21 October 2015

Dear Member of Parliament,

Stolen Generations (Compensation) Bill 2014

The Public Interest Advocacy Centre (**PIAC**) notes the Stolen Generations (Compensation) Bill (**the Bill**) was restored to the South Australian House of Assembly on 24 September 2015. The Legislative Council approved the Bill in December 2014, prior to the prorogation of the first session of the 53rd parliament.

PIAC is an independent, non-profit law and policy organisation, based in NSW but with a nation-wide remit. PIAC has a long history of working with Aboriginal and Torres Strait Islander communities and has for many years advocated for a reparations scheme to be established to fulfil the recommendations made in the 1997 *Bringing them Home* report (**BTH report**).

PIAC understands that there is a degree of reluctance from the Government and certain stakeholders to adopt the Bill in its current form. PIAC recognises that the Bill is limited, particularly in that it provides only for a monetary payment scheme to recognise the impact of the forcible removals policy on members of the Stolen Generations and their children. This clearly falls short of recommendation 3 of the BTH report, which provided for reparations to be made to members of the Stolen Generations which encompassed:

- an acknowledgement and apology;
- guarantees against repetition;
- measures of restitution;
- measures of rehabilitation; and
- monetary compensation.

PIAC acknowledges that no amount of money will ever be able to adequately compensate for the trauma and injury inflicted upon members of the Stolen Generations. Nor will a compensatory payment scheme address the intergenerational trauma that continues to impact Aboriginal and Torres Strait Islander communities. PIAC believes the best approach would be for the South Australian Parliament to approve a bill establishing an independent tribunal in accordance with the *van Boven principles*.[1] Such a Tribunal would be able to award a range of reparation measures, including not only monetary payments but access to appropriate counselling services, health services and language and cultural training; community education programs about the history of forcible removals; and monetary payments for individuals to meet current needs such as funding to travel to see family.[2]

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[1] Professor Theo van Boven, *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law* (24 May 1996).

[2] PIAC drafted a Bill encompassing the full range of reparations that the BTH report recommended, see Public Interest Advocacy Centre, *Providing Reparations: A Brief Options Paper* (1997), Appendix C in Durbach, A and Thomas, L *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the Stolen Generations Compensation Bill*, Public Interest Advocacy Centre and the Australian Human Rights Centre, April 2008, available at http://www.piac.asn.au/publication/2008/04/080410-piac-stolengens.

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At the same time, PIAC recognises an urgent need to initiate some form of process to recognise the suffering of members of the Stolen Generations and their descendants. The advancing age of members of the Stolen Generations, the failure of civil litigation to provide a plausible route to compensation and the intergenerational trauma caused by the forcible removals policy may mean a pragmatic approach is most appropriate. Accordingly, although this Bill falls short of the kind of redress the BTH report envisaged, PIAC supports its adoption in principle.

PIAC does, however, share the concerns regarding a number of the Bill's clauses that have been raised by Aboriginal communities and others in South Australia.[3] If these concerns are not addressed by way of legislative amendment, the Bill runs the risk of creating an ineffective scheme, the practical implementation of which would risk undermining the broader reconciliation framework.

Accordingly, working within the parameters of this Bill, PIAC sets out a number of recommendations in this letter regarding how the Bill should be improved with a view to mitigating the concerns that have been raised.

About the Public Interest Advocacy Centre

PIAC works for a fair, just and democratic society, empowering citizens, consumers and communities by taking strategic action on issues in the public interest. Established in July 1982 as an initiative of the (then) Law Foundation of New South Wales, with support from the (then) 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 Trade and Investment NSW for its work on energy and water, and from Allens 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 also works with private law firms that provide pro bono legal services. In preparing this briefing, PIAC acknowledges with gratitude the work and support of Herbert Smith Freehills.

PIAC has been involved in work to remedy the problems faced by the Stolen Generations since the early 1990s, in close collaboration and consultation with Aboriginal and Torres Strait Islander communities throughout Australia. PIAC has represented members of the Stolen Generations seeking compensation in the NSW Supreme Court and before the NSW Victims Compensation Tribunal.

