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The Director
General Purpose Standing Committee No. 3
Parliament House
Macquarie St
Sydney NSW 2000

Dear Director,

RE: Reparations for the Stolen Generations in New South Wales (Inquiry)

The UNSW Law Society is the peak representative body for all of the students in the UNSW Faculty of Law. Nationally, we are one of the largest student-run law organisations, attracting sponsorship from prominent national and international firms. We seek to develop UNSW Law students academically, professionally, personally and socially, and to assist students to aspire towards their professional and personal paths. The UNSW Law Society is proud to celebrate a rich diversity of students with a multiplicity of aims, backgrounds and passions.

We welcome the opportunity to make a submission to the New South Wales Legislative Council Inquiry into reparations for the Stolen Generations of NSW.

The submission below reflects the varied backgrounds, perspectives, values and opinions of the students of the UNSW Law Society. It addresses points 1(b) and 2(c) of the Inquiry Terms of Reference.

Kind Regards,

UNSW Law Society

Submission to
New South Wales Legislative
Council General Purpose Standing
Committee No. 3

*Inquiry into Reparations for the
Stolen Generations in New South
Wales*

August - October 2015

UNSW Law Society

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Overseas Jurisdictions

This section addresses point 1(b) of the Inquiry Terms of Reference.

A number of jurisdictions have introduced reparations schemes to provide redress to indigenous populations. By analysing the approaches to reparations in New Zealand; Canada; South Africa; and Sweden, Norway and Finland, this section will identify factors to be considered when designing and implementing a reparations scheme in Australia.

New Zealand

After the establishment of The Waitangi Tribunal, the New Zealand government engaged in a comprehensive reparation process to address Maori grievances arising from breaches of the 1840 Waitangi Treaty.

A Benefits of the New Zealand Reparations Model

Design of the Reparations Model

The three core components of the New Zealand reparations model are:

1. Tribunal inquiries into Maori grievances,
2. The role of the courts, and;
3. A reparation package negotiated with the New Zealand Government.¹

In 1975 the New Zealand government established the Waitangi Tribunal to address any Maori complaints of breaches of the 1840 Treaty of Waitangi.² The tribunal's scope was widened in 1985 to include retrospective powers to examine historical grievances from 6

¹ Catherine J Iorns Magallanes, 'Reparations for Maori Grievances in Aotearoa New Zealand' in Frederico Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 523, 564.

² *Treaty of Waitangi Act 1975* (NZ) s 6(1).

February 1840 to the present.³ Since its inception the Tribunal has adjudicated a variety of claims, including claims relating to education funding,⁴ the Maori language,⁵ and representative decision-making.⁶

The New Zealand courts have also been involved in the reparations process through their application of the common law doctrine of Aboriginal title, the Treaty of Waitangi and interpretation principles to resolve historical grievances.⁷ Decisions have involved issues of customary title,⁸ legislative measures to ensure compliance with Treaty principles⁹ and the use of the Treaty as an interpretative tool to adjudicate challenges from indigenous groups against government legislation.¹⁰ However, many grievances have been settled out of court, due to the New Zealand's government willingness to negotiate settlements with Maori claimants. Settlements have included financial reparation payments for indigenous groups¹¹ and, perhaps more importantly, a Crown apology for past grievances.

B Criticisms of the New Zealand Model

Tribunal Limitations

The Tribunal can only make non-binding recommendations, and hence cannot bind the New Zealand Government. Moreover, since 1993 the Tribunal's remedial powers have also been reduced.¹² Other limitations to the Tribunal's success have been its underfunding, leading to

³ *Treaty of Waitangi Amendment Act 1985* (NZ) s(1), amending the *Treaty of Waitangi Act 1975* (NZ) s 6(1).

⁴ Waitangi Tribunal, *The Wananga Capital Establishment Report* (Wai-718, 1999).

⁵ *Report of the Waitangi Tribunal on the Te Reo Maori Claim* (Wai-11, 1986).

⁶ Waitangi Tribunal, *Preliminary Report on the Te Arawa Representative Geothermal Resource Claims*, 1993.

⁷ Catherine J Iorns Magallanes, 'Reparations for Maori Grievances in Aotearoa New Zealand' in Frederico Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 523, 542.

