



**Submission to Senate Finance and Public Administration  
Legislation Committee**

# **Inquiry into the Territories Stolen Generations Redress Scheme**

**10 September 2021**

## SUBMISSION

*Inquiry into the Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021 and the Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021*

Attn: Senate Finance and Public Administration Legislation Committee

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### Introduction

1. Shine Lawyers appreciates the invitation to provide a submission to the inquiry into the *Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021* (Cth) and the *Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021* (Cth) (together, “**the Redress Bills**”) undertaken by the Senate Finance and Public Administration Legislation Committee (“**FPALC**”).
2. Shine Lawyers is supportive of the redress scheme for survivors of the Stolen Generations in the Northern Territory, Australian Capital Territory and Jervis Bay Territory proposed by the Redress Bills (“**Proposed Scheme**”).
3. However, Shine Lawyers draws the attention of the FPALC to the issues of accessibility to the Proposed Scheme and the need for a general payment on behalf of victims of the Stolen Generations who have since passed away.

### Accessibility

4. Schemes of this nature have historically had issues regarding accessibility. That is to say that the people that the scheme was created for can have difficulty accessing the scheme for a range of reasons. This has the impact of further disenfranchising victims while undermining the purpose of the scheme itself.
5. We refer the FPALC to examples of similar schemes including relevant criticisms below. We would encourage the FPALC to learn from these historical examples and ensure that the Proposed Scheme improves for the benefit of those it has been created to compensate.

### New South Wales Scheme

6. The Stolen Generations Reparations Scheme in New South Wales (“**NSW**”) (“**NSW Scheme**”) was commenced on 1 July 2017 and encountered criticism for the eligibility criteria which restricted accessibility.
7. The NSW Scheme provided “ex-gratia payments to living Stolen generations survivors who were removed by, committed to, or otherwise came into the care of the New South Wales Aborigines Protection or Welfare Boards... up until the act was repealed on 2 June 1969.”<sup>1</sup>
8. The major criticism of the eligibility criteria was that it only extended to survivors under care of the Aborigines Protection or Welfare Boards which limited access to the NSW Scheme for Aboriginal people who were removed from their families through other frameworks, such as child welfare legislation.<sup>2</sup>
9. The final report of the Inquiry into Reparation for the Stolen Generations in NSW (“**NSW Report**”), which was presented to the government and used as the basis for the NSW Scheme, specifically notes the impact of child welfare legislation on the Indigenous population of NSW.<sup>3</sup> The NSW Report notes that Aboriginal children could come under the care of the Child Welfare Department if the child was found to be ‘uncontrollable’ by the court.<sup>4</sup> A submission to the NSW Report estimated that 1600 Aboriginal children were removed under child welfare legislation.<sup>5</sup> Despite being provided with this information, the NSW government limited the eligibility criteria, excluding these potential claimants.
10. In addition to this, the original eligibility criteria of the NSW Scheme set the cut-off date as 20 March 1969.<sup>6</sup> This was the date the government voted to repeal the relevant legislation, not the actual repeal date itself.<sup>7</sup> This led to claimant’s applications being rejected despite the fact that they had a valid claim that arose between the repeal vote date and the repeal

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<sup>1</sup> ‘NSW Stolen Generations Reparations Scheme and Funeral Assistance Fund’, *NSW Aboriginal Affairs* (Webpage, n.d.) <<https://www.aboriginalaffairs.nsw.gov.au/healing-and-reparations/stolen-generations/reparations-scheme/>>.

<sup>2</sup> <https://www.mondaq.com/australia/indigenous-peoples/982188/the-nsw-stolen-generations-reparations-scheme-appropriate-or-disproportionate>

<sup>3</sup> Legislative Council (NSW), *Reparations for the Stolen Generation in New South Wales: Unfinished Business* (Final Report, June 2016) 94.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid at 12.

<sup>6</sup> ‘NSW Stolen Generations Reparations Scheme and Funeral Assistance Fund’, *NSW Aboriginal Affairs* (Webpage, n.d.) <<https://www.aboriginalaffairs.nsw.gov.au/healing-and-reparations/stolen-generations/reparations-scheme/>>.

