Inquiry into former forced adoption policies and practices: a national framework for Indigenous Australians

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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 relevant to this inquiry

PIAC welcomes the opportunity to provide this submission to the Senate Community Affairs References Committee's inquiry into the Commonwealth Government's contribution to forced adoption policies and practices. In this submission, PIAC focuses on the impact of forced adoption policies and practices on Indigenous Australians.

PIAC has worked extensively to advocate for access to remedies for Indigenous people who have suffered harm as a result of the impact of past government laws, practices and policies, in particular, those that permitted the forcible removal of Indigenous children from their families (resulting in the Stolen Generations), and those that diverted wages and other payments due to Indigenous people into government-managed trust fund accounts (referred to as Stolen Wages).

Since 2001, PIAC has advocated for the establishment of compensation schemes to address the wrongs committed against Indigenous Australians by past governments and to eliminate ongoing intergenerational disadvantage that continues to flow as a result. In this submission, PIAC draws

on its work developing a national framework for the provision of reparations to members of the Stolen Generations, their families and communities.

PIAC has had a long-standing interest in the impact of forced adoption practices and policies. In addition to PIAC's work with members of the Stolen Generations in relation to forcible removal practices, PIAC has also advised and represented non-Indigenous women subjected to forced adoption practices[1] and made a submission in 1999 to the *Legislative Council Standing Committee on Social Issues' inquiry into adoption practices in NSW from 1950 to 1998* (the 1999 Inquiry).[2]

Forcible removal practices in Indigenous communities

The *Bringing them home* report of the *National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (*National Inquiry*) deals extensively with forcible removal (including adoption) practices in Aboriginal and Torres Strait Islander communities in all jurisdictions in Australia.[3] The report acknowledges that, due to poor record keeping practices and the fact that many records in relation to removal practices have not survived, it is difficult to determine precisely how many Indigenous children were forcibly removed from their families.[4] However, it is estimated that between one in three and one in ten Aboriginal and Torres Strait Islander children were forcibly removed between 1910 and 1970.[5] These estimates do not differentiate between children who were removed from their families and placed in institutional homes, foster care or adoptive families. Indeed, the *Bringing them home* report acknowledges that adoption was one of the methods, among others, of removing Indigenous children from their families as part of a nationwide assimilation policy, which resulted in the widespread dislocation of Indigenous families and communities.[6]

Adoption practices varied across Australia; however, evidence presented to the *National Inquiry* presented many common features in the way in which the practices were carried out. Often forced adoptions occurred in circumstances where mothers who had just given birth were coerced to relinquish their newborn babies or where those whose children had already been removed were pressured by government agencies to consent to adoption.[7]

The *Bringing them home* report outlines in detail the various legislative frameworks that were in operation in all states and territories, which enabled the adoption of Indigenous children.[8] In NSW for example, Indigenous children removed from their families were placed under the care and

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1 *'W' v State of New South Wales* [1996] NSWSC No. 13426 of 1993 (Unreported, Greenwood M, 13 December 1996).

2 McEniery, Trish, *Submission to Legislative Council Standing Committee on Social Issues Adoption Inquiry*, Public Interest Advocacy Centre, December 1999.

3 Human Rights and Equal Opportunity Commission, *Bringing them home, Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* (1997).

4 Ibid, 36.

5 Ibid, 37.

6 Ibid, 48.

7 Ibid, 48, 153, 177.

8 Ibid, 31 – 149.

control of the Aborigines Protection Board, later renamed the Aborigines Welfare Board (collectively referred to as the 'Board'). The Board could not consent to the adoption of its wards, as it did not exercise guardianship responsibility over them. However, the now repealed *Adoption of Children Act 1965* (NSW) allowed for the consent requirement to be waived if the child's guardian (a parent or a family member), was 'in the opinion of the Court, unfit to discharge the obligations of a parent or guardian by reason of having abandoned, deserted, neglected or ill-treated the child.'[9] This allowed the Board to apply to the Children's Court to waive the consent requirement, rather than contacting the mother or guardian of a child to obtain consent to the adoption.[10] In the Australian Capital Territory, between 1954 and 1968, Indigenous children were removed under the *Commonwealth Child Welfare Ordinance 1954* (Cth). However, due to its geographic proximity to NSW, the Board was responsible for the removals and children were placed in institutions or foster care homes in NSW.

