SUBMISSION TO THE SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

INQUIRY INTO THE STOLEN GENERATION COMPENSATION BILL 2008

Prepared by the Croker Island Stolen Generation People

Croker Island Stolen Generation
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Executive Summary:

This submission has been prepared by the Croker Island Stolen Generation and other stolen generation institutional groups from the Northern Territory. It is responding to the Inquiry's aims of examining the viability of the Stolen Generation Compensation Bill's proposed compensation model.

The Croker Island Stolen Generation and other groups represented in this submission aims to provide the Committee with information that is relevant to the Bill and how it falls short in a number of key areas;

1. There is a very general classification of laws stated in the Bill (2008) where by stolen generation children were forcibly removed. There needs to be clear definition of what laws were enacted by the Commonwealth government, also clarify which states and/or territories these federal laws cover.
2. The process of assessing applications, the duration it takes to do this.
3. The ex gratia payment amount, one amount does not cover everyone's experience. This is true when you have people removed under the Aboriginal Ordinance 1911 to those that were removed under various state enacted laws.

The Croker Island Stolen Generation and other groups view this Bill as a possible starting point. However legally, socially and morally it lacks the substance to resolve the issue of compensation for Indigenous people that have suffered under the various state and federal laws of the time.

The submission has the following sections:

1) Introduction;
2) Comments in relation to sections (4), (5), (6), (8) and (11) of the 2008 Bill;
3) Unique circumstance of the Northern Australian experience of Stolen Generation. One solution does not fit all; also the laws that govern the forcible removal of indigenous children must have heightened importance. All of the participants in this submission were apart of the Bringing them home report.
4) Recommendations for the Committee to consider.

It has been noted over the years by various advocacy groups in Australia that the actions of previous governments had major and everlasting effects on the Stolen Generation children. These are some of the noted issues in the political arena past and current;

- Australia government continual reliance on the judicial system to resolve this issue in the courts. This has proven to be a timely and costly approach, which again shows no leadership in dealing with the issue of reparations to the Stolen Generations.

- The Australian government does not acknowledge the principles or needs for reparations and monetary compensation to the Stolen Generations.
- Forcible removal can be seen to fall within the definition of genocide in the Genocide convention article 2(e) of the Convention provides that genocide includes acts committed with the intent to destroy, in whole or in part, a racial group as such by forcibly transferring children of the group to another group. Similarly, genocide can occur without physical killing, with mixed motives, some of which may be perceived as beneficial and without the complete destruction of the group. (HEREOC Submission Dr W Jonas 8 June 2000)

This submission recommends the following be considered by the Senate Standing Committee;

1) They consider the amendments proposed for section (4), (5), (6), (8) and (11) of the Bill 2008.
2) Consider the laws that governed states and territories relating to the Aborigines Ordinance of 1911 and 1918. The fact is the Commonwealth government was responsible for enacting laws that forcibly removed aboriginal and half cast children in the Northern Territory.
3) The amount of ex gratia payment can not be one amount fits all. The Senate Committee needs to consider compensation and reparations payment to children that were affected by Commonwealth legislation under the Ordinance Act of the time. This also includes the fact that other States have established their own policies and laws and their own respective Stolen Generation Fund.
4) The Croker Island Stolen Generation believes the recommendations outlined in this submission are viable for the Federal government to pay compensation / reparations. There is a limited to small number of stolen generation people affected by the federal government laws at the time.

Introduction:

In 1941 the Methodist Church established and built a children's home on an island site 200 km northeast of Darwin called Croker Island (Minjilang). The purpose of establishing the children's home was part of the then government policies to have Aboriginal children in government care. A number of Aboriginal children were transferred to various missionaries in the top end and central region of the Northern Territory.

In 1944 there were 95 children on Croker Island under the Methodist Church care. There was only one store and four cottages to accommodate both the children and their cares. Between 1937 and 1966 when the mission was open and operating they had some 200 children cared for by the Methodist church workers.

Since then this group of stolen generation have kept in constant contact with each other including those that were removed to other states in Australia.

Majority of the stolen generation members of this institution and others established in the Northern Territory have continued to fight for the injustices of the past. They continue to tell their stories of how the government policies of the days robbed them of a childhood, their families and culture.

Human Rights Violations:

The National Inquiry into separations of Aboriginal and Torres Strait Islander children from their families (the legal advice provided during that time was compiled and published as The Stolen Generation: A Legal Issue Paper for Lawyers and other Advisers) identified a number of human rights violations.