Following the publication of the BTH report, PIAC conducted a national consultation project, *Moving forward: achieving reparations*, that brought together over 150 Aboriginal and Torres Strait Islander people and consulted with all Stolen Generations groups that existed in Australia at the time. The report from this consultation, *Restoring Identity*, was published in 2002. Among other matters, the report called for a comprehensive reparations tribunal to be established which reflects the various facets of monetary and non-monetary compensation recommended by the BTH report. Following this process, PIAC developed and published a draft Stolen Generations compensation tribunal bill.[4]

PIAC was also extensively involved in advocating for the reimbursement of Aboriginal trust funds monies to rightful claimants in NSW. Once the NSW Aboriginal Trust Fund Reparations

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[3] See, for example, letter from Rocco Perrotta (President Elect of The Law Society of South Australia) to Hon. Terry Stephens MLC, 30 October 2014, 4.

[4] See note 2, above.

Scheme (**ATFRS**) was established (otherwise known as the 'Stolen Wages scheme'), PIAC worked to publicise the scheme among relevant communities, provided representation and information to claimants and descendant claimants, and provided training for all lawyers who represented ATFRS claims through the Stolen Wages Referral Scheme.

PIAC's current policy and legal work primarily focuses on criminal and civil justice issues, with a large number of PIAC's current clients being Aboriginal and Torres Strait Islander young people. PIAC's Indigenous Justice Program, set up in 2001, aims to identify public interest issues that impact on Aboriginal and Torres Strait Islander people and conduct public interest advocacy, litigation and policy work on behalf of our clients and their communities.

In-principle support for the Bill

Nearly two decades since its publication, there have been minimal steps towards reconciliation along the lines proposed by this Bill. Tasmania remains the only state to have established a compensatory scheme. Compensation schemes for Stolen Wages have been established in NSW, Western Australia and Queensland (the latter to reopen in late 2015 due to initial inadequacies in its operation). There have been a number of bills that have proposed compensation schemes specifically for the Stolen Generations, in both the federal and state jurisdictions.

PIAC urges the South Australian Parliament to adopt the current bill, albeit with amendments. As reflected through extensive consultation PIAC has undertaken in the wake of the BTH report with Aboriginal and Torres Strait Islander communities, there is a clear desire for such a tribunal to be established.

Outline of the Bill

The Bill currently before the South Australian Parliament provides for ex-gratia payments to be made to Aboriginal and Torres Strait Islander applicants who were removed from their families prior to 31 December 1975, or their biological children where those applicants are deceased.

The Preamble to the Bill provides that the South Australian Parliament recognises that the forcible removals policy were racist and caused emotional, physical and cultural harm, that Indigenous children 'should not, as a matter of general policy, be separated from their families' and calls on the 'distinct identity of the Stolen Generations' to be recognised. It also provides for an ex-gratia payment scheme to be established in 'further recognition' of their experiences.

Part 1 sets out preliminary issues. Part 2 sets out how the ex-gratia payment scheme should be administered: a Minister, whose functions can be delegated, shall determine if an applicant is eligible for an ex-gratia payment (clauses 4 and 5). Part 3 sets out who is eligible to apply (clause 6), how applications shall be made (clause 7), the quantum and method of payment (clause 8) and notification of the determination to the applicant (clause 9). Part 4 provides for certain decisions made by the Minister to be reviewable by the South Australian Civil and Administrative Tribunal (clause 12). Part 5 sets out miscellaneous matters, including for the provision of regulations.

The clauses and how PIAC believes they should be amended are set out in further detail below.

Part 1 – Preliminary

PIAC notes clause 3 sets out that the Bill, if passed, will not 'exclude or derogate from rights to damages or compensation that exist under any other Act or law'. PIAC supports this approach.

While PIAC believes it may be appropriate to take into account any amount of compensation awarded through another process, participation in the ex-gratia payment scheme should not preclude the possibility of resorting to civil litigation if the survivor wants this. While PIAC believes that the majority of claimants will prefer the tribunal process over and protracted litigation, there are situations where litigation is more suited to the matter at hand.

Part 2 – Administration

Clause 4(1) of the Bill provides that the Minister has the function of determining whether an applicant is eligible for an ex-gratia payment and to determine the quantum of that payment. Clause 5 provides for the Minister to delegate that function to a body or person.

