Royal Commission into Institutional Responses to Child Sexual Abuse
GPO Box 5283
Sydney 2001
By email: solicitor@childabuseroyalcommission.gov.au

Dear Commissioners,

Responses to: Consultation Paper Redress and Civil Litigation

Members of the Northern Territory Stolen Generations Aboriginal Corporation (NTSGAC) would like to thank you for giving interested persons opportunity to contribute responses to the Consultation Paper Redress and Civil Litigation.

Since the National Inquiry into the separation of Aboriginal and Torres Strait Islander children in 1997, monetary compensation has been a key recommendation in providing full and effective reparations to those removed under official government policies\(^1\).

Compensation for the Stolen Generations in the Northern Territory has remained a key recommendation for reparation and an issue of national and international concern.

The consequences of removal have been documented in *Bringing them home*, academic research and government reports\(^2\). This together with the personal testimony of those removed shows the primary effect was detrimental and laid foundations for ongoing individual and community problems.\(^3\) *Bringing them home* describes the effect of removal as traumatic and reveals in some cases physical, psychological and sexual abuse\(^4\) in many instances children were brought up in conditions of neglect, with poor levels of education and where Aboriginal culture was suppressed\(^5\).


\(^4\) Cornwall, 'Restoring Identity', 10.

\(^5\) Ibid.
This evidence concludes that there is strong moral and legal basis for providing compensation and that there is a growing urgency to resolve this issue as the Stolen Generations have little time left.

NTSGAC is a community based organisations representing the interest and concerns of all former Aboriginal residents removed from their families and traditional lands and placed in Intuitions across the Top End, that aims to achieve access to justice for wrongful removal. We seek to provide ‘Link Up’ services and support, promote member’s human rights and work to redress inequalities experienced by them and their families.

Victims compensation through litigation has been a particularly significant area of our casework practice over many years. The Cubillo / Gunner / Kruger versus Commonwealth are cases in point.

Please find our responses to the Consultation Paper Redress and Civil Litigation at Attachment A.

Yours sincerely

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6th March 2015
Responses to the Royal Commission Consultations Paper
Redress and Civil Litigation

Failings of Institutions
As became apparent in the Royal Commission hearing Case Study 17, many of the children who lived at Retta Dixon Home (RDH) during the time were sexually abused by carers or others. Some suffered either severe physical or mental trauma at the hands of those charged with their care. Others suffered from sexual or physical assault when fostered out. The same can be said by children who were removed and placed in other institutions across the Northern Territory.

All institutions where Aboriginal children were removed to from their mothers were established under Commonwealth policies from the period 1911 to 1971. Children were deemed “wards of the state”. Those who were not wards of the state were otherwise effectively in government care, which had been delegated by the Commonwealth to Religious organisations.

Failings of the Federal Government
Compensation is internationally recognised as essential in acknowledging and repairing the harm done to those who have suffered gross violations to their human rights. The focus of this Response is compensating children who form part of the Stolen Generations in the NT and to establish Commonwealth responsibility. We contend the Commonwealth had responsibility towards the welfare of these children. This was so whether they had been removed from their families and placed in these institutions by officers of the Commonwealth pursuant to assimilation policies or otherwise.

The Commonwealth continues to consistently maintain the relevant institutions were responsible for harm caused to children removed under Commonwealth law. While the evidence presented to the Commission in Case Study 17 supports this, any position of attributing total blame to the Aboriginal Inland Mission (now the Australian Indigenous Mission) or to other such institutions presents as an apparent denial of responsibility that properly resides with the Commonwealth.

Most past residents of NT institutions acknowledge the Commonwealth was not solely responsible for their loss and damage caused by trauma. The actual perpetrators who were engaged by the religious organisations where they were held bear principal responsibility for the crimes perpetrated upon them. Nevertheless, we take the view that the Commonwealth government was in part responsible for the trauma that was visited upon them and had legal liability for the loss and damage suffered by them.
NTSGAC was heartened to hear in Case Study 17 that the Commonwealth has accepted a level of responsibility and indicated a preparedness to engage in redress talks. We note the following statements were made by counsel for the Commonwealth in the Royal Commission:

On 24 September 2014 –

"Thank you Your Honour. You asked yesterday at the closing whether the Commonwealth accepts that it was the guardian of these children in this home, and the answer in many cases would have been yes. The Commonwealth recognises that the children who were removed from their parents in accordance with Commonwealth legislation and placed in an institutionalised Retta Dixon Home were effectively under the guardianship of the Commonwealth and that it had a general responsibility toward all the children in the home.