⁸ *Te Runanganui o Te Ika Whenua Inc Soc v Attorney-General* [1994] 2 NZLR 20.

⁹ *Conservation Act 1987* (NZ) s 4; *State Owned Enterprise Act 1986* (NZ).

¹⁰ *Attorney-General v New Zealand Maori Council* [1991] 2 NZLR 129.

¹¹ *Waikato Raupatu Claims Settlement Act 1995* (NZ).

¹² *Treaty of Waitangi Amendment Act 1993* (NZ), inserting s 6(4A).

extensive backlogs and delay,¹³ and a lengthy Tribunal process because of the adversarial approach taken to some claims.¹⁴

Compensation Awards

The New Zealand government has aimed to make all monetary reparations awards reached in negotiation as fair as possible. However, there is often disagreement stemming from ‘redress quantum’ or the cash value of the reparations to be awarded.¹⁵ This is because it would be fiscally impossible for the New Zealand government to provide full compensation for the total loss suffered by indigenous communities.¹⁶

It is important that compensatory reparations be adequate. Inadequate reparations run the risk of being seen as a political gesture, rather than a concerted effort to remedy injustices. However, reparations are not limited to financial compensation. The New Zealand government has recognised this by including both financial compensation and awards of land in Crown settlement offers.¹⁷ Settlements may also include ‘cultural redress’, some examples of which are deeds of recognition and replacing English place names with the traditional Maori name.¹⁸

C Conclusion

The New Zealand experience demonstrates that it is possible to make significant and substantial reparations for grievances inflicted after colonisation. The successes of the New Zealand reparations scheme are attributable in part to the political will and leadership shown by the New Zealand government and the corresponding public support for the reparations model.

For reparations schemes to operate effectively, governments must commit to, and follow through with, their reparations policy.

¹³ Catherine J Iorns Magallanes, ‘Reparations for Maori Grievances in Aotearoa New Zealand’ in Frederico Lenzerini (ed) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 523, 540.

¹⁴ The Ngai Tahu Claim; see *Ngai Tahu Claims Settlement Act 1998* (NZ).

¹⁵ Magallanes, above n 1, 550.

¹⁶ Guy Robinson, ‘Treaty and Tribunal: Redressing longstanding grievances in Aotearoa/New Zealand’ (2002) 91 *The Round Table* 367, 621-622

¹⁷ Robinson, above n 16, 622.

¹⁸ Magallanes, above n 1, 551.

Canada

In 2007, the Canadian Government introduced the Indian Residential Schools Settlement Agreement to address the harm the residential schools system has caused in Indigenous communities. As part of wider efforts toward reconciliation, the Agreement seeks to ‘bring a fair and lasting resolution to the legacy of Indian Residential Schools’.¹⁹

A Benefits of the Canadian Reparations Model

Design of the Residential Schools Settlement Agreement

The Agreement was negotiated with the active involvement of Aboriginal groups representing school survivors.²⁰ Accordingly, much attention has been paid to community participation, commemoration, and healing. The Canadian reparations scheme pursues a ‘holistic and comprehensive resolution’ through five components:²¹

1. Common Experience Payments given to all former students in recognition of culture loss and loss of family life;²²
2. Individual reparations grants paid to survivors of serious sexual, physical or psychological abuse, with further payments for those who can show loss of income;²³
3. The creation of the Truth and Reconciliation Commission, which is tasked with accurately and comprehensively documenting the experiences of survivors;²⁴
4. Funding for health and healing projects, including community services, prevention and awareness programs, traditional activities, and training and education;²⁵ and

¹⁹ *Indian Residential Schools Settlement Agreement*, signed May 8 2006 (entered into force 19 September 2007).

²⁰ Linda Popic, ‘Compensating Canada’s “Stolen Generations”’ (2008) 7 *Indigenous Law Bulletin* 1, 15.

²¹ Jennifer Llewellyn, ‘Bridging the Gap Between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission’ in Marlene Brant Castellano, Linda Archibald and Mike Degagné (eds), *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Aboriginal Healing Foundation, 2008) 183, 185.

²² *Indian Residential Schools Settlement Agreement*, signed May 8 2006 (entered into force 19 September 2007) art 5.01.