Appointing the Minister as the sole decision maker differs markedly from previous proposals for compensation schemes, which have recommended a Tribunal be established by the proposed Act.[5] Under the *Stolen Generations of Aboriginal Children Act 2006* (TAS) (the **Tasmanian Act**) a 'Stolen Generations Assessor' was appointed by the Tasmanian Premier (s 14).

PIAC agrees with the South Australian Law Society that it is important that an independent assessment be made of any claim for an ex-gratia payment.[6] While there is no reason to doubt the Minister and his or her delegates will exercise their discretion fairly and perform their functions properly, it is vital that there be an arms' length decision maker so that affected communities are certain that in both perception and reality there is no bias. PIAC's experience with the ATFRS scheme in NSW is that transparency, accountability and independence are vital features of any compensation scheme to secure community confidence in the process. PIAC does not believe that a scheme administered by the Minister will achieve those objectives.

PIAC's favoured model is that an independent tribunal be established by the Act. Establishing a tribunal would also influence the process for how the scheme would operate. PIAC's *Restoring Identity* report recorded that an important element of reparations that emerged from community consultations was to provide 'a forum in which Indigenous people affected by forcible removal policies could tell their story, have their experience acknowledged and be offered an apology'.[7] As it stands, the Bill will not lead to any apologies being given directly to the complainant. However, having a process by which a tribunal assesses a claim for a compensation payment is more likely to allow for a process by which applicants will be given a forum to tell the story of what happened to them as children and its long-term impact.

PIAC appreciates that the intention behind clause 5 may be for the Minister to delegate to a panel of assessors. To remove any doubt, this structure should have a legislative basis.

In the alternative, PIAC would propose that an independent assessor be appointed, akin to the model adopted in the Tasmanian Act as noted above. The functions of the 'Stolen Generations Assessor' were to 'decide whether an applicant is eligible for an ex-gratia payment' and 'such other functions as may be prescribed' (s 15). There are a number of advantages that stem from the independent assessor model, including the reality and perception of independence from government and consistency in decision making.

PIAC accordingly recommends the Act be amended as follows.

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5 For example, see cl 4 of the Stolen Generations Reparations Tribunal Bill 2010 (SA); cl 7 of the Stolen Generations Compensation Bill 2008 (Cth).

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7 Public Interest Advocacy Centre, *Restoring Identity – Final report of the Moving Forward consultation project* (2002), 55.

Amendment 1 (Option A): Functions of the Minister

Page 3, line 18, after 'to' insert 'to appoint a Tribunal'.

Page 3, line 29, at end insert new clause

'5A – Composition of the Tribunal

(1) The Tribunal shall consist of six members, at least half of whom must identify as Aboriginal or Torres Strait Islander.

(2) The Minister must by writing determine a code of practice within 15 days of the commencement of this Act, for selecting persons to be nominated by the Minister for appointment as members of the Tribunal. The code of practice should set out general principles on which the selections are to be made, including but not limited to:
(a) merit; and
(b) independent scrutiny of appointments; and
(c) probity; and
(d) openness and transparency.

(3) After determining a code of practice under subsection (2), the Minister must publish the code in the *South Australian Gazette.*

(4) A code of practice determined under subsection (2) is a legislative instrument for the purposes of the *Subordinate Legislation Act 1978* (SA).

'5B – Powers of the Tribunal

(1) The Tribunal has power to do all things necessary or convenient to be done to perform its functions and, in particular, has power:
(a) to obtain information from departments and agencies; and
(b) to obtain further information from the applicant, if unable to decide from the information obtained under paragraph (a) whether an applicant is eligible for an ex-gratia payment under s 8.

(2) The Tribunal may exercise its powers notwithstanding any other legislation relating to the confidentiality or privacy of information.'

Consequential amendments are set out in Appendix A.

Effect of Amendment 1 (Option A)

The effect of Amendment 1 (Option A) would be to require the Minister to appoint a panel of six independent people, half of whom should identify as Aboriginal or Torres Strait Islander, that would determine whether an applicant is eligible and, if so, the quantum of the payment they are due. PIAC believes that establishing a Tribunal will lend itself to more of a 'forum' in which applicants can tell their story. PIAC also considers it vital that there be strong consultation with Aboriginal and Torres Strait Islander communities in establishing any monetary payment scheme; requiring half the Tribunal identify as Aboriginal or Torres Strait Islander will assist to achieve that objective.