The Commonwealth government accepted that it had responsibility for care, welfare, education and advancement of those children, and a Commonwealth official was the legal guardian of these children. The Commonwealth retained responsibility until 1978, which was the time of self government".

And in closing submissions on 17 November 2014 -

"The statement that I made during the course of the hearing stands Your Honour, in relation to the Commonwealth's responsibility to these children. The Commonwealth has indicated, and maintains a preparedness to participate in a redress discussion. That redress discussion, will of course, need to extend to children in like positions, if those children are identified, so it’s uniform and appropriate”.

These comments are welcomed and we see this as proof for the Royal Commission to make recommendations for the Commonwealth to fully engage in meaningful Redress and Compensation for members of the Stolen Generations.

Failings of Religious organisations
We suggest there be a nationally consistent scheme across Australia and that a mechanism be established to frame compensation amounts based on criteria that recognise the seriousness of the damage caused by child sexual assault that is independent of the vagaries of political and budget priority influences and subject to indexation.

Religious organisations recruited mainly single men and women to provide the day to day care of children placed in their care. Few if any had Policies in place to vet their employees. Little or no training was provided and as was reported to the Commissioners in Case Study 17 no policy was in place when it came to reporting sexual abuse once employees became aware of these abuses taking place.

Children were physically abused (punished) when one had the courage to step forward and report these crimes to their institutional carer. Consequently, many suffered silently and alone believing these acts as a stain against them personally.
Civil Litigation

Litigating under the only Justice System we have has not always been favourable experiences for Aboriginal people. Two cases brought by NTSGAC against the Commonwealth *Kruger v Commonwealth*[^8] and *Cubillo/Gunner v Commonwealth*[^9] failed. The reasons provided for in the judgment in that case may point to possible reforms to civil litigation systems that can be put to the Royal Commission. Damages were sought on the basis of wrongful imprisonment and deprivation of liberty, negligence, physical, emotional and sexual abuses; and breach of statutory and fiduciary duty. Extension of time was sought under the Limitation Act (NT). One of the findings was the Commonwealth was not responsible for the sexual abuse of Peter Gunner while he was at St Mary’s as only the Director of Welfare had a duty of care to the claimant. We have always argued both were legally responsible and both failed in their duty of care. In any event, the children were abused.

Detriments to Civil Litigation for survivors of abuse include to some extent:

- Lack of written records
- Generations of loss
- Focus is on individual claimants
- Incidents of harm
- Witnesses are frail and old
- Passing of time equals passing of witnesses
- Legal costs

The likely or possible re-traumatisation and the publicity involved in seeking redress through civil litigation has been the reason for most witnesses, assessed by legal teams as having a very good chance of success, to not pursue litigation. The causation and damage assessment processes, particularly if they involve cross-examination and facing their perpetrators is not always the way to go. Some witnesses may be quite willing to pursue redress through litigation, most are not.

Statutory victims’ compensation schemes and schemes or processes established by Governments or institutions to offer compensation and/or services that can independently assess information provided to it by victims, without public airing of the information and without cross-examination is preferred.

The possible use of mediation and early dispute resolution processes may sit well with some however, there is a need to seek out variants of these processes to form part of a mechanism suitable to victims who are unwilling to risk re-traumatisation. To instigate change in the litigation systems that eliminates or lessens the risk of re-traumatisation must continue to be an important objective for the Royal Commission. Royal Commission

outcomes that do not achieve this objective would fail many victims potentially. Several of the Aboriginal victims of sex abuse suffered while institutionalised have stated that they see the Royal Commission as ‘our last chance’, by which it is taken to mean their last chance of Redress.