<sup>7</sup> Ibid.

itself. The eligibility criteria of the NSW Scheme was altered to extend the cut-off date accordingly.<sup>8</sup>

### South Australia Scheme

11. The South Australian Stolen Generations Reparations Scheme was criticised because a claimant's criminal history was considered in the decision making process for eligibility for a reparations payment.<sup>9</sup> The rejection of an application on the basis of serious criminal offending was considered prejudicial because it failed "...to recognise that the trauma experienced by members of the Stolen Generations has led to dysfunction and increased disadvantage which is associated with criminal behaviour."<sup>10</sup> This is another example of the issues surrounding accessibility for reparations schemes.

### Western Australian Stolen Wages Scheme

12. The Stolen Wages Reparations Scheme was established by the Western Australian government in 2012 to compensate Aboriginal people who were affected by wage control practices ("**WA Scheme**"). To be eligible, a claimant must have been born before 1958, been a resident at a government native welfare settlement and experienced control of their wages.<sup>11</sup>

13. The eligibility criteria of the WA Scheme was criticised because it only included residents of native welfare settlements even though it is well established that wage control practices also occurred on pastoral properties.<sup>12</sup> This strict eligibility criteria made the WA Scheme inaccessible to a large portion of Aboriginal people even though they had experienced wage control.

14. The WA Scheme was also criticised for the short window of time allowed for applications and the insufficient attempts to make potential claimants aware of the WA Scheme. Initially, claimants had a six month window to apply which was later extended to almost nine months.<sup>13</sup> Given the geographically dispersed nature of Western Australia, this

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<sup>8</sup> Ibid.

<sup>9</sup> John Hill, *Report of the South Australian Stolen Generations Reparations Scheme: Independent Assessor* (Final Report, July 2018) 63.

<sup>10</sup> Legislative Council (NSW), *Reparations for the Stolen Generation in New South Wales: Unfinished Business* (Final Report, June 2016) 96.

<sup>11</sup> Ibid.

<sup>12</sup> Western Australia Stolen Wages Taskforce, *Reconciling the Past: Government control of Aboriginal monies in Western Australia, 1905-1972* (Final Report, 2008).

<sup>13</sup> State of Western Australia, 'Stolen Wages Reparation Scheme WA (2012-2012)', *Find and Connect* (Webpage, 8 February 2019) <<https://www.findandconnect.gov.au/guide/wa/WE00788>>.

application period did not provide ample time for claimants to apply, restricting accessibility.

15. The cultural and linguistic diversity of the potential claimants compounded the issue of accessibility because, even if informed of the WA Scheme, a claimant may not have been able to apply for a range of reasons including literacy levels and limited access to support (such as translators).

#### Shine Lawyers Experience

16. Shine Lawyers is in a unique position to comment on accessibility issues faced by Aboriginal Australians in accessing schemes like this. Shine Lawyers are the solicitors for the applicants in class actions to recover compensation for Stolen Wages practices in Western Australia and Northern Territory ("**Stolen Wages Class Actions**").
17. An important step in all class actions is to promote the class action to potential claimants to inform them of their legal rights in relation to the class action. Typically, when promoting a class action, Shine Lawyers advertise through online, social media, radio and print media channels.
18. For the Stolen Wages Class Actions Shine Lawyers has done all of the above to promote the Stolen Wages Class Actions but has also had to undertake an "Outreach Program" to sufficiently inform potential claimants of the class action. This has involved Shine Lawyers staff physically visiting 62 communities in Western Australia and planning to visit 87 communities in the Northern Territory.
19. This additional step to promote the Stolen Wages Class Action has been necessary for several reasons;
  - a. the dispersed nature of the potential claimants;
  - b. a lack of internet and mobile reception in many areas where potential claimants reside;
  - c. a lack of means or technical literacy required to undertake research into the class action;
  - d. a lack of literacy levels or low levels of formal education among potential claimants means that the ability to read and understand promotional material cannot be assumed; and

- e. the need to have direct dialogue with potential claimants in order to explain facets of the class actions and their options in relation to it (this is important where mobile reception is limited for claimants).
20. The Outreach Program ensures that potential claimants who may not have been notified about the class action are able to access the information necessary to make informed decisions about their legal rights. Without undertaking this program, it is likely that claimants would completely miss their opportunity to be compensated for the losses they have suffered.
21. With regard to the above examples and experience, Shine Lawyers emphasises the importance of considering accessibility for all survivors in the implementation of the Proposed Scheme. This is in relation to both the eligibility framework of the Proposed Scheme, as well as the way potential claimants are communicated to.