The inquiry found the following as a result of evidence presented:

- Basic legal safeguards protecting non-indigenous families from forcible removal were not applied to indigenous families;
- The forced separations of indigenous children from their families and communities could be properly called genocide and breached international law at least from December 1946 following a UN Resolution declaring genocide a crime under international law.
- The practice of forcible removal also breached the international prohibition of systematic racial discrimination form as early as 1945.

In 1989 the Sub-Committee on Prevention of Discrimination and Protection of Minorities entrusted Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, taking into account relevant existing international human rights norms and relevant

decisions and views of international human rights organs. Van Boven found that under international law, the violation of any human right gives rise to a right of reparations for the victim, and that particular attention must be paid to gross violations of human rights, which includes genocide, systematic discrimination and the forcible transfer of populations. Thus every state (government) has a duty to make reparations in the case of a breach of such rights, including where necessary the duty to adopt special measures to permit expeditious and fully effective reparations. (Van Boven T - UN Doc: E/CN4/Sub 2/1993/8.at p4 1993).

The History of the Northern Territory:

In order to understand where we are today, it is important to inform the Senate Committee on the history and the unique position Northern Territory Stolen Generation people are in when it comes to the laws that governed them at the time.

In 1910 the Northern Territory Aboriginal Act 1906 was passed, establishing the Northern Territory Aboriginal Department. The Chief Protector a position created under this law was appointed the 'legal guardian of every Aboriginal and every half cast child up to the age of 18 years'. When the Commonwealth government took control of the Northern Territory in 1910, it confirmed these laws. This would provide the means through which segregation could be legally achieved. (HEROC- Bringing them home education module updated Dec 2007)

In 1918 the Chief Protector's powers were extended under the Aborigines Ordinance 1918 which stated: all indigenous females (regardless of age) were under the total control of the Chief Protector unless they were married and living with a husband 'who is substantially of European origin'. To marry a non-indigenous man they had to obtain the Chief Protector's permission. (HEROC- Bringing them home education module updated Dec 2007)

From 1863 to 1911 the Northern Territory was annexed to South Australia for legislation applying to the Northern Territory prior to 1895. However the Aboriginal Ordinance of 1911 which had to be read in accordance with the Aboriginal Act of 1910, happen after the Northern Territory became a territory of the Commonwealth on 01/01/1911 all South Australian laws remained in force until altered by the Commonwealth laws.

The Aboriginal Ordinance 1918 combined the 1910 Act (SA) and the 1911 Ordinance (Cth) giving the Chief Protector wide ranging powers over Aboriginal people.

What is so significant about the ordinance and acts, and how is it relevant to this enquiry? We as the Stolen Generation people of the Northern Territory find it very significant as it highlights these key areas:

- Even though the Northern Territory was annexed under the South Australian government between 1863 and 1911. It was the Commonwealth government that took control and responsibility for the Territory. The Commonwealth government enacted all legislative laws over the indigenous and non-indigenous people that resided there.
- The governance of the Northern Territory and its people in particular 'aboriginal and half cast' is of great importance as it highlights who is answerable and responsible for enacting such laws. Therefore, this governing and ruling body would need to be accountable for such acts.
- A key point that must be highlighted to the Senate Committee under the Aboriginal Ordinance 1911 (Cth) the Chief Protector undertook care, custody or control of any 'aboriginal or half cast' if in his opinion it is necessary or desirable.

In summary not every state was affected directly by these laws if anything the Northern Territory is unique due to it becoming the territory of the Commonwealth Government on 01/01/1911. This implemented the Aboriginal Ordinance 1918 which affected 'aboriginal and half casts' from North Australia and Central Australia (1927). All amendments to this act (Aboriginal Ordinance 1918) from 1927 to 1939 were done by the Commonwealth government that governed over the Northern Territory.

There are members of the Croker Island and other institutional groups of Stolen Generation that are alive today that were forcibility removed from their families. We have referred to this group as the first generation of stolen generation people.

The Concerns with Sections of the Bill:

The Croker Island Stolen Generation group acknowledges that the Compensation Bill 2008 is a step in the right direction. However, sections of the Bill needs to drastically changed to reflect a number of key issues:

- Not every stolen generation person was directly affected by the Commonwealth Government Aborigines Ordinance Act of 1918.
- Other States had enacted their own Aboriginal Acts to forcibly remove 'aboriginal and half cast children'. Therefore those acts are relevant and applicable to those indigenous people residing it their respective states.
- At the end of the day, the Senate Committee should base their decision based on the laws and the government which enacted them.
- The first generation felt the impact of the Commonwealth Aborigines Ordinance. Then subsequently other generation from then on.

