Not relevant

605 ATTORNEY-GENERAL'S ITEM (Michael Atkinson and Jay Weatherill) – DEFER ONE MONTH

Not relevant

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LOCKED

To THE HON. THE PREMIER AND CABINET TO NOTE

About STOLEN GENERATION REPARATION OPTIONS

1. PROPOSAL

1.1 That Cabinet note that work has commenced on:

1.1.1 exploring options for a "Commission" or similar body that will listen to, and record, testimonies of indigenous people who as children were forcibly removed from their parents by the State under former practices. That body would not adjudicate any matter. Appropriate legal protections from civil liability would need to be conferred on those involved in the process;

1.1.2 the investigation of a statutory reparation scheme whereby indigenous children removed from their parents by the State under former practices can apply for a reparation payment from the State through an administrative process in lieu of bringing civil proceedings in the courts;

1.1.3 identifying other counselling or support services necessary for the implementation of such programs;

1.1.4 the preparation of a detailed report exploring the options for a Commission, a reparation scheme including sunsetting and other necessary programs; and

1.1.5 the establishment of an inter-Departmental taskforce that will report to Cabinet through the Attorney-General and the Minister for Aboriginal Affairs and Reconciliation, once the initial report is complete, to further develop the program.

2. BACKGROUND

2.1 In 1995, the Human Rights and Equal Opportunities Commission (HREOC) was asked by the Commonwealth with the support of the State and Territory governments to inquire into and report on the practices of the forcible removal of indigenous children from their parents. That inquiry was headed by the Commission's President, Sir Ronald Wilson (a retired Justice of the High Court of Australia) and the Aboriginal Torres Strait Islander Social Justice Commissioner, Mr Mick Dodson.

2.2 In 1997, the HREOC published a report entitled *Bringing Them Home - Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Island Children from their Families.*

2.3 That Report made a variety of recommendations including that COAG ensure appropriate agencies fund the record and preservation of testimonies of Aboriginal people affected by forcible removal policies (recommendation 1) and that a national fund be established to make monetary compensation to indigenous people affected by forcible removal (recommendations 14-20).

2.4 The Government of South Australia has not yet determined to act on those particular recommendations.

2.5 The Commonwealth, New South Wales, Victoria and the Northern Territory, have either rejected or have no plans for a statutory reparation scheme.

2.6 In 2006, the Parliament of Tasmania passed the *Stolen Generations of Aboriginal Children Act 2006 (Tas)* that created a scheme providing for ex *gratia* payments to be made to a defined class of aboriginal people who had been forcibly removed. Applications could be made by living members of the stolen generation as well as the children of deceased members of that group. The scheme provided for the creation of a Stolen Generations Assessor who would decide on the entitlement of applicants. A fixed lump sum was put in a Fund which was to be divided among those within the accepted class. The scheme was open for six months. Decisions on those applications were required to be made by 15 January 2008 and were announced on 22 January 2008 by the Tasmanian Premier. The Assessor found that 84 applicants were eligible for compensation (rejecting further 45 applications). From a total pool of $4.9 million, compensation is to be divided equally between applicants giving rise to an entitlement to each of $58,330. A further $100,000 was set aside for applicants that were children of eligible members of the Stolen Generation. 22 such applicants were found to be entitled to compensation of about $4,550 each.

2.7 Though not exclusive to members of the Stolen Generation, both Queensland and Western Australia have "redress schemes." Similar in structure, they create an entitlement of applicants who were abused as children in state care, including members of the Stolen Generation. The schemes are not statutory. Both schemes provide for an ex *gratia* payment to an applicant abused in state care to a maximum amount of $7,000 in Queensland and $10,000 in Western Australia. A higher maximum is fixed where there is evidence of harm, being $40,000 in Queensland and $80,000 in Western Australia. To receive compensation, applicants are required to release the State from any future liability. The schemes provide for an acknowledgment to the applicant of the abuse and support services for applicants, including legal advice and counselling (through increased funding to relevant organisations).

2.8 On 1 August 2007, The Honourable Justice Gray delivered judgment in the Supreme Court of South Australia in the matter of *Trevorrow v State of South Australia*. Those proceedings arose directly from the removal of Mr Trevorrow, an indigenous person, from the custody of his parents in 1957.