Amendment 1 (Option A) also sets out the powers that will be necessary for the Tribunal to effectively fulfil its functions. This follows the approach taken in s 16 of the Tasmanian Act. It

places the appropriate emphasis on the Tribunal to identify any official records of the removal, rather than placing the onus entirely on the applicant to establish their claim.

In the alternative:
Amendment 1 (Option B): Functions of the Minister-

Page 3, line 18, after 'to' insert 'to appoint a person to be the Stolen Generations Assessor'.

Page 3, line 29, at end insert,

'5B – Powers of the Stolen Generations Assessor

(1) The Stolen Generations Assessor has power to do all things necessary or convenient to be done to perform their functions and, in particular, has power:
(a) to obtain information from departments and agencies; and
(b) to obtain further information from the applicant, if unable to decide from the information obtained under paragraph (a) whether an applicant is eligible for ex-gratia payment under s 8.

(2) The Stolen Generations Assessor may exercise their powers notwithstanding any other legislation relating to the confidentiality or privacy of information.'

Consequential amendments are set out in Appendix B.

Effect of Amendment 1 (Option B)
The effect of this amendment would be to require the Minister to appoint an independent person to be a Stolen Generations Assessor. If a Tribunal is not to be established, PIAC believes the option taken under the Tasmanian Act would be preferable to the appointment of the Minister as the sole decision maker with regard to claims for compensation made by applicants. The Amendment also sets out the powers needed for the Assessor to complete his or her role effectively, for the same reasons given above.

Part 3, clause 6 – Eligibility for the ex-gratia payment scheme

Clause 6 sets out eligibility for an ex-gratia payment. Eligible applicants include:
(a) an Aboriginal person who was, as a child, removed from his or her family prior to 31 December 1975 (where the removal was carried out, directed or condoned by the State government or an agent of the State government); or
(b) who is a biological child of a deceased person contemplated in subclause (a).

An 'Aboriginal person' is defined in clause 2 to include 'a person of the Aboriginal race of Australia', while a 'child' is defined as 'a person under 18 years of age'. This accords with the definition under the *Aboriginal and Torres Strait Islander Act 2005* (Cth).

PIAC believes the definition of eligible descendants is unnecessarily narrow. PIAC recommends this criterion be widened to better reflect kinship structures within Aboriginal and Torres Strait Islander communities and to ensure that all those who are affected by the forcible removals policy are included. Limiting eligibility to biological children will also likely disadvantage the earliest members of the Stolen Generations, whose only surviving family may be their grandchildren and subsequent generations. Amendment 2 would better ensure the injuries caused by the Stolen Generations policy are properly addressed.

Amendment 2 – Eligibility for ex-gratia payment under Act

Page 4, line 7, remove subsection (b).

Page 4, line 6, at end insert:

(b) an Aboriginal or Torres Strait Islander person and a living descendant of a deceased person who would have satisfied the criteria in subsection (1); or

(c) an Aboriginal or Torres Strait Islander person who is a relative or family member of a person who satisfies or would have satisfied the criteria in subsection (1),

who the Tribunal is satisfied suffered or was harmed as a consequence, in whole or in part, of the removal of that person.'

Effect of Amendment 2

The effect of new sub-clause (1A) would be to extend eligibility to grandchildren and great grandchildren of deceased members of the stolen Generations. New sub-clause (1B) would catch those more indirect relations of those who were removed, but who were directly affected by the removal.

PIAC recognises that it will be important that there be close consultation with South Australian Aboriginal and Torres Strait Islander communities to give further definition to the category of living descendants within the specific kinship structures of their communities. Further definition would most appropriately be placed in regulation, provided for under clause 16 of the Bill. PIAC would recommend that the Tribunal take into account statements by organisations such as the Nunkuwarrin Yunti of South Australia and Aboriginal Family Support Services (South Australia) for the purpose of determining eligibility under this section.