²³ *Ibid* art 6.01.

²⁴ *Ibid* art 7.01.

²⁵ *Ibid* art 8.01.

5. Funding for national and community commemorative projects, including memorials at former school sites and cemeteries.²⁶

The Agreement is designed to address the legacy of residential schools and previous flawed attempts at reparations.²⁷ By including symbolic reparations and community-based healing projects, the Agreement goes beyond monetary compensation and creates an atmosphere of dignity and respect.²⁸ Recognition of harm and extra health supports enhance the positive effects of compensation, have lasting value, and are conducive to the larger reconciliation process.

B Criticisms of the Canadian Reparations Model

Exclusions and Barriers to Compensation

The restrictive claims process weakens the relationship between financial compensation and healing. The Aboriginal Healing Foundation has criticised the Common Experience Payment process for placing the onus on survivors to prove their attendance at residential schools, making it difficult to demonstrate eligibility.²⁹ In practice, missing documents often lead to many claims being denied or survivors only receiving partial payment.³⁰

As a result, many survivors reported they were made to feel like ‘liars’ and ‘frauds’, and found the process of receiving partial payment to be ‘degrading’ and a trigger for reawakened feelings of rejection.³¹ Survivors reported that the claims process ‘triggered an extreme emotional reaction’ leading to depression, thoughts of suicide, or self-destructive

²⁶ Ibid art 7.02.

²⁷ Robyn Green, ‘Unsettling Cures: Exploring the Limits of the Indian Residential Schools Settlement Agreement’ (2012) 27 *Canadian Journal of Law and Society* 129, 134.

²⁸ Linda Popic, ‘Compensating Canada’s “Stolen Generations”’ (2008) 7 *Indigenous Law Bulletin* 1, 16.

²⁹ Aboriginal Healing Foundation, *The Indian Residential Schools Settlement Agreement’s Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Aboriginal Healing Foundation, 2010), 30.

³⁰ Robyn Green, ‘Unsettling Cures: Exploring the Limits of the Indian Residential Schools Settlement Agreement’ (2012) 27 *Canadian Journal of Law and Society* 129, 139.

³¹ Aboriginal Healing Foundation, *The Indian Residential Schools Settlement Agreement’s Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Aboriginal Healing Foundation, 2010), 29.

behaviours.³² Insensitive claims systems can further victimise survivors, rather than allowing them to feel gratified by receiving compensation in acknowledgment of past harm. Morse suggests that shifting the onus to the government to refute a statement of attendance would be the fairer approach.³³

Lack of Support during the Claims Process

Given the claims process is inherently triggering, survivors require a robust support system to manage negative emotions and traumatic flashbacks. However, Government run support services have produced an underwhelming result. Lack of trust in counselling, lack of traditional activities and wellness practices, and lack of Aboriginal staff culminate in a service that is incredibly insensitive to the emotional effects the process has on survivors.³⁴ Without adequate Aboriginal-led community-based support, the compensation process can quickly disrupt the healing journeys of survivors, and result in feelings of ‘pain, anger, sadness, and bitterness’.³⁵

C Conclusion

Although sincere in its design, the Agreement’s restrictive implementation has failed to truly restore respect and dignity to residential school survivors. Considering the residential school system within wider colonial practices of assimilation and cultural genocide, facilitating Indigenous cultural expression and promoting community-based healing is imperative. Otherwise, the reparations scheme is merely a state-run institution controlling yet another aspect of the lives of Indigenous people.³⁶ Canada’s approach suggests that sensitive

³² Ibid 38.

³³ Bradford W Morse, ‘Government Responses to the Indian Residential Schools Settlement in Canada: Implications for Australia’ (2008) 12 *Australian Indigenous Law Review* 41, 51.

³⁴ Aboriginal Healing Foundation, *The Indian Residential Schools Settlement Agreement’s Common Experience Payment and Healing: A Qualitative Study Exploring Impacts on Recipients* (Aboriginal Healing Foundation, 2010), 70-74.

³⁵ Ibid 85.