The National Inquiry

The *Bringing them home* report made recommendations on a wide range of issues to address the trauma and ongoing intergenerational disadvantage caused by forcible removal practices.[11] The recommendations included that all governments, as well as churches and non-government agencies that played a role in the administration of laws and policies under which Indigenous children were forcibly removed, should provide appropriate reparations to those who suffered as a result of those laws and policies.[12] The types of reparations recommended in the report consisted of:

1. **acknowledgment and apology** by federal and state parliaments, and by state and territory police forces, churches and non-government agencies;
2. **guarantees against repetition** through community education and legislation for national Indigenous Child Placement Principles, and incorporation of the United Nations Genocide Convention into Australian law;
3. **restitution** through language and culture centres, family tracing and reunion services and the protection of records;
4. **rehabilitation** by way of counselling services and providing opportunities for Indigenous communities to assume responsibility for the welfare of their children; and
5. **monetary compensation** to people directly affected by forcible removal practices.

Despite lengthy political discourse about the issue of reparations for Indigenous people, progress on the implementation of these recommendations has been very slow and inconsistent across the different states and territories. This is discussed in further detail below. However, the report also led to considerable improvements to the legislative and policy framework governing adoption practices, in particular, the introduction of Indigenous child placement principles in child care and protection legislation in various states and territories and the abolition of unjust consent waiver provisions which permitted the adoptions to be carried out without the consent of a child's parent or guardian. This submission, however, focuses on the overall response by Commonwealth,

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9 *Adoption of Children Act 1965* (NSW) No 23, section 32(c); Repealed by the *Adoption Act 1975* No 75.

10 *Bringing them home,* above n 3, 49.

11 Ibid*,* 651 – 665.

12 Ibid*,* 651 – 652, Recommendations 3, 4, 5a, 5b and 6.

State and Territory Governments to the recommendations of the *Bringing them home* report and proposes a national framework for ensuring there is a consistent and equitable approach to the provision of reparations to Indigenous people who suffered as a result of these unjust laws, practices and policies.

Addressing the consequences of forced adoption practices

Legal Claims

Historically, the role of litigation as a means of achieving social justice outcomes for Indigenous Australians has been limited. Whilst in some areas, such as land rights, there have been notable examples of the effective use of litigation as a means of redressing historical injustices and advancing rights long denied to Indigenous people,[13] such results have not been achieved in relation to broader issues such as compensation for members of the Stolen Generations and the repayment of wages and other entitlements denied to Indigenous people. Through its extensive experience advising and representing members of the Stolen Generations and Indigenous people more broadly, PIAC has observed the considerable challenges faced by those who seek to bring legal action against the government arising from forcible removal and other unjust practices. This is further evidenced by the fact that the case of *Trevorrow v State of South Australia* remains the only successful court claim for compensation by a member of the Stolen Generations against an Australian government.[14]

Trevorrow's case not only highlights the detrimental impact and ongoing disadvantage that flows from forced removal practices, it also demonstrates the continual challenges that members of the Stolen Generations face in seeking redress through the courts. In Trevorrow's case, the South Australian Government appealed against the first instance decision of Justice Gray in the Supreme Court, which found the state liable for breaching its duty of care, misfeasance in a public office and false imprisonment in relation to Trevorrow's forcible removal. Whilst Mr Trevorrow was ultimately successful in his action against the South Australian Government, it was after a decade long legal battle, and he died before the full court handed down its final decision. Whilst this is undoubtedly a significant case for members of the Stolen Generations and indeed the broader community, the legal reality is that there are significant barriers to accessing justice through the court system for members of the Stolen Generations.

The statutory bar on bringing legal proceedings after a specific period of time has elapsed since the occurrence of the harm (usually three to six years) will preclude many from making a claim against the government.[15] Although most jurisdictions and courts allow a plaintiff to apply for an extension of time in limited circumstances, there remain considerable challenges in getting past this first hurdle. In the case of *Cubillo v Commonwealth,*[16] although the Court was prepared to defer making a decision on the question of limitations until after it had considered the substantive matters raised in the case, it was ultimately decided that there would be 'irremediable prejudice'

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13 Mabo v State of Queensland (No 2) 1992 175 CLR 1.