Part 3, clause 6 – Exclusions from the ex-gratia payment scheme

Clause 6 also contains exclusionary criteria, such that a person will not be eligible for an ex-gratia payment:

- 'unless he or she is living' at the time the Act comes into operation: cl 6(2);
- 'if the Minister determines that the person's removal from his or her family was genuinely in the person's best interests': cl 6(3); or
- 'if the person's removal from his or family arose out of the person having been found guilty of the commission of an offence': cl 6(4).

PIAC recommends that clause 6(3) be removed from the Bill. Given the history of the forcible removals policy, the use of the 'best interests' phrase, and indeed this criterion more generally, is irredeemably problematic. History has shown that those charged with removing children frequently justified their actions as being in the 'best interests of the child' as it was understood at the time. The Chief Protector in Western Australia from 1915 to 1940, for example, stated

> there are scores of children in the bush camps who should be taken away from whoever is looking after them and placed in a settlement. … I want to give these children a chance … Unless those children are removed, social conditions in those places will go from bad to worse. …I want to teach them right from wrong.[8]

Excluding applicants on the basis that their removal was in their 'best interests' is to invite a debate that may prove hurtful and damaging to the applicants and achieve the opposite of what

[8] 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), 95.

is intended by the Bill. Credible evidence that the removal was in the child's best interests could be a factor in the consideration of the quantum of damages to be awarded to the applicant, where relevant.

Amendment 3 – removal of the 'best interests' exclusion
Page 4, line 10, remove subclause (3).

Effect of Amendment 3
Amendment 3 would remove sub-clause 6(3) from the Bill.

PIAC also has concerns regarding sub-clause 6(4), which provides that a person is ineligible for an ex-gratia payment if the removal arose from the person having been found guilty of the commission of the offence.

PIAC considers clause 6(4) is cast too broadly in two respects:

- it may inadvertently exclude persons who were removed on the grounds that they were 'destitute' or 'neglected', definitions that may have been applied to the detriment of Aboriginal children due to a lack of respect for or understanding of Aboriginal culture and traditions;
- by using the language of 'commission' of an offence, as opposed to 'conviction', an applicant may be deprived of an ex-gratia payment even where they were removed due to a minor or trifling offence.

Due to these concerns, outlined in further detail below, PIAC recommends sub-clause 6(4) be removed (Amendment 4, Option A, below). In the alternative, PIAC recommends that the sub-clause be amended to directly target it to the commission of serious criminal offences (Amendment 4, Option B, below).

Amendment 4, Option A – remove sub-clause 6(4)
Page 4, line 13, remove sub-clause (4).

Effect of Amendment 4, Option A
Amendment 4, Option A, would remove sub-clause 6(4) in its entirety.

As noted above, the inclusion of this exclusion is likely to be detrimental. The Law Society of South Australia observed that Aboriginal children in South Australia were sometimes themselves charged with, and convicted of, neglect and suggested that the Bill be amended to ensure that it does not exclude applicants on this basis.[9] The *State Children's Act 1895* (SA), for example, in force from 1895 to 1927, provided:

> 32. Any constable may, without a warrant, apprehend any child appearing or suspected to be a destitute or neglected child, and take such child before Justices.
>
> 33. The Justices, upon complaint being made in the prescribed form, and upon being satisfied that any child charge with being a destitute child ro a neglected child, is in fat a destitute child or a neglected child, may order such child to be forthwith sent to an institution, to be

[9] Letter from Rocco Perrotta (President Elect of the Law Society of South Australia) to Hon. Terry Stephens MLC, 30 October, 2014, 4.

> there detained or otherwise dealt with under this Act until such child shall attain the age of eighteen years.

It is certainly arguable that a child removed under the *State Children's Act 1895* (SA), on the ground that they were 'destitute' or 'neglected', could be said to have been removed because they were 'guilty of the commission of an offence'. The High Court has held that the phrase 'commission of an offence' should be distinguished from the phrase 'conviction of an offence', with only the latter referring to a finding of guilt by a criminal court.[10] The position is more uncertain in this context given the Bill is framed in terms of someone 'found guilty of the commission of an offence'.

In any event, the inclusion of the sub-clause is problematic given the context in which 'neglect' or 'destitute' were often applied in order to remove Aboriginal children, particularly given these terms were often adopted to classify nomadic traditions of Aboriginal culture. Allowing a child to 'sleep in the open air', for example, was often classified as 'neglect'.[11] Further, inclusion of the sub-clause would allow denial of payment to persons whose removal was justified on the basis they had committed a minor offence.