2.9 An amount of $525,000 was awarded to Mr Trevorrow, made up of $405,000 for past general damages, $45,000 for future general damages and $75,000 for exemplary (or punitive) damages against the State. In addition, an amount of $250,000 was awarded in lieu of interest. Both the State's legal costs and the expected legal costs of Mr Trevorrow (that the State will be ordered to pay) are expected to exceed greatly that amount. The State Government has already paid Mr Trevorrow $525,000 minus a Medicare debt of about $4,000. The State Government has yet to finalise its position on the basis of an appeal in this matter.

2.10 The recommendations of the report *Bringing Them Home,* the Tasmanian legislation and the *Trevorrow* proceedings highlight the importance of considering a simple administrative mechanism for claims and reparations to be made for damages caused by the practice of the forcible separation of indigenous children from their parents.

2.11 The *Trevorrow* case also highlights the potential future liability of the State to claims arising from its involvement in the forcible removal of indigenous children from their parents.

2.12 There is no published or reliable data of the total number of indigenous persons removed from their families in South Australia. Using Australian Bureau of Statistics data from a survey of indigenous South Australians who reported being removed from their family, it is possible to estimate that the number of living persons removed from their families in South Australia is about 1,380. Information from the **D**epartment of Aboriginal Affairs and Reconciliation suggests that anecdotally the number is thought to be about a thousand. It is known that 500 indigenous people have registered as having been removed with Link-Up (an indigenous organisation that helps members of the stolen generation to find their families), but that register is not complete.

3. DISCUSSION

3.1 Against that background, we propose to commence to:

3.1.1 explore options for a **C**ommission or similar body that will listen to, and record, testimonies of indigenous children removed by the State under former practices; and

3.1.2 investigate a statutory reparation scheme whereby indigenous children removed by the State under former practices of removal have the option of applying for a reparation payment from the State through an administrative process in lieu of bringing civil proceedings in the courts.

3.2 The fundamental features of the proposed reparation scheme would be:

- a statutory scheme similar to that under the *Workers Rehabilitation and Compensation Act 1986* that creates an exclusive scheme for the resolution of claims arising from the removal of indigenous children from their parents. Such a scheme would extinguish common law entitlements. The rationale of an exclusive scheme is that it prevents applicants choosing between the courts or the scheme depending on their view of their prospects of success under one or the other. An exclusive scheme allows applicants to receive the benefit of resolving the matter in an administrative process without needing to prove liability and without the risk of adverse costs if unsuccessful. The State would receive certainty in fixing the amount of claims, finalising liability and avoiding future legal costs in defending civil proceedings;

- the provision of a reparation payment to those persons removed with involvement by the State. (An option exists to also make descendants of deceased persons eligible to an assessed reparation payment or a fixed amount, though this has the potential of significantly increasing the reparation scheme's total liability. An alternative course is to provide for descendants through other programs);

- the provision of reparation payments to be assessed by a specially appointed assessor(s);

- the determination of the amount of payments having regard to the degree of hardship caused by removal. An option exists for payments to be in a fixed amount (similar to the Tasmanian scheme). Although a fixed amount is administratively simpler to handle, it does not take into account differences between applicants such as hardship and need;

- the identification of a start and end date for eligibility that appropriately reflects the commencement and end of both the official and effective operation of the policy of removal;

- the fixing of a period of time within which an applicant is entitled to make his or her application. Though it is possible for the scheme to be open-ended, the schemes in Tasmania, Western Australia and Queensland referred to above in 2.6 and 2.7 have required applications to be made within a fixed window at the scheme's commencement. The benefit is that, once the applications are determined, the administrative costs of operating the scheme cease.

We propose that the Commission and reparation processes would run concurrently.