³⁶ Ibid 31.

implementation of any reparations scheme is necessary if meaningful reparations are to be achieved.³⁷

South Africa

In 1995, the South African Parliament created the South African Truth and Reconciliation Commission ('TRC') to investigate the nature, causes and extent of the gross violations of human rights perpetrated in South Africa between 1960 and 1994.³⁸ As part of its function, the TRC was required to 'determine measures of reparation to rehabilitate and restore the human and civil dignity of victims of human rights violations.'³⁹

A Benefits of the South African Reparations Model

Design of the Reparations Program

Victims of human rights abuses have a wide and diverse range of needs. Accordingly, reparation programs must be multifaceted if they are to respond to the needs of victims and promote healing and reconciliation. The TRC recognised the importance of multi-layered reparations when it made its recommendation on reparations. Accordingly, the South African reparations scheme has five components:⁴⁰

1. Interim reparation payments were given to victims with urgent financial needs;
2. Individual reparations grants were paid to victims or their relatives and dependents, to cover costs arising from medical, educational and housing needs;⁴¹
3. Symbolic, legal and administrative measures were taken, including issuing death certificates for people who had been killed during apartheid, renaming streets and

³⁷ Linda Popic, 'Compensating Canada's "Stolen Generations"' (2008) 7 *Indigenous Law Bulletin* 1, 16.

³⁸ *Promotion of National Unity and Reconciliation Act 1995* (RSA).

³⁹ *Ibid.*

⁴⁰ See, eg, Truth and Reconciliation Commission, *Truth and Reconciliation Commission of South Africa Report*, vol 5, pp 175-6.

⁴¹ It should be noted that criticisms have been made of the individual reparations grants for being significantly less than what was recommended by the Truth and Reconciliation Commission. See, eg, Ereshnee Naidu, 'Symbolic Reparations and Reconciliation: Lessons from South Africa' (2012) 19 *Buffalo Human Rights Law Review* 251, 261.

- creating monuments to honour the past, and introducing a public day of remembrance and reconciliation;
4. Community rehabilitation services were introduced, which included health care, mental health care, education and housing; and
 5. Legal and administrative reforms of South African institutions occurred to prevent human rights abuses in the future.

The reparations scheme in South Africa was designed to go beyond mere compensation for past actions. By including symbolic reparations and guarantees of non-repetition, the TRC evinced a desire to promote healing in the South African community. Such reconciliation could not be achieved through solely financial reparations, nor could healing occur through reparations that are purely symbolic without restitution or rehabilitation.⁴²

A Criticisms of the South African Model

Delay in Making Final Payments

Delay in the award of reparations has been ‘the most damaging aspect of the truth commission’s work.’⁴³ Colvin criticises the South African government for its delay in awarding urgent interim reparations payments; TRC hearings began in 1996, however urgent interim reparations payments did not begin until 1998, and the process was not completed until April 2001.⁴⁴ Similar delays have affected the payment of final reparations grants.⁴⁵

Naidu asserts that ‘symbolic reparations are only meaningful if they are part of a comprehensive package that would include compensation for all survivors, rehabilitation and

⁴² Ibid 268.

⁴³ Ibid 260.

⁴⁴ Christopher J Colvin, ‘Overview of the Reparations Program in South Africa’ in Pablo de Greiff (ed) *Handbook of Reparations* (Oxford University Press, 2006) 176.

⁴⁵ See Erin Daly, ‘Reparations in South Africa: A Cautionary Tale’ (2003) 33(2) *The University of Memphis Law Review* 367; Ereshnee Naidu, ‘Symbolic Reparations and Reconciliation: Lessons from South Africa’ (2012) 19 *Buffalo Human Rights Law Review* 251.

increased access to health services, and community reparations.’⁴⁶

Delays in the award of reparations can ‘disconnect’ the payment from other reparative measures, ‘reducing the symbolic sense of the reparation.’⁴⁷ Poor administration of financial reparations can create feelings of anger, neglect and frustration, diminishing the symbolic and healing value, not only of the financial payment, but also of other reparations measures.

Lack of Community Consultation

Colvin argues that ‘no sustained or meaningful conversation has taken place between government and representatives of victims or civil society’ with respect to reparations.⁴⁸ One example of this lack of consultation was the failure of the South African government to have discussions with victims before the value of the final reparations grant was determined.⁴⁹ The lack of consultation between the government and the victims has resulted in feelings of ‘bitterness and sense of betrayal’ among victims.⁵⁰ Such alienation has the potential to heighten discord between victims and the State, rather than promote healing and reconciliation.