Accordingly, PIAC's preference is that sub-clause 6(4) be removed (as per Amendment 4, Option A, above). In the alternative, the sub-clause should be narrowed, as per Amendment 4, Option B, below.

Amendment 4, Option B

Page 4, line 13, remove from 'person's to the end of line 15, and insert

'person was removed from his or her family as a result of being convicted of a serious offence.

(5) Subsection (4) does not apply to an applicant who was convicted of being a neglected child or destitute child under the *State Children's Act 1985* (SA) or similar legislation.'

Effect of Amendment 4, Option B

For the reasons outlined above, the language of being 'found guilty of the commission of an offence' is too broad; this amendment would narrow the application of this exclusion to those who were removed after being convicted of a serious offence. To remove any doubt, new sub-clause (5) would ensure that those who were inappropriately considered to be 'neglected' or 'destitute' in order to justify their removal are not excluded from making an application.

This amendment reflects ss 5(4) and 5(5) of the Tasmanian Act. The Stolen Generations Assessor in Tasmania noted in this report:

> When considering this issue, the Assessor examined the wording on the face of any court record to determine whether or not the removal resulted from a 'conviction' for an offence. In many cases where minor offences were involved, the Children's Court did not proceed to a formal conviction and the word 'conviction' did not appear on the record. In those cases, it was determined that section 5(4) did not apply.

[10] See observations of French CJ, Hayne, Kiefel, Bell and Keane JJ in *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 89 ALJR 382, at [37].

[11] *Bringing them Home* report, at 104.

> In a number of cases applicants were convicted only of being a neglected child and those applicants, if they satisfied the remaining criteria in the Act, were eligible to receive an ex-gratia payment.[12]

Part 3, Clause 7 – Time for making an application

Clause 7(3) currently provides a six month time limit to make an application to the ex-gratia payment scheme, with no exception contemplated. PIAC believes imposing such a tight timeframe for applications to be made would completely undermine the payment scheme and must be amended.

In PIAC's experience, one of the greatest limitations of the success of the Stolen Wages repayment scheme in NSW was the short timeframe for the lodging of claims. The tight timeframe did not allow for communities to become even aware of the opportunity to make a claim, let alone receive sufficient independent legal advice in order to make a submission. PIAC notes that the recommendation by the Royal Commission into Institutional Responses to Child Sexual Abuse is that any redress scheme established in accordance with its recommendations should have no closing date.[13] Considering the extent of the trauma suffered during the era of forcible removals, there must be sufficient time for members of the Stolen Generations to come to terms with the difficulty of telling their story, once again, trusting that on this occasion they will be listened to. Time must also allow for independent information and advice to be given to potential applicants.

PIAC notes that there was a six-month time limit imposed under the Tasmanian Act. It should be borne in mind, however, that the structure of that payment scheme differed, with no ex-gratia payments being able to be made until the number of descendant applications was known. The time limit in the Tasmanian Act therefore had to straddle two competing interests: allowing sufficient time for applicants to make an application, while ensuring that the time limit imposed did not unduly delay the making of payments.

Imposing a six-month time limit would also be out of step with the South Australian victims compensation scheme, which currently allows victims of crime to make an application for compensation within three years of the commission of the offence.[14] Victims compensation can clearly be distinguished from what is being considered here; PIAC does not suggest that a deadline be tied to the actual act of forced removal. The victims compensation scheme limitation period does, however, provide a useful example and comparator when considering of how long an applicant for an ex-gratia payment will need to be informed about the scheme, seek and receive legal advice and complete his or her application.

PIAC has recommended in the context of a nation wide reparations tribunal scheme for members of the Stolen Generations that a 10-year timeframe be imposed. In the context of a single state, PIAC recommends that a three-year time limit be substituted for the current six month period.

Amendment 5 – time limit for making applications

Page 4, line 22, remove '6 months' and insert '3 years'.

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12 Department of Premier and Cabinet, Parliament of Tasmania, *Report of the Stolen Generations Compensation Assessor* (2008), 14.