We would like to highlight and communicate that there are a number of first generation (stolen generation) people alive in the Northern Territory today that have not seen justice or reparations for being forcibly removed from their families.

Section 4: Entitlement to ex gratia payment

There are major concerns with having the section entitlements prior to eligibility. A person must satisfy the eligibility criteria first in order to be entitled to an ex gratia payment. The whole of section 4 should be placed after eligibility criteria. This seems to put the chicken before the egg and visa versa which only adds confusion.

The Croker Island Stolen Generation proposes the following amendments to section 4: Entitlement to ex gratia payment as follows:

- The whole of section 4 should be removed and located as section 5 under the Bill.
- Section 4 (1) - An ex gratia payment is payable from funds appropriated by the Federal Parliament of Australia for the purpose of this section on an application under section 6 if the applicant satisfies the eligibility criteria in subsection 5 (1) (a) and (b) as proposed amendments below.
- Section 4 (2) – If a person makes an application under the eligibility criteria set out in subsection 5 (1), (2) or (3) (as amendment suggest) and the Stolen Generation Tribunal determines that the person satisfies the eligibility criteria, the person is entitled to receive a one only ex gratia payment.
- Section 4 (3) – A person who has already received or is eligible to apply for payment under State Stolen Generation compensation legislation or like legislation is not eligible for an ex gratia payment under this federal Act.

Section 5: Eligibility criteria for ex gratia payment

Section 5 (eligibility) should be prior to section 4 (entitlements) as a person must satisfy the eligibility criteria before an application for entitlements can be sought. It is also under this section (5) of the Bill that the Senate Committee should consider amending the following subsections in detail to reflect the laws that were relevant to the forcible removal of 'aboriginal and half cast children' at the operating time.

The Croker Island Stolen Generation proposes the following:

- Section 5 (1) to remain the same.
- Section 5 (1) (a) *should state an Aboriginal and Torres Strait Islander person who was subject to the Commonwealth Aborigines Ordinance 1911 and/or 1918 which combined the 1910 Act (SA) and the 1911 Ordinance (Cth) (Amend and insert) Welfare Ordinance 1958. That forcibly removed 'aboriginal and half cast children' from their families; or*

- Section 5 (1) (b) *any Aboriginal and Torres Strait Islander person who was not subject to the Commonwealth Aborigines Ordinance of 1911 and/or 1918, but was subject to similar state legislation which resulted in their being forcibly removed from their families prior to 31st December 1975.*
- Section 5 (2) introduction to remain the same.

- Section 5 (2) (a) should be moved to (b) this subsection must be amend as follows – *an Aboriginal or Torres Strait Islander person who was removed from their family (Amend and insert) under the Child Welfare Ordinance 1958 and prior to 31st December 1975 that was subject to similar state legislation and was under the age of 21 years at the time of their removal. The Stolen Generation Tribunal is satisfied, the person was subject to duress, by a state agency as a consequence, in whole or part of policies operating at the time;*
- Section 5 (2) (b) should be moved to (a) this subsection should be amended as follows – *An Aboriginal and Torres Strait person who was subject to the Aborigines Ordinance Act of 1911 and/or 1918 which enacted the forcible removal of 'aboriginal and half cast children' from their families. The Stolen Generation Tribunal is satisfied the person was subject to duress in whole or part of the policies operating at the time.*
- Section 5 (3) to remain the same.
- Section 5 (3) (a) to remain the same.
- Section 5 (3) (b) – *should state a living descendent being only one family member may apply for a deceased person who would of satisfied the criteria.*
- Section 5 (3) (i) in subsection (1) (a) or (b) as outlined in the amended version above.
- Section 5 (3) (ii) in subsection (2) (a) or (b) as outlined in the amended version above.

Section 6: Application for ex gratia payment

There are a number of concerns with this section of the Bill. These concerns are as follows:

- Does not clearly define how applications can be made.
- How can descendants of a stolen generation person (under section 5 of the Act) make an application if that relative has been deceased for a period of time. This is also a concern of how they can provide proof for the Stolen Generation Tribunal to consider in their decision making process of the application.
- There are no details in relation to the appeal process that applicants can undertake if they have concerns with the decision making of the Stolen Generation Tribunal.

Section 8: Time for completion of assessment

This section of the Act is far too long to assess application. It should be amended based on classification:

- Original stolen generation applicant will attempt to finalise decision within 3months of receiving application.
- Descendent of a stolen generation person applying for ex gratia payment will be assessed no earlier than 3 months to no later than 6 months.