C Conclusion

South Africa is an example of a reparations scheme that was designed well, but implemented poorly. The example of South Africa teaches us that effective implementation of reparations is necessary for reparations to have their full effect of healing and facilitating reconciliation.

⁴⁶ Ereshnee Naidu, ‘Symbolic Reparations and Reconciliation: Lessons from South Africa’ (2012) 19 *Buffalo Human Rights Law Review* 251, 268.

⁴⁷ *Ibid* 261.

⁴⁸ Christopher J Colvin, ‘Overview of the Reparations Program in South Africa’ in Pablo de Greiff (ed) *Handbook of Reparations* (Oxford University Press, 2006) 176, 201.

⁴⁹ Oupa Makhalemele, ‘Still not Talking: The South African Government’s Exclusive Reparations Policy and the Impact of the R30,000 Financial Reparations on Survivors’ in Carla Ferstman, Mariana Goetz and Alan Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill, 2009) 541.

⁵⁰ *Ibid*, 566.

Without effective implementation, victims will see reparations schemes as political processes, rather than mechanisms through which justice can be obtained.⁵¹

Sweden, Norway and Finland

Sweden, Norway and Finland have a relatively long history of recognition of the Indigenous Sámi people. This began in 1751 with the Lapp Codicil, a document which drew the borders between Sweden and Norway and expressed the wish for the continued existence of the Sámi nation.⁵² However in the mid- nineteenth century Scandinavian governments claimed that they had the right to take control of Sámi land.⁵³ The Swedish, Norwegian and Finnish governments have since established the Sámi Council in 1956,⁵⁴ established a Sámi National Parliament in each State,⁵⁵ recognised the Sámi as their Indigenous people and have commissioned the Draft Nordic Sámi Convention.⁵⁶

The main aims of Swedish, Norwegian and Finnish reparations are twofold:

1. To recognise the Sámi People as the Indigenous people of Northern Scandinavia; and
2. To promote the cultural self-determination of the Sámi People.

A Benefits of the Swedish, Norwegian and Finnish Model

Establishment of Sámi Parliaments

The Sámi Parliaments in Sweden, Norway and Finland all aim to formally recognise the Sámi People as the Indigenous people and give the Sámi a level of cultural and linguistic

⁵¹ Ereshnee Naidu, 'Symbolic Reparations and Reconciliation: Lessons from South Africa' (2012) 19 *Buffalo Human Rights Law Review* 251, 264.

⁵² *Lapp Codicil* (Sweden and Norway) 1751.

⁵³ Stefania Errico and Ann Hocking, 'Reparations for Indigenous Peoples in Europe: The Case of the Sami People' in Federico Lenzerini (eds) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 363, 372.

⁵⁴ Timo Koivurova, 'The Draft for a Nordic Saami Convention: Nations Working Together' (2008) 10 *International Community Law Review* 279, 280.

⁵⁵ *Sami Parliament Act* (Sweden) 1992: 1433, Article 1; *The Sami Act* (Norway) 12 June 1987, No. 56, Article 1; *Act on the Sami Parliament* (Finland) 974/1995, Article 1.

⁵⁶ Timo Koivurova, 'The Draft for a Nordic Saami Convention: Nations Working Together' (2008) 10 *International Community Law Review* 279, 280.

autonomy. All three Parliaments may give their opinion to their governments on issues which affect the Sámi population.⁵⁷ The Finnish Sámi Parliament Act also includes an ‘obligation to negotiate,’⁵⁸ where the Finnish government must consult the Sámi Parliament on issues which directly and specifically target the Sámi population.⁵⁹

Constitutional Recognition

The Norwegian Constitution recognises the preservation of Sámi ‘language, culture and way of life’ in Article 110a.⁶⁰ Similarly, the Finnish Constitution recognises the Sámi People in Article 17,⁶¹ a provision which also allows them to submit inquiries to government authorities in their native language. Article 121 also gives a level of cultural and linguistic autonomy to the Sámi People.⁶²