### **Inclusion of Deceased Survivors' Families**

22. Shine Lawyers also notes that the Proposed Scheme is “for survivors of the Stolen Generations who were removed as children from their families”.<sup>14</sup> The Proposed Scheme does not appear to extend to people impacted by the Stolen Generations who have since passed away (“**Deceased Survivors**”).
23. Due to the period of time that Stolen Generations practices occurred, a large number of people impacted by the Stolen Generations will have passed away to date. The Australian Institute of Health and Welfare estimated that between 2002 and 2018, the cohort of surviving members of the Stolen Generations reduced by approximately 20%, with this trend to continue as the surviving cohort continue to age.<sup>15</sup>
24. Shine Lawyers submits that, by excluding Deceased Survivors, the Proposed Scheme will fail to properly recognise the harm caused by the forcible removal of Aboriginal Australians. The impact of Stolen Generations practices has not been limited to those directly involved but has impacted subsequent generations, ultimately contributing to the societal disadvantage still faced by many Indigenous Australians.

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<sup>14</sup> Explanatory Memorandum, Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021 (Cth) cl 2.

<sup>15</sup> Australia Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations and descendants: Numbers, demographic characteristics and selected outcomes* (Final Report, 2018) 96-97.

25. The Tasmanian Stolen Generations Scheme (“**TAS Scheme**”), despite its issues, made provision for a compensation payment not exceeding \$5,000 to Aboriginal children of members of the Stolen Generations.<sup>16</sup> This payment was approximately \$50,000 less than a payment to a surviving member of the Stolen Generations in recognition of the differing level of impact.<sup>17</sup>
26. By making provision for this, the Tasmanian government recognised that descendants of members of the Stolen Generations were impacted and, therefore, deserved a measure compensation.
27. In addition to financial compensation, the Proposed Scheme offers survivors the opportunity to tell their story and receive a personal apology from a government representative. Shine Lawyers believes this should also be extended to the families of Deceased Survivors and while living survivors should be prioritised, those families of Deceased Survivors should have an opportunity after living survivors to engage in this process.

### **Shine Lawyers’ Experience with the Northern Territory Stolen Generations**

28. Shine Lawyers are the solicitors for the Applicant in the class action against the Commonwealth on behalf of the Stolen Generations in the Northern Territory. As at the date of this submission Shine Lawyers have been contacted by approximately 349 potential group members.
29. Prior to the filing of the Originating Application and Statement of Claim on 28 April 2021, Shine undertook an extensive investigation of the claims of the Applicant and of persons who are or are likely to be group members in this class action.
30. In the course of those investigations, and following the commencement of the proceeding, representatives of Shine have attended on numerous Aboriginal persons who were removed as children. As such, we have built significant relationships with key persons in the community and have become a crucial point of contact.
31. Following the Morrison’s Government announcement of the Proposed Scheme, Shine Lawyers have been contacted by numerous potential group members who have expressed concerns with the Proposed Scheme. These concerns include:

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<sup>16</sup> *Stolen Generations of Aboriginal Children Act 2006* (Tas) ss 5, 11.

<sup>17</sup> Legislative Council (NSW), *Reparations for the Stolen Generation in New South Wales: Unfinished Business* (Final Report, June 2016) 94.

- a. the “dishonour” that they feel due to the exclusion of deceased family members, including a number of stories of family members passing away in the week before the announcement;
- b. confusion at the process of applying for redress and seeking legal advice as to how they would access the compensation as many do not have access to or understanding the appropriate legal processes; and
- c. concerns in light of low literacy and numeracy levels the ability to comprehend the documents required.

## **Conclusion**

32. Shine Lawyers hopes that the FPALC takes the above points into consideration through the inquiry. Accessibility to the Proposed Scheme is a vital factor which, if appropriately considered, will ensure all impacted people are compensated and that the scheme is ultimately successful. Consideration should also be given to extending the Proposed Scheme to include (in both financial and non-financial terms) the families of members of the Stolen Generations who have passed away.

33. Shine Lawyers welcomes the general intention of the Proposed Scheme but regard must be had to the form and execution of the Proposed Scheme, in order to achieve its intended outcomes.

## **SHINE LAWYERS**

10 September 2021