14 *Trevorrow v State of South Australia* (2007) SASC 285.

15 In NSW for example, in addition to the three year time limit in which to bring a claim for personal injury, there is also an ultimate bar to bringing legal proceedings of 30 years from when the harm occurred: *Limitations Act 1969* (NSW), sections 18A and 51.

16 *Cubillo and Gunner v Commonwealth of Australia* (2001) 183 ALR 249.

to the defendant if the time limits were extended to allow the plaintiffs to bring their claim. This was largely due to the fact that the considerable passage of time since the relevant events, called into question the reliability of evidence.[17]

The difficulty with overcoming statutory limitations periods to bring an action in relation to harm that occurred a long time ago is not unique to Indigenous Australians. PIAC's submission to 1999 Inquiry into adoption practices in NSW, focused on its experience representing two non-Indigenous women who made claims against the NSW Government for the forced relinquishment of their babies in the 1960s.[18] For a number of reasons not relevant to this submission, only one of the cases ran in the Supreme Court and PIAC's client in that case, Ms 'W', was unsuccessful in overcoming the limitations hurdle. The Court found that the defendant, the State of NSW, would suffer prejudice if the limitations period were extended. The Court's finding was on the basis that key witnesses were either deceased or had no recollection of the events giving rise to the action and, as such, there would be prejudice to the defendant in trying to defend a claim dealing with events that took place 28 years earlier in the face of uncorroborated statements from Ms W.[19] A subsequent appeal of the decision by PIAC was also unsuccessful. In dismissing the claim, the court ordered that PIAC's client pay the legal costs of the defendant, which amounted to nearly $30,000.

This case highlights the difficulties of seeking redress through traditional legal avenues for people affected by forced adoption practices. Moreover, the risk of an adverse costs order serves as a significant disincentive to bringing any court action as unsuccessful litigants could be exposed to a court order requiring them to pay the legal costs of the other party. Ms W's case was funded by Legal Aid NSW, meaning that Legal Aid, rather than Ms W, was liable to pay the legal costs of the defendant in the proceedings. However, in PIAC's experience with these kinds of cases in NSW, it is very difficult to obtain a grant of legal aid because the challenges of overcoming the limitations hurdle significantly reduce the prospects of success and Legal Aid is generally reluctant to grant aid in cases with low prospects. Furthermore, in other states in Australia, a grant of legal aid would not necessarily protect the client against an adverse costs order.[20]

Stolen Generations litigants can also face inherent disadvantage in proving a claim to the requisite standard required by the courts, because of the lack of evidence available to support a successful claim. The *Bringing them home* report highlights the fact that records, which could have shed light on forced removal (including adoption) practices, were lost, destroyed, poorly kept or not properly maintained by government agencies and other agencies and institutions responsible for providing care and maintenance to removed Indigenous children.[21] If such records

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17 *Cubillo and Gunner v Commonwealth of Australia* (2001) 183 ALR 249, 365, 371.

18 McEniery, Trish, *Submission to Legislative Council Standing Committee on Social Issues Adoption Inquiry*, Public Interest Advocacy Centre, December 1999.

19 *'W' v State of New South Wales* [1996] NSWSC No. 13426 of 1993 (Unreported, Greenwood M, 13 December 1996), para 33 – 34.

20 In Victoria, Legal Aid may pay the costs of a person against whom a costs order has been made by a court or tribunal in specified circumstances, such as if the person applies in writing to claim assist with the payment of the costs, the amount claimed is reasonable and the person would suffer 'substantial hardship' if Victoria Legal Aid does not pay the costs.

21 *Bringing them home,* above n 3, 20.

were properly maintained and were complete, they could be of high evidential value in a court case as they may serve to corroborate aspects of the litigant's evidence.