3.3 A report is being prepared within the Attorney-General's Department with the assistance of the Department of the Premier and Cabinet and Department of Families and Communities. The report will develop in greater detail the possible framework of a reparation scheme having the features set out above. It will include an analysis of other relevant reparation schemes, in particular the scheme established under the *Stolen Generations of Aboriginal Children Act 2006 (Tas)* and the principles underpinning the scheme proposed in the *Bringing Them Home Report* recommendations 14-20. It will also investigate the options for:

- the criteria for determining eligibility to reparation payments for applicants having regard to the precise circumstances in which children were removed in South Australia;

- the development of a tiered structure for assessment of reparation taking into account the differing consequences of removal on applicants;

- the criteria for resisting such claims taking into account that the passage of time has caused a disadvantage to the applicants in proving their claim and to the State in investigating such claims. This will include the option of reversing the burden of proof such that it would be incumbent on the State to prove on the balance of probabilities that the person was not eligible for reparation;

- the form of the administrative framework and process that would handle and determine such claims taking into account the cultural sensitivity of the process;

- the time within which such claims should be made;

- identify a reasonable reparation payment for claims that is fiscally responsible;
- the option of providing advocacy and financial planning services as part of the reparation, possibly provided through a funding agreement with

the Aboriginal Legal Rights Movement or the Legal Services Commission;

- options for the structuring of reparation payments, such as fortnightly payments or lump sum or the creation of a Trust to receive and apply funds from applicants that do not wish to take reparation payments personally;

- the effect on statutory payments that might be payable pursuant to Commonwealth legislation (for example payments to Medicare and Centrelink);

- the source of funds for such a reparation scheme;

- the costs and risk of not implementing such a scheme;

- any other provisions necessary to ensure the success of such a scheme.

3.4 The matters to be considered in the report in relation to a "Commission" or similar body would include:

- the establishment of a "Commission" or similar body that would at the request of the Government of South Australia listen to, and record in a suitable form, testimonies of indigenous persons that had been forcibly removed as children by the State under former practices;

- the conferral of appropriate legal protections from civil liability on those involved in the process;

- the need for the "Commission" or similar body to travel to regional locations to hear testimonies and if so where it might need to travel;

- the suitable archiving of records of the "Commission" or similar body so that they were available for the purposes of historical research and for the education of the public as to these practices and their extent;

- the publication of a suitable report, book or electronic resource that would make widely available the testimonies with appropriate consent;
- the time the testimonial process would require and the resources that would need to be made available for it;

- the commissioning of a suitable public monument or the development of another suitable project in consultation with indigenous communities that would in a lasting way record these practices and their effects on indigenous people.

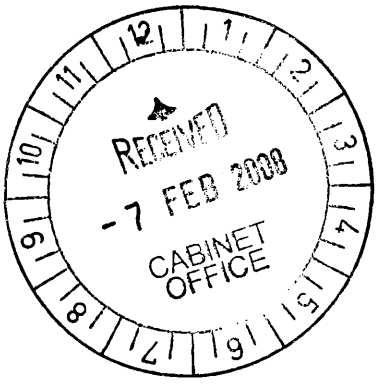
3.5 Subsequent to the preparation of the report, it will be necessary to consider the development of an inter-Departmental taskforce to work further on the project.

4. RECOMMENDATION

4.1 That Cabinet note that work has commenced on:

4.1.1 exploring options for a "Commission" or similar body that will listen to, and record, testimonies of indigenous people who as children were forcibly removed from their parents by the State under former practices. That body would not adjudicate any matter. Appropriate protections from civil liability would need to be conferred on those involved in the process;

4.1.2 the investigation of a statutory reparation scheme whereby indigenous children removed from their parents by the State under former practices can apply for a reparation payment from the State through an administrative process in lieu of bringing civil proceedings in the courts;



4.1.3 identifying other counselling or support services necessary for the implementation of such programs;

4.1.4 the preparation of a detailed report exploring the options for a Commission, a reparation scheme and other necessary programs; and

4.1.5 the establishment of an inter-Departmental taskforce that will report to Cabinet through the Attorney-General and the Minister for Aboriginal Affairs and Reconciliation, once the initial report is complete, to further work up the program.

I declare that I have no actual or potential conflict of interest about the proposals contained in this submission.

MICHAEL ATKINSON M.P.

PORTFOLIO: ATTORNEY-GENERAL

DATE: 30 January 2008

I declare that I have no actual or potential conflict of interest about the proposals contained in this submission.

JAY WEATHERILL M.P.

PORTFOLIO: MINISTER FOR ABORIGINAL AFFAIRS AND RECONCILIATION

DATE: 30/1/08