In contrast, the Swedish Constitution does not formally recognise the Sámi People. However Sweden has ratified the Council of Europe’s Framework Convention for the Protection of National Minorities, as well as the European Charter for Regional and Minority Languages, which recognise the Sámi as an Indigenous population. The Swedish government has stated that the Sámi People are adequately protected and recognised in the current Constitutional provisions which state that ‘ethnic, linguistic and cultural minorities shall be granted the opportunity to keep their culture and social life.’⁶³

Compensation Funds

Both Sweden and Norway have compensation funds, called the ‘Sámi Fund’ and ‘Sámi Development Fund’ respectively. Both are aimed at compensating the Sámi People for loss of

⁵⁷ *Sami Parliament Act* (Sweden) 1992: 1433; *The Sami Act* (Norway) 12 June 1987, No. 56; *Act on the Sami Parliament* (Finland) 974/1995.

⁵⁸ *Act on the Sami Parliament* (Finland) 974/1995, Article 9.

⁵⁹ Stefania Errico and Ann Hocking, ‘Reparations for Indigenous Peoples in Europe: The Case of the Sami People’ in Federico Lenzerini (eds) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 363, 380.

⁶⁰ *Constitution of the Kingdom of Norway* (Norway) 17 May 1814, Article 110a.

⁶¹ *Constitution of Finland* (Finland) 11 June 1999, Article 17.

⁶² *Constitution of Finland* (Finland) 11 June 1999, Article 121.

⁶³ Eva Josefsen, ‘The Saami and the National Parliaments: Channels for Political Influence’ (Report, United Nations Development Program, 2010) p. 8.

land which has traditionally been used for reindeer grazing. These funds are ‘directed towards the development of reindeer husbandry, Sámi culture and Sámi organisations.’⁶⁴ Both also provide subsidies for reindeer herders, as reindeer herding is intimately connected with the history and livelihood of the Sámi People. Finland provides compensation for reindeer killed by predators and has numerous district organisations established for the purpose of overseeing reindeer husbandry.⁶⁵

B Criticisms of the Swedish, Norwegian and Finnish Models

There is criticism that whilst the Sámi Parliaments are consulted by the Swedish, Norwegian and Finnish governments, their role is mainly advisory. The ‘obligation to negotiate’ has only a limited effect and the views of the Sámi People are not given adequate weight in decision-making. There is also a lack of a formal structure, or formal channels for the giving of advisory opinions, meaning that consultation with the Sámi Parliaments can only have a limited effect.⁶⁶

The Sámi People have ‘users rights’ over much of their traditional land but do not have ownership rights.⁶⁷ Most of the policies of self-determination are directed towards cultural and linguistic autonomy, not territorial autonomy. Whilst cultural autonomy is essential to an Indigenous population, a level of territorial autonomy for a nomadic population is also important.

C Conclusion

The reparations to and recognition of the Sámi People by the Swedish, Norwegian and Finnish governments has been essential in the maintenance of Sámi culture and livelihood.

⁶⁴ Sven E. Olsson and Dave Lewis, ‘Welfare Rules and Indigenous Rights: the Sami People and the Nordic Welfare States’ in John Dixon and Robert P. Scheurell (eds), *Social Welfare with Indigenous Peoples* (Routledge, 1995) 141, 167.

⁶⁵ *Ibid*, 167.

⁶⁶ Stefania Errico and Ann Hocking, ‘Reparations for Indigenous Peoples in Europe: The Case of the Sami People’ in Federico Lenzerini (eds) *Reparations for Indigenous Peoples: International and Comparative Perspectives* (Oxford University Press, 2008) 363, 380.

⁶⁷ *Ibid*, 382-3.

Although, arguably, the Sámi Parliaments are not consulted extensively enough on issues affecting the Sámi population, the Sámi are constitutionally recognised as the Indigenous people of Scandinavia and the governments have established official fora in which the Sámi People may practice a level of cultural and linguistic autonomy.

Lessons Learned

There are important lessons to be learned from the experiences of the reparations schemes in New Zealand, Canada, South Africa and Sweden, Norway and Finland. It is not sufficient for a reparations scheme to be purely compensatory or purely symbolic; redress for the complex harms suffered by Indigenous populations can only be provided through multi-dimensional policies. Reparations aimed at providing compensation and restitution must be complemented by symbolic, rehabilitative and transformative reparations.