That justice in the form of appropriate punishment delivered through the criminal justice system to individuals and/or institutions deemed culpable for crimes committed against victims by the perpetrators is a compensatory measure that comes within the meaning and objective of providing redress to victims. For that to happen the criminal justice system continues to be the only means of achieving that.

Elements of Redress and Compensation

NTSGAC agrees with the Royal Commission on the three elements of redress. Guaranteeing the funds for counselling and psychological care and a monetary sum in recognition of the wrongs done. Many survivors suffer life-long consequences, yet removal from families into institutional care with a promise of a better life, failed them. For many, the life sustained was cruel and brutal in most cases.

Many suffer unstable lives today. They have missed out on being able to have opportunities that others get as a rule for their personal lives to be productive. Career opportunities to enable them to build wealth and home ownership has eluded them as a result of the trauma suffered. Many have never once held down jobs as they are so scared.

Compensatory redress

(a) Monetary Compensation

Monetary compensation can be a significant part of the healing process for people who were harmed and abused. In the case of the NTSGAC Going Home Conference in 1994, and the recommendations in the Bringing them Home Report much support was given for legislation to establish a system of ‘just redress’ with the giving of ex gratia payments. A National Scheme of Redress is our preferred option given the NT Government’s appalling history in ensuring just compensation for Aboriginal people and we give the examples of Aboriginal peoples rights under the Land Rights (NT) Act and Native Title Act. They (NT) have fought long and hard, at a great cost in the Courts denying Aboriginal people of these rights.

Monetary Compensation will assist in rebuilding lives,

(b) Counselling and Therapeutic

NTSGAC endorses continued counselling services for victims and their families. Our preference, given many mainstream counselling services are not being utilised to the

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extent it should by Aboriginal users, that the Royal Commission also recommends therapeutic services that are more culturally appropriate for our client group. These services should be funded to include healing camps and getting back to country to let the country heal within. There are examples for the success of these forums across many Indigenous nations internationally.

(c) Psychological care
Although many will go on to gaining some mental and emotional benefit with psychological care therefore requiring the service less, many more will require support well into the future. We strongly endorse this care be available on an ongoing basis where necessary.

(d) Legislative and Executive Program Compensation
1. Changes to the Native Title legislation and the Aboriginal land Rights (NT) Act 1976 to recognise rights to land for those removed from their families;
2. Resources to support economic participation;
3. Introduction of a Bill of Rights that would provide protection and safe custody of Aboriginal children and to prevent the future removal of Aboriginal children from their families; and
4. Develop historical information about Stolen Generations and the impact of go

Another and in our view important form of Redress that is encompassed by all four of the above categories is to establish a community centre in Darwin to support those removed and harmed. Views about this have already been proposed to the Royal Commission.

NTSGAC comments relating to the Royal Commissions probable recommendations:

1. The establishment of a national redress scheme of some kind supported by culpable institutions as well as Governments is supported.
2. We would like the Commonwealth of Australia to make contact with NTSGAC as soon as practicable to initiate talks with a view to making reasonable redress and that Institutional group members should come together and reach their own redress arrangements without delaying the process any further.
3. There must be a degree of flexibility in implementing a Redress scheme. The knowledge and understanding held by NTSGAC can optimise the coordination of Redress implementation when it relates to our members. Involvement of NTSGAC requires funding arrangements to be made available to NTSGAC for this purpose.
4. We agree on the scale of compensation proposed and would not support any amount below the $65,000 as many experienced sexual abuses beyond comprehension. Crimes of this nature must not be trivialised by token gestures just to pacify politics of the day.
5. We do not support payments by instalments. One off payments will go some way to allow for immediate needs to be met but more importantly understanding many of our members are frail and aged.
6. Statutory victims of crime compensation schemes should recognise that injury is inherent in sexual assault and sexual abuse. Statutory victims of crime compensation schemes should have, as an option, a base level claim that does not have a separate requirement that an injury be made out before. Time limits should not apply for statutory compensation schemes for victims of child sexual abuse for compensation to be awarded.

7. There should be no time limitation when reporting sexual abuse or in application for redress to crime compensation schemes. We know of many who still have yet to report after 40 years of holding in the trauma — every individual has to be ready to speak up and report when they know it is safe to do.