The adversarial nature of litigation can also act as a disincentive to bringing an action in court. Litigants who have suffered emotional and psychological harm are required to undergo extensive cross-examination in relation to difficult and sensitive matters. The *Bringing them home* report highlighted the prevalence of sexual exploitation and abuse suffered by Indigenous people who had been removed and placed into institutional, foster or adoptive care. The report estimated that one in six witnesses to the *National Inquiry* gave evidence about experiencing sexual abuse.[22] PIAC has advised a number of members of the Stolen Generations, both men and women, who decided against pursuing an action for harm suffered as a result of their removal because they were not prepared to have to retell their story of abuse in an adversarial process. In one case, PIAC commenced an action against the government on behalf of an Indigenous woman who had been forcibly removed, however the client later withdrew the claim because the litigious process was too traumatic for her to continue.

There are further limitations on litigation as a measure to redress harm and disadvantage caused by forcible removal and adoption policies. Legal claims often turn on specific technical points and deal with narrow issues such as whether a mother's consent technically complied with the laws at the time. However, the claims do not address other issues of significance to Indigenous people such as the social, cultural and individual impacts of the removal policies and practices.

Proposal for a National Stolen Generations Reparations Scheme

In recognition of the considerable challenges faced by Indigenous people in obtaining redress through traditional legal avenues and the failure of governments, non-government agencies and churches to comprehensively implement the recommendations in the *Bringing them home* report, PIAC undertook an extensive national consultation project in 2001, called *Moving forward: achieving reparations*, in which it sought the views of members of the Stolen Generations, their families and communities about what reparations measures were important to them and an appropriate framework for the provision of reparations.

The consultation project culminated in a report initially released in 2002 and revised in 2009. That report, *Restoring identity*, proposed a model for a national Stolen Generations Reparations Tribunal as a framework for providing comprehensive reparations packages to members of the Stolen Generations, their families and communities to address the impact of forcible removal practices and ongoing intergenerational disadvantage resulting from those practices. A copy of the *Restoring Identity* report is attached at **Appendix A**.[23]

The proposed tribunal provides an alternative to litigation for members of the Stolen Generations seeking compensation for harm and injustices suffered. Further, the consultation project revealed that one key feature of such a tribunal should be to provide a forum for Indigenous people affected by forcible removal policies to tell their story in a non-adversarial process and to have their experiences documented and acknowledged. The tribunal would also be able to provide measures for reparations, including family tracing and reunion services, rehabilitation and counselling services and recommend changes to the law to ensure forcible removal practices are

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22 *Bringing them home,* above n 162 – 163.

23 Appendix A contains the revised version of *Restoring Identity*, which was released in 2009.

not repeated. In certain circumstances, monetary compensation for the harm caused to Indigenous people could be awarded to people directly affected by removal practices.

Restoring Identity contains a draft Stolen Generations Reparations Tribunal Bill (Bill), which encapsulates the tribunal model in legislative form and outlines the proposed functions and powers of the tribunal and sets out the eligibility criteria for reparations. The advantage of the proposed tribunal as a measure of addressing the impact of forced adoption and removal practices is that it allows for informality and procedural flexibility in its approach to providing redress. Further, the tribunal would be able to take a more holistic approach to addressing the needs of people affected by forced adoption and removal practices where appropriate, by providing a broad range of reparations as recommended in *Bringing them home*.

Although PIAC's proposal for a national Stolen Generations Reparations Tribunal has not been implemented, it has received considerable support from the Australian Democrats and the Australian Greens. Further, in June 2008, the Senate Standing Committee on Legal and Constitutional Affairs conducted an inquiry into a Stolen Generations Compensation Bill. PIAC presented its tribunal proposal to the inquiry. The Legal and Constitutional Affairs Committee found that PIAC's proposal might provide a valuable framework for consideration of the development of a reparations scheme, but the Committee did not go so far as to recommend its implementation. PIAC's Bill was recently re-introduced into the Senate on 30 September 2010 by Senator Rachel Siewert, the Australian Greens spokesperson for Community Services who renewed calls for the implementation of a national redress scheme modelled on the Bill.

The Commonwealth's role in addressing the consequences of forced adoption practices

The response to the recommendations in the *Bringing them home* report has been extremely slow, ad hoc, and inconsistent. The response has also lacked the sort of coordination and cooperation by all Australian Governments that was envisaged in *Bringing them home*. However, in the 14 years since the recommendations were made, there have been some positive developments in the efforts to provide a comprehensive package of reparations to Indigenous people affected by forced removal and adoption practices.