Further, reparations schemes will only be effective if they are implemented in consultation with the Indigenous population and are supported by political commitment and leadership. Otherwise, suspicion and mistrust may develop between Indigenous populations and the government, undermining the reconciliatory benefits of the reparations scheme.

Measures of Restitution

This section addresses point 2(c) of the Inquiry Terms of Reference.

Any consideration of a redress scheme needs to be cast against the alternate form of recourse available in litigation. It is suggested here that a redress scheme is (i) not only less favourable to a potential stolen generation claimant in terms of legitimate financial award, but also (ii) distracts from the litigious advantages recently made available to claimants.

Inadequacy of Payment

The most compelling reasons against the implementation of a redress scheme is the likely inadequacy of any redress payment made to a survivor. The operational history of redress schemes in Tasmania, Queensland, Western Australia, and South Australia all demonstrate the low expected value that a survivor might expect to receive, if they are successful in their applications.⁶⁸ Under the Queensland Government's *Forde Inquiry redress scheme* (October 2007 – June 2010) for example, which provided a two-stage ex-gratia payment scheme, the most that a survivor could expect was between \$7,000 and \$40,000.⁶⁹ Even when looking at the highest paying government scheme, the South Australian scheme, ex-gratia payments were capped at \$50,000, with maximum payouts made only in 'exceptional circumstances' at the discretion of the Attorney-General.⁷⁰ Redress scheme history in Australia clearly demonstrates that redress payments are capped, are of low-value, with claimants rarely awarded the entire possible amount.

The availability of a meagrely sized redress scheme underestimates the true quantum value that a claimant might be entitled to at common law. The argument here therefore, is that any redress payment sought through a redress scheme, will be immoderately less than the legitimate value when assessed according to common law head of damages. Consider for example, the South Australian case of *Trevorrow v South Australia*.⁷¹ This is the largest known successful stolen generations claim in Australia. In that case the Plaintiff, Bruce Trevorrow, was awarded \$450,000 for personal injury and loss even after excluding exemplary damages (valued at \$75,000) and interest (valued at \$250,000),⁷² Granted that the case was based on specific circumstances. Nonetheless, when compared to the ceiling-value

⁶⁸ Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia *State Redress Schemes* (Completed Inquires 2010-2013).

⁶⁹ Queensland Government, *Support for Forgotten Australians* (6 March 2015) <<https://www.qld.gov.au/community/getting-support-health-social-issue/support-for-forgotten-australians/>>.

⁷⁰ Attorney-General's Department (SA), *Application Guidelines: For ex gratia payments for former residents in state care who experienced sexual abuse as children* (7 May 2014) , 2 <<http://www.agd.sa.gov.au/sites/agd.sa.gov.au/files/documents/Policies%20Procedures%20Codes/Ex%20gratia%20payments/2014%20Application%20Guidelines%20for%20Ex%20Gratia%20%28Former%20residents%20in%20State%20Care%20Sexually%20Abused%29.pdf>>

⁷¹ *Trevorrow v State of South Australia* (No 5) [2007] SASC 285; (2007) 98 SASR 136.

⁷² *Ibid* 387, 393.

(\$50,000) of the South Australian redress scheme for child victims of abuse in state care, his payment far exceeds such a payment by almost a ratio of 10:1. The point here is that a redress scheme is likely to be disproportionately undervalued compared to the likely greater award that a claimant might make at common law.

The undervaluation of damages claims can only aggravate and heighten the sense of disrespect to dignity that claimants are likely to already experience as a result of historical institutional abuse.⁷³ The perception is further compounded on account of deed or release indemnification; by precluding survivors from lodging any further claim against the State, survivors may gain the perception that they are being cheated into accepting a lower value payment. Undoubtedly, financial reparation can never restore a survivor for irreparable injustices suffered by them. Nevertheless, the dignity of a survivor should not be eroded further by their preclusion from their legitimate common law entitlements.