13 Royal Commission into Institutional Responses to Child Sexual Assault, *Redress and Civil Litigation report* (September 2015), at page 39.

14 *Victims of Crime Act 2001* (SA), s 18(2).

Effect of Amendment 5

Amendment 5 would require applications to be made to the repayment scheme within three years after the commencement of the section.

PIAC also considers that discretion to extend time in certain circumstance is important in the context of the Bill, even if Amendment 5 is adopted, thereby increasing the time for making an application to three years. Delays in making an application could arise for any number of reasons, such as difficulties in obtaining relevant records and evidence to substantiate an application due to the passage of time and a lack of awareness of the scheme in rural and remote communities.

PIAC suggests that potential applicants be able to apply to the decision maker for an extension of time to make an application, providing parameters for the decision maker so as to ensure consistency in the determination of such applications.

Amendment 6 – discretion to extend time for making applications

Page 4, line 22, at end insert

‘(3A) The Minister* may, for any proper reason, extend the time for making an application under s 7(3), taking into account

(a) the reason for the delay;
(b) the merits of the application;
(c) fairness as between the person and other persons in a like position; and
(d) any other factor the Minister considers to be relevant.

(3B) A person who is eligible under s 6(1)(a) is excluded from the operation of s 7(3A).

* *or Tribunal, should Amendment 1 (Option A) be adopted.*

Effect of Amendment 6
New sub-clause (3A) would allow for an application for time to be extended beyond the time limit imposed under clause 7(3) in certain circumstances.

New sub-clause (3B) would prevent a person who is eligible to make an application under sub-clause 6(1)(b) (that is, ‘the biological child of a deceased person contemplated’ by sub-clause 6(1)(a)) to make an application for an extension of time to submit their compensation claim. Currently, the Bill caps the aggregate amount that can be paid to the biological children of a particular deceased person at $50, 000. It is therefore necessary to finalise the number of applicants before an ex-gratia payment can be made. Practical difficulties would therefore arise if the decision maker has made ex-gratia payments to 10 biological children of a single deceased person, but then later an 11th biological child makes a late application and is found to be eligible.

Part 3, new clause 8A, time for making a determination

Currently, under the Bill there is no time limit imposed on the decision maker in which to decide applications. PIAC believes there should be a fixed time frame imposed on the making of

determinations under clause 8. This would provide certainty for applicants and reduces the scope for undue delays in the decision making process. The timeliness of decision making under the Bill is particularly important in a context where many of the applicants are elderly. Accordingly, we consider that it would be prudent for a 12-month time limit to be imposed on decision making to ensure that eligible applicants receive an ex-gratia payment within a reasonable period of time.

Amendment 7 – timeframe for decisions

Page 5, line 20, at end insert

‘8A Time for completion of assessments

(1) Except as provided in this section, the Minister* must make his or her decision in relation to eligibility for an ex-gratia payment under s 8 within 12 months after receiving an application.

(2) Where the Minister* defers determination of an application under s 9(3), the Minister must make his or her decision in relation to eligibility for an ex-gratia payment within 6 months after the expiry of the period within which applications must be made.’

** or Tribunal, should Amendment 1 (Option A) be adopted.*

Effect of Amendment 7

Amendment 7 would insert a new clause 8A which would require the decision maker to determine the questions of eligibility and quantum of the ex-gratia payment within 12 months of receiving the application.

Sub-clause 8A(2) would impose a six month time limit on the decision maker in circumstances where the decision maker has deferred a determination where there are multiple descendant applicants under sub-clause 8(3).

Practical matters

Based on its experience in relation to the Stolen Wages repayment scheme in NSW, PIAC also makes a number of recommendations in relation to the practical operation of the repayment scheme to maximise the changes of its success. In brief, these include the following.