All Australian Governments have now formally acknowledged and apologised for past forcible removal policies. The apology to members of the Stolen Generations made by former Prime Minister, the Hon. Kevin Rudd, in February 2008 was the first significant breakthrough on a national scale in acknowledging the experiences of those affected by forcible removal policies. Since the apology, the Commonwealth Government has established an Aboriginal and Torres Strait Islander Healing Foundation to address the cycle of grief and trauma affecting the Stolen Generations and their families.

The Commonwealth Government has also continued to fund and extend the work of family reunion services such as Link Up and has implemented a range of other 'practical assistance' measures to provide counselling, parenting support programs, language and culture programs,

preserve government archival records and other measures to address the impact of forced removal policies.[24]

The State and Territory Governments have also implemented similar measures but there is a great variance across the different states and territories in the measures that are provided.

Further, there has been an emergence of State Government compensation schemes designed to provide financial redress to children who experienced abuse and/or neglect in state care. In 2006, Tasmania implemented a scheme to provide compensation to its members of the Stolen Generations under the *Stolen Generations of Aboriginal Children Act 2006* (Tas).[25] The Queensland redress scheme was established in May 2007 following the *Forde inquiry into abuse of children in Queensland institutions* to compensate harm suffered by Indigenous and non-Indigenous people in identified Queensland Government institutions.[26] The West Australian Redress scheme was established in December 2007 to provide redress to Indigenous and non-Indigenous children who suffered abuse and/or neglect while under the care of the state.[27]

The Queensland and WA redress schemes were not specifically designed for Indigenous people. However, given that many Indigenous people placed into state care were subjected to some form of abuse, neglect or other mistreatment in institutional homes, foster care or in the care of adoptive families, these schemes do provide some measure of reparations to members of the Stolen Generations in Queensland and WA.

Despite the emergence of these schemes and the varying measures implemented by the Commonwealth, State and Territory Governments to address the impact of forcible removal practices, there has not been a consistent and coordinated nationwide approach to addressing these issues. As a result, the overall response to the recommendations in the *Bringing them home* report has not been comprehensive or consistent. Indeed, the *Bringing them home* report in making recommendations about the provision of reparations to Indigenous communities affected by forcible removal practices, envisaged that such measures should be provided as part of a whole of government response to ensure that there is a consistent and equitable approach to providing reparations to those affected by forcible removal practices.

PIAC submits that the only way that this can be achieved is for the Commonwealth, State and Territory Governments to implement a nationwide response to addressing the issue and work in an effective partnership to ensure there is a consistent approach nationwide. PIAC's proposal for a National Stolen Generations Reparations Tribunal would ensure that there is such an approach.

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24 Minister for Aboriginal and Torres Strait Islander Affairs Hon John Herron, *Senate and Legal Constitutional References Committee inquiry into the Stolen Generations*, March 2000, ii-iii.

25 Office of the Stolen Generations Assessor, Department of Premier and Cabinet; *Stolen Generations of Aboriginal Children Act 2006 – Report of the Stolen Generations Assessor*, February 2008, 2 (The Tasmanian scheme offered compensation payments of $58,333.33 each to 84 surviving members of the stolen generations, and 22 additional payments of either $4000 or $5000 to children of deceased member's of the Stolen Generations. The Tasmanian scheme has closed.).

26 Queensland Government Department of Communities, *Redress Scheme Application Guidelines: About the Redress Scheme*, June 2008.

27 Government of Western Australia, *Redress WA Guidelines,* 15 February 2010.

PIAC urges the Committee to show its support for the introduction of a national tribunal by instigating debate on the Bill in the Senate, and giving serious consideration to the support of a national reparations tribunal, whether in its current proposal, or in an amended form.

Recommendations

1. *That the Commonwealth Government should introduce a nationwide response to forced removal and adoption practices;*
2. *That the Commonwealth, State and Territory Governments should coordinate their efforts to ensure that there is a consistent and equitable approach to the provision of reparations to Indigenous people who suffered as a result of forced removal and adoption practices;*
3. *That the Commonwealth Government should establish PIAC's model of a Stolen Generations Reparations Tribunal; and*
4. *That the Commonwealth Government should instigate a debate on PIAC's Stolen Generations Reparations Tribunal Bill in the Senate.*