A Redress as a Smokescreen to Litigation

An attending concern to the provision of redress is its obscuration of access to justice through litigation. It has been suggested that in the wake of the *Trevorrow* decision, combined with the large potential pool of stolen generation claimants, that there has been a less than expected number of stolen generation civil actions.⁷⁴ Key amongst the reasons hypothesized as being explanatory of this fact is, *inter alia*, the daunting and traumatising process of litigation, its financial cost, and the uncertain prospects of success. These are commonly surmounted reasons for not pursuing litigation in any dispute context, Indigenous or non-Indigenous. Yet, it is equally possible to hypothesize that litigation in the field of Stolen Generation cases remains low due to the limited awareness of litigation (including pre-trial

⁷³ Sarah Pritchard, 'The Stolen Generation and Reparations' (1998) 21 *UNSW Law Journal* 259, 264; Victoria, *Betrayal of Trust: Inquiry into the handling of child abuse by religious and other non-government organisations*, pp no.275 (2013), 567.

⁷⁴ Randall Kune, "The Stolen Generations n Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations" (2011) 30(1) *University of Tasmania Law Review* 32.

settlement) itself, as well as litigation advantages that have recently been made available to claimants against the state.

There have indeed been significant developments NSW public policy in recent years, which have changed the litigation landscape for Stolen Generation claimants, making pre-trial settlement more favourable. Since 8 July 2008, the NSW government has maintained a *Model Litigant Policy for Civil Litigation*.⁷⁵ It is a policy that necessarily would be applicable to any litigation by a Stolen Generation's survivor against the State. According to the policy, government lawyers are duty bound to, *inter alia*, 'deal with claims promptly and [without] causing delay', 'paying legitimate claims without litigation', 'endeavouring to avoid litigation', (where litigation is not possible 'not requiring the other party to prove a matter which the State or an agency knows to be true', not taking advantage of a claimant who lacks the resources to litigate to a legitimate claim, and 'not relying on technical defences'.⁷⁶ These are standards by which the NSW government have imposed upon itself, and should be applied willingly by the State to all NSW survivors who choose to litigate against it.

The enforcement of model litigant policy does remain uncertain. Nevertheless, it is perhaps indicative within recent NSW case law that the policy is finding executive and judicial support. A most recent example is the NSW Supreme Court interlocutory hearing of *Bowden v State of NSW* [2014].⁷⁷ That matter concerned a claim of vicarious liability against the State for psychiatric injuries suffered by Cecil Bowden, resulting from abuse at a boys' home at Kinchella, NSW between 1943 and 1958.⁷⁸ Cecil Bowden was 72 at the time of commencing proceedings. At hearing, the State had attempted to move a notice of motion for the issue of limitation periods to be heard separately from the primary hearing. Garling J found reason in

⁷⁵ NSW Government, Model Litigant Policy (8 July 2008) <<http://www.justice.nsw.gov.au/legal-services-coordination/Documents/cabinetapp-mlp.pdf>>.

⁷⁶ *Ibid* 3.2(a)–(g).

⁷⁷ *Bowden v State of NSW* [2014] NSWSC 87.

⁷⁸ See Cecil Bowden, Cecil Bowden (undated) Kinchella Boys Home <<http://www.kinchelaboyshome.org.au/story/cecil-bowden/>>.

the Plaintiff's argument that it was in the 'interests of justice' to not do so, based on the claimant's advanced age and limited prejudice caused to the defence case in having the matter heard at the same time⁷⁹. The matter did not proceed to trial and was settled for an undisclosed amount. It is understood that in the wake of that claim, a number of further Stolen Generation claims have been commenced and gradually resulted in informal settlement.⁸⁰

Litigation is a legitimate form of recourse that should be open to any individual holding a genuine claim against the State. Consistent with the spirit of the mode litigant rules, there necessarily should be a moral onus upon the State to invite potential litigants to initiate their common law rights, with a view to informal settlement. In no way should redress be pursued by the State with a view of diversionary tactic from the availability of litigation and its legal obligations.

⁷⁹ *Bowden v State of NSW* [2014] NSWSC 87, [54].

⁸⁰ Howard Harrison, *Howard Harrison's Blog* (10 November 2014) Carroll & O'Dea Lawyers <<http://www.codea.com.au/Blog-1700-NSW-Government-Issues-Formal-Apology-in-Stolen-Generation-Action-.aspx>>.