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Supplementary submission

to the Joint Standing Committee on implementation of the National Redress Scheme

Dear Senator Catryna Bilyk and Senator Dean Smith,

This supplementary submission by Tuart Place focusses on a single issue: the emergence of a disturbing trend in which increasing numbers of Western Australian First Nations survivors are being found ineligible for redress by the National Scheme.

The characteristics of this group are:

- Aboriginal people born after the repeal of the *Native Welfare Act in WA* (1963-1972)
- Descendants of Stolen Generations survivors of abuse in missions and orphanages;
- Placed by the WA Child Welfare Department in kinship care with Aboriginal relatives;
- Sexually abused by multiple offenders, the victims of adults who had themselves spent childhoods institutionalised and separated from parents.

As children, the State controlled every aspect of their lives, but did not place them under wardship. In most cases, the WA Government paid a subsidy for their maintenance. The Department decided where and with whom they would live, and where they went to school. They have extensive Child Welfare files often detailing frequent contact with the Department; admissions to reception homes, and/or visits from police and departmental workers.

The very poor conditions in which these children lived, regular instances of harm and injury, and the ongoing risks they faced are documented in Case Conference notes. For example, after being admitted to hospital starving and dehydrated, nine-year-old 'M' refuses to return to a foster placement so is released into her own care. She is described as *"placing herself at risk wandering around the neighbourhood all hours of the day, mixing with older undesirable teenagers and adults, there was some concern that she may have been glue sniffing and sexually active … and the Police reported that M was taking up a lot of their time…"* [Emphasis not in original] (DCW. *Case Conference Summary*, 20-12-1995).

The extreme risks and actual harms recorded in this nine-year-old child's file are characteristic of case notes on the wider cohort of First Nations survivors. Departmental staff monitored and reported on their circumstances and movements, and noted the risks and harms, but did not take statutory action to protect them.

We ask three questions:

1. Why was so little done to help this cohort of children, who were known to be living in appalling conditions, with obvious signs of abuse and neglect?

2. Why are they now not eligible for redress?

3. Why is this problem only emerging in Western Australia?

1. Why was so little done to help this cohort of children? These are the children and grandchildren of the Stolen Generations. Their childhoods occurred at a time of mounting public awareness and condemnation of the removal of Aboriginal children from their families. This awareness led to a backswing in policy; a 'hands off' approach by the Department; and repeal of the *Native Welfare Act in* WA (1963-1972).

After 1972, the lives of Aboriginal children were governed by the *Child Welfare Act 1947 (WA),*[1] under which the Department had broad powers to intervene in the lives of children considered to need care and protection, without taking formal responsibility for that child's welfare or placing the child under state wardship.

The aim of this legislative change was to prevent another generation of Aboriginal children being 'stolen', and arose from:

> *"…the efforts of Aboriginal and Islander Child Care Agencies during the 1970s to ensure that Aboriginal children were placed with Aboriginal families when adoption or fostering was thought to be necessary. The aim is to ensure that Aboriginal children are raised in a culturally appropriate environment*".[2]

This work led to the development of Aboriginal Child Placement Principles (ACPP) to guide the practice of child protection services in Western Australia. ACPP were eventually ratified by the Department for Community Services in 1985. From that time, Aboriginal children in Western Australia could not be placed with non-Aboriginal carers without the approval of the Director General.

While the motives for these policies were worthy, it led to a generation of Aboriginal children who had substantial involvement with Department, but were denied statutory protection in circumstances that clearly warranted it. The new 'hands off' approach did not account for the damage caused to the survivors of abuse and neglect in missions and orphanages, which led to mental health problems, drug and alcohol addictions, and impaired capacity to care for their own children.

2. Why are they not eligible for redress? As children, these survivors were placed by the Department in 'kinship' or so called 'private' arrangements with foster carers to whom they were related, and were not made wards of the state. They are now deemed ineligible for redress on the basis that the Department did not take this statutory action. The example below characterises the treatment of their NRS applications:

> *"[S]'s application was found ineligible today by the IDM who said that her mother was her legal guardian during the periods when the sexual abuse happened; that the Department of Communities administered a private foster care arrangement; and that they only paid money for her care while living with her grandmother, so they were not responsible for the abuse".*

The treatment of another application is similar, with an IDM observing that: *"While the Department was responsible for placing Ms [K] with her aunt, the Department had not made Ms [K] a ward of the state…*"

A subsequent Request for Review of this Determination was unsuccessful, with an IDM pointing out that he or she was "*not satisfied that [K]'s application for redress had met all of the eligibility criteria under section 13 of the Act … to the standard required by subsection 12(b)(c) of the Act…*". (Independent Decision Maker – *Statement of Reasons*, 20-1-23).

