processes

Advantages

- Legal precedent and legal settlement provide parameters for process and for settlement amounts .
- Enables individual circumstances to be taken into account.
- Provides a flexible response to situations where records may be patchy or non-existent.
- Enables the settlement process to be explained to claimants by reference to their circumstances.
- Enables information to be provided to ineligible claimants in ways that these claimants understand.
- Enables settlements to occur in communities so claimants do not have to travel and can call upon evidence of other residents for support and to substantiate claims.
- Settlement costs can be controlled by prior approval of legal fees, travel costs etc.

Disadvantages

- As claimants and the State are legally represented in the settlement process, costs are relatively high.
- As settlement conferences are conducted in communities, travel and related costs are high.
- As settlement conferences are conducted in communities, community events (eg deaths in community, community meetings) may preclude settlements occurring at short notice.
- Meeting are scheduled to suit community needs so the number of claimants waiting to have their claims addressed is not controllable and lengthy waiting periods can lead to dissatisfaction.
- As settlements are dependent upon individual circumstances, there is considerable variation in outcomes. Although settlements are confidential, information circulates in communities. This has on occasion resulted in complaints from claimants about “not everyone being treated the same”.

SUMMARY OF QUEENSLAND GOVERNMENT WAGES AND SAVINGS PROCESSES

Process	Precedent for Process	Eligibility	Eligibility Process	Outcome
Compensation for Under Payment of Award Wages	<ul style="list-style-type: none"> • Outcome of <i>Bligh and Ors v State of Queensland</i> (1996) HREOCA 28 resulted in successful claimants each being awarded \$7,000. 	<ul style="list-style-type: none"> • Had worked for predecessor departments of Aboriginal and Torres Strait Islander Services between 1975 and 1986 • Work attracted Award Wages • Were underpaid by reference to the relevant awards. • Were alive on 31 May 1999 	<ul style="list-style-type: none"> • Application Form completed with assistance from Indigenous service provider • UAW Process Staff established eligibility through search of Government records and from information sought from applicants (in case of difficulties in locating relevant records etc.) • Eligible claimants willing to execute a deed with legal advice provided by service provider, waiving right to further compensation 	<ul style="list-style-type: none"> • 5,729 eligible claimants were each paid \$7,000 • Total payments for the scheme were \$40.1 million.

Mission Worker Settlements	<ul style="list-style-type: none"> Baird v State of Queensland [2006] FCAFC 162 resulted in settlements in the range \$0 – \$85,000 	<ul style="list-style-type: none"> Had worked on communities of Hope Vale, Wujal Wujal, Aurukun, Mornington Island, Doomadgee in the period from 1975 to (varying) dates when Churches relinquished control. Work attracted Award Wages Were underpaid by reference to relevant awards Were alive on 31 May 1999 	<ul style="list-style-type: none"> Legal representatives of claimants took work histories from potential claimants. Work histories were checked by Queensland Government against existing records. Claims were assessed to determine underpayments Settlements to be offered were calculated on the basis of the formula adopted to settle the matters decided by the court Further information was sought or was provided by applicants at settlement conferences Documentation required for claims made on behalf of deceased persons to determine survival to survival date Agreed settlements resulted in execution of a deed with legal advice provided by applicants' legal representatives, waiving right to further compensation 	<ul style="list-style-type: none"> 758 matters settled to date for total settlements of \$5.12 million
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Reparations Process	None	<ul style="list-style-type: none"> • Were born before 1 January 1957 • Were subject to government controls over their wages and/or savings under the "Protection Acts" • Survived to 9 May 2002 	<ul style="list-style-type: none"> • Application Form submitted with assistance provided by departmental staff • Documentation required for claims made on behalf of deceased persons to determine survival to survival date • Eligibility determined by Reparations staff through search of Government records and other available records that claimants were subject to government controls over wages and savings. • Further contact with claimants was made by use of a Freecall Number staffed by Indigenous staff members • Eligible claimants willing to execute a deed with legal advice provided by a legal practitioner contracted for the reparations process by the Queensland Government, waiving right to further compensation. 	<ul style="list-style-type: none"> • 5773 persons paid \$35.5 million to date.
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