Section 11: Amount of ex gratia payment

The amount of an ex gratia payment should be based on the applicant's eligibility under section 5 (3) which are based on the previous suggested amendments:

- Section 5 (3) to remain the same.
- Section 5 (3) (a) to remain the same.
- Section 5 (3) (b) – *should state a living descendent being only one family member may apply for a deceased person who would of satisfied the criteria.*
- Section 5 (3) (i) in subsection (1) (a) or (b) as outlined in the **amended version above.**
- Section 5 (3) (ii) in subsection (2) (a) or (b) as outlined in the **amended version above.**

The Croker Island Stolen Generation would like to highlight the following:

- The amount of $20,000 as a common experience and $3000 for every year of institutionalisation. The payment can not be a solution of one amount fits all. The fact that all Stolen Generation people are to receive one common amount doesn't reflect the laws that were enacted by the Commonwealth and State governments at a given time.
- Most State government have established and/or about to set up a Stolen Generation compensation legislation and funds. To provide reparations to its Stolen Generations. As far as we are aware most states have based this decision on litigation cases won in the courts. Queensland and Western Australia are currently in the process as we write this submission of establishing such funds.
- Due to the unique circumstances of the Northern Territory we came under the jurisdiction of the Commonwealth government back in 01/01/1911 when the Aborigines Ordinance Act was enacted as law. Therefore we believe it is the Commonwealth governments responsibility to establish a fund that compensations these people affected by the Aborigines Ordinance Act of 1911 and/or 1957.

- The amount should be $450,000 for injustices and loss suffered. A further one of payment of $75,000 for damages incurred. Should be made available to living stolen generation applicants.
- For other applicants that are subject to Section 5 (2) (a) should be moved to (b) this subsection must be amend as follows – *an Aboriginal or Torres Strait Islander person who was removed from their family prior to 31st December 1975 that was subject to similar state legislation and was under the age of 21 years at the time of their removal. The Stolen Generation Tribunal is satisfied, the person was subject to duress, by a state agency as a consequence, in whole or part of policies operating at the time;* should receive a minimum payment of $20,000 as common experience and $3,000 for each year of institutionalisation.
- This should also be the situation for descendents of a stolen generation person eligible under section 5 (1), (2) and (3) as outlined in amended version above. These applicants should receive a minimum payment of $20,000 as common experience and $3,000 for each year of institutionalisation.

Recommendations:

As the Senate Committee is considering submissions far and wide across Australia we would like them to take into consideration the laws that governed various states and territories at the time.

The Aborigines Ordinance 1911 and 1957 only impacted one group of indigenous people in a distinct area of Australia. Sure it can be argued that other states were impacted in directly, however how many can actually state they were directly affected by the Aboriginal Ordinance of 1911 and 1957 not many.

There are only a very limited number of first generation stolen generation people alive today that were affected by the commonwealth government laws at the time.

The ex gratia payment is for only a small number of indigenous people affected by the Aborigines Ordinance of 1911 and 1918. Most if not all of the indigenous people that were affected by this Act also participated in the Bringing them home report.

Croker Island Stolen Generation and other institutional groups recommend the following be considered by the Senate Committee, they are as follows:

1) They consider the amendments proposed for section (4), (5), (6), (8) and (11) of the Bill 2008.
2) Consider the laws that governed states and territories relating to the Aborigines Ordinance of 1911 and 1918. The fact is the Commonwealth government was responsible for enacting laws that forcibly removed aboriginal and half cast children in the Northern Territory.

3) The amount of ex gratia payment can not be one amount fits all. The Senate Committee needs to consider compensation and reparations payment to children that were affected by Commonwealth legislation under the Ordinance Act of the time. This also includes the fact that other States have established their own policies and laws and their own respective Stolen Generation Fund.
4) The Croker Island Stolen Generation believes the recommendations outlined in this submission is viable for the Federal government to pay compensation / reparations as there is a limited to small number of stolen generation people affected by the federal government laws at the time.

We seek closure and resolution to ensure our stolen generation have a quality way of life. This submission highlights the importance of considering how unique the Northern Territory experience was. We were governed by the Commonwealth at the time and need them to take leadership and responsibility to ensure there is justice and closure for our stolen generation.

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References:

1) Brining them home report.

2) Human Rights and Equal Opportunity Aboriginal and Torres Strait Island Social Justice Home page. http://www.hreoc.gov.au/social_justice/index.html

3) Public Interest Advocacy Centre: Submission to the Senate legal and constitutional reference committee. Inquiry into the Stolen Generation.

4) Stolen Generation Compensation Bill 2008-04-08

5) Van Boven, T 1993: study concerning the right to restitution compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. Final report.