



Law Council
OF AUSTRALIA

Office of the President

30 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

RESPONSE TO QUESTION ON NOTICE FROM 24 SEPTEMBER 2021 HEARING OF THE INQUIRY INTO THE TERRITORIES STOLEN GENERATIONS REDRESS SCHEME BILLS

1. The Law Council of Australia (**the Law Council**) appreciates the opportunity to have appeared before the Senate Finance and Public Administration Legislation Committee (**the Senate Committee**) at its public hearing in relation to its inquiry into the Territories Stolen Generations Redress Scheme (Facilitation) Bill 2021 and the Territories Stolen Generations Redress Scheme (Consequential Amendments) Bill 2021, facilitated via video link on Friday 24 September 2021.
2. During the course of the hearing, representatives of the Law Council undertook to provide further details on the recommendation in the 1997 *Bringing Them Home Report* of 'the establishment of a national reparations tribunal' for Stolen Generations survivors, following a question from Senator Lidia Thorpe.¹ The response to this Question on Notice is as follows.

1997 Recommendation of a National Compensation Fund

3. For clarity, the Law Council corrects the record on the phrase 'national reparations tribunal'. The actual phrase used in the recommendations of the 1997 *Bringing Them Home Report* was 'National Compensation Fund', to be administered by a 'Board' constituted of a majority of Indigenous people and chaired by an Indigenous person.² In full, these recommendations read as follows:

¹ Evidence to Senate Finance and Public Administration Legislation Committee, Parliament of Australia, Canberra, 24 September 2021, 'Proof Committee Hansard', 13 (Tony McAvoy SC, via video link).

² 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* (April 1997) <https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>.

Recommendation 15: That the Council of Australian Governments establish a joint National Compensation Fund.

Recommendation 16a: That the Council of Australian Governments establish a board to administer the National Compensation Fund.

*Recommendation 16b: That the Board be constituted by both Indigenous and non-Indigenous people appointed in consultation with Indigenous organisations in each State and Territory having particular responsibilities to people forcibly removed in childhood and their families. That the majority of members be Indigenous people and that the Board be chaired by an Indigenous person.*³

4. Part of the reasoning behind recommending a National Compensation Fund was in response to the concern expressed by the Australian Government at the time ‘that different jurisdictions would be likely to differ in their decisions on compensation, thus causing inequity between claimants’.⁴
5. The Law Council reiterates the point it was making at the hearing in reference to these recommendations of the *Bringing Them Home Report*: that the fact these recommendations have gone without action for almost twenty-five years speaks to the importance of facilitating the widest possible application and reach of the scheme now proposed, such as extending the scheme to deceased estates.
6. In this respect, the Law Council notes the *Bringing Them Home Report* anticipated the National Compensation Fund as a scheme of the widest possible application, stating, ‘Everyone who can establish forcible removal and everyone who can establish harm or loss resulting from the forcible removal of any person should be entitled to claim monetary compensation regardless of the date of removal’.⁵
7. It characterised the National Compensation Fund as a (voluntary) ‘alternative to the cumbersome and often prolonged processes of civil claims’, and therefore considered that ‘its processes should be straight-forward and non-technical’, making recommendations as to procedural principles such that there should be ‘the participation of Indigenous decision-makers’, ‘cultural appropriateness’, the ‘widest possible publicity’, and ‘no limitation period’.⁶ It further recognised that, given ‘evidentiary material such as records may be difficult to obtain or have been destroyed’, ‘the burden of proof should be on governments to rebut otherwise credible claims’, rather than on claimants.⁷
8. The Law Council observes that the substance of these recommendations – the overwhelming importance of accessibility – has now been repeated nearly twenty-five years later in much of the evidence to the Senate Committee on the present proposed Redress Scheme.

³ Ibid.

⁴ Ibid.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid.

Yours sincerely

Dr Jacoba Brasch QC
President