- The repayment scheme must be accessible, with hearings or forums held in regional and rural areas as well as in metropolitan areas.
- Any guidelines or regulation setting out what should be accepted as evidence by the decision maker should be less stringent that those applied in the context of civil litigation. In PIAC’s experience of the Stolen Wages scheme in NSW, a great limitation of the scheme was the refusal to rely solely on oral and circumstantial evidence. The Tasmanian Stolen Generations Assessor, on the other hand, relied on corroborating evidence from eye-witnesses to determine claims where records were lost, destroyed or had never been created.
- The procedures adopted by the decision maker should be informal. In PIAC’s experience with the Stolen Wages scheme in NSW, informality of process ensured that for many clients it was a positive experience to be able to tell their story.
- PIAC also recommends that, bearing in mind any privacy concerns, any determinations by the decision maker with regard to compensation payments be made public. In PIAC’s

experience with the Stolen Wages scheme in NSW, the lack of transparency around the determinations was a weakness of the scheme. The publication of decisions will ensure confidence in the process and parity across applications. This could be adequately dealt with in regulations.

- A key to the ex-gratia payment scheme's success will depend in part on how widely its function and role are publicised and promoted. With regard to the Stolen Wages scheme in NSW, PIAC made its own efforts to raise awareness about the scheme by staging community forums and meetings throughout NSW. During these meetings, PIAC was frequently told by potential claimants that they had never heard of the scheme. It is vital that the ex-gratia payment scheme is accompanied by a specific communications strategy is developed and adequately funded.
- Independent legal advice and information should be provided at all stages for potential claimants. PIAC's experience of Stolen Wages in NSW shows that whether or not an applicant was legally represented, or received legal assistance, made a difference to the outcome of the process. Training should be provided, where necessary, to all lawyers assisting claimants to equip them with the ability to support a claimant through the process.
- Clause 15 provides an Annual Report be prepared and laid before both Houses of Parliament. It is vital that the views of claimants and other participants are included in this reporting process. Generally speaking, the greater the transparency the more likely the scheme will retain the confidence of South Australian communities.

Should you have any queries please do not hesitate to contact us, our details are below.

Yours sincerelv

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Appendix A: Consequential amendments should Amendment 1 (Option A) be adopted

Page 3, line 9, at end insert,

> ***Tribunal*** means the tribunal appointed under s 4.

Page 4, line 10, delete 'Minister' and insert 'Tribunal'.

Page 4, line 18, delete 'Minister' and insert 'Tribunal'.

Page 4, line 19, delete 'Minister' and insert 'Tribunal'.

Page 4, line 24, delete 'Minister' and insert 'Tribunal'.

Page 4, line 25, delete 'Minister' and insert 'The Tribunal'.

Page 4, line 30, delete 'Minister' and insert 'Tribunal'.

Page 4, line 34, delete 'Minister' and insert 'Tribunal'.

Page 5, line 2, delete 'Minister' and insert 'Tribunal'.

Page 5, line 11, delete 'Minister' and insert 'Tribunal'.

Page 5, line 16, delete 'Minister' and insert 'Tribunal'.

Page 5, line 21, delete 'Minister' and insert 'The Tribunal'.

Page 5, line 22, delete 'Minister' and insert 'Tribunal'.

Page 5, line 25, delete 'Minister's' and insert 'Tribunal's'.

Page 5, line 26, delete 'Minister' and insert 'Tribunal'.

Page 5, line 29, delete 'Minister' and insert 'Tribunal'.

Page 6, line 8, delete 'Minister' and insert 'the Tribunal'.

Page 6, line 10, delete 'Minister' and insert 'Tribunal'.

Page 6, line 11, delete 'Minister' and insert 'Tribunal'.

Page 7, line 4, delete 'Minister' and insert 'Tribunal'.

Page 7, line 6, delete 'Minister' and insert 'Tribunal'.

Appendix B: Consequential amendments should Amendment 1 (Option B) be adopted

Page 3, line 9, at end insert,

> ***Stolen Generations Assessor*** means the tribunal appointed under s 4.

Page 4, line 10, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 4, line 18, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 4, line 19, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 4, line 24, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 4, line 25, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 4, line 30, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 4, line 34, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 5, line 2, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 5, line 11, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 5, line 16, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 5, line 21, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 5, line 22, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 5, line 25, delete 'Minister's' and insert 'Stolen Generations Assessor'.

Page 5, line 26, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 5, line 29, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 6, line 8, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 6, line 10, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 6, line 11, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 7, line 4, delete 'Minister' and insert 'Stolen Generations Assessor'.

Page 7, line 6, delete 'Minister' and insert 'Stolen Generations Assessor'.