The impersonal wording of this Determination is hard to reconcile with the human experience. K's adult life has followed a sadly predictable trajectory of psycho-social disadvantage following an impoverished

[1] https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_135_homepage.html
[2] https://www.findandconnect.gov.au/guide/australia/FE00002

childhood marked by abuse and neglect. When K sought help to prepare a redress application in 2021, she found it harrowing, and was notably retraumatised by reliving the sexual abuse. As she waited more than a year for an outcome, she dreamed of having her teeth fixed and giving some money to her kids.

Because the Department's intervention in her childhood had been so substantial, K had believed she was a Ward, and eligible for redress. She was shocked, hurt and humiliated to discover that, because she was denied the protection of wardship as a child she is now ineligible. This extremely vulnerable and unwell First Nations woman, who still lives in poverty, is far worse off than before. She went through all that for nothing. This is not an isolated case.

3. Why is this problem only emerging in Western Australia? We have been unable to obtain a definitive answer to this question. It is unclear whether the rejection of these survivors' redress applications is occurring at the IDM level or at a state level.

knowmore Legal Service has observed that:

> "The situation is more complicated in Western Australia due to a practice of the Western Australian Government of placing children in private care arrangements. In this context, private care arrangements refer to the government placing a child into a non-institutional care arrangement (for example, with a family member) without bringing the child under state guardianship or obtaining formal court orders for the arrangement. While similar practices may have occurred in other states and territories, our experience is that survivors in Western Australia are most affected by this issue. The issue especially impacts Aboriginal and/or Torres Strait Islander survivors in Western Australia.
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> In our experience, if an NRS decision-maker identifies a private arrangement, they will almost certainly find the applicant ineligible for redress, regardless of any other eligibility factors. For example, we have seen the NRS find applicants ineligible for redress in cases where the Western Australian Government had ongoing involvement in the child's care, including in cases where the government was paying the child's carers for the arrangement.
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> This approach denies access to redress for survivors in situations where there is a significant degree of institutional responsibility held by the government".[3]

A further factor is that the NRS does not consider principles of duty of care and negligence when reaching a decision. Independent Decision Makers are only required to consider the factors set out in redress legislation. In this regard, the National Redress Scheme has a 'higher bar' than civil proceedings, which are often successfully brought on the basis of an institution's negligence in caring for a child, regardless of whether wardship was in place.

Tuart Place has raised this matter with the WA Inquiry, providing three case studies that illustrate the devastating experiences of this cohort of NRS applicants.[4] In our Supplementary Submission A, we cited heartening new data released by the WA Department of Justice showing that the identified problem (at least to July 2023) was statistically small, with only 28 applications deemed ineligible by the WA Government - just a fraction of the overall total of 3,135 applications received prior to 30 June 2023.[5]

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[3] knowmore Legal Service. *Submission to the WA Community Development and Justice Standing Committee's inquiry into the options available to survivors of institutional child sexual abuse*. 11-08-23 (p.42)

[4] https://www.parliament.wa.gov.au/Parliament/commit.nsf/(EvidenceOnly)/C759C87000EEB37E482589D600029F5A?opendocument#Submissions

[5] Government of Western Australia, Department of Justice, Office of the Commissioner for Victims of Crime. *Western Australian Government Submission*. P00039 18 August 2023. (p.28).

Although this data is now 12 months old, we believe the problem is probably still statistically small. While the flow of ineligible outcomes has continued, the treatment of these claims has diminished the confidence of survivors in applying for the Scheme, and, as service providers, we have been warning prospective applicants about this potentially negative outcome. Both factors have served to deter people from applying.

Not a big problem to fix

As we have continued to receive ineligible Determinations for our clients, we have often wished the person responsible could meet the person most affected – the survivor. And we wonder if they could bring themselves to make the same decision.

This cohort of survivors – the children and grandchildren of Stolen Generations survivors – are *by far* the most harmed, the most disadvantaged, and most vulnerable people we have encountered in 15 years of working with survivors of institutional child abuse. It is within this cohort of survivor-victims that the dynamic of intergenerational trauma and poverty has become truly apparent. The dreadful impact of refusing them redress cannot be adequately captured in words.

A great injustice – and a real moral wrong – is being done to a group of people who needed much better protection when they were young, and deserve far better treatment now.

Given that the rejection of this category of applications seems confined to a small proportion of NRS applicants, mostly in Western Australia, this may not be a big problem to fix.

We ask your Committee to examine the causes of this problem and recommend an appropriate remedy.

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