The University of Sydney

Faculty of Law

SYDNEY CENTRE FOR INTERNATIONAL LAW

173–175 Phillip Street
Sydney NSW 2000
Australia

DX 983, Sydney
Tel: +61 2 9351 0354
Facsimile: + 61 2 9351 0200

Senate Legal and Constitutional Affairs Committee

10 April 2008

Dear Senate Committee

Re: Submission to the Inquiry into the Stolen Generation Compensation Bill 2008

Thank you for the opportunity to make a submission to this inquiry. The Sydney Centre for International Law is a leading research and policy centre on international law in Australia. For the purposes of this submission, Dr Thalia Anthony is recognised as an expert in indigenous law and torts, while Dr Ben Saul has expertise in international human rights law and the law on genocide; and we are assisted in research by Ms Naomi Hart of Sydney Law School.

In principle, we welcome the Bill and support its broad objectives of providing reparations to indigenous Australians who were directly affected by Australian governments' policies of removing indigenous and part-indigenous children from their parents.

A SUBSTANTIVE LEGAL ISSUES

1. Legal Basis of Compensation for Forced Removals

Ay compensation scheme for indigenous child removals should, at a minimum, address the underlying legal injuries suffered as a result of removal practices and their consequences.

Under international human rights law, Australia is required to provide effective remedies for rights violations, which in the case of the stolen generations may include infringements of rights to family life (International Covenant on Civil and Political Rights (ICCPR), art 23), culture/minority rights (ICCPR, art 27), liberty and security of person (ICCPR, art 9), equal protection before the law (ICCPR, art 26), a fair hearing (ICCPR, art 14), and education (ICCPR, art 18); as well as infringements of the prohibition on racial discrimination (ICCPR, art 26; Convention on the Elimination of All Forms of Racial Discrimination), children's rights (Convention on the Rights of the Child), freedom from arbitrary interference with their privacy, family and the home (ICCPR, art 17), and freedom from cruel, inhuman or degrading treatment (ICCPR, art 7; Torture Convention).

It should also be noted that so far as international best practice is concerned, the emergent international law regime on the rights of indigenous people (2007 UN Declaration on the Rights of Indigenous Peoples) and on the reconceptualization of indigenous peoples as legal "peoples" entitled to (internal) self-determination should also influence the measure of compensation (although such emergent regimes were likely not applicable, at law, at the time of child removals). In particular, the Declaration on the Rights of Indigenous Peoples recognises a duty to make reparations to indigenous peoples whose individual *and collective* rights have been infringed.[1]

In addition, some removal practices may have amounted to genocide as defined under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. While the Convention primarily establishes individual criminal liability for genocide, it also imposes an obligation on States to prevent genocide (art 1). Under the principles of State responsibility, a breach of that obligation to prevent genocide engages the responsibility of the State to make reparation for injury (including through compensation): International Law Commission, Articles on State Responsibility.

There is sufficient historical evidence available to conclude that at least some forced removals of indigenous children manifested a specific intent to destroy indigenous people as a distinct group. The immediate physical extermination of members of the group is not a necessary element of the crime of genocide. Further, a subjective benevolent intention by the removing authorities does not negative any underlying objective genocidal intent. To put it another way, if the authorities believed that it was in the best interests of indigenous children to erase their blackness or 'whiten' them through assimilation, such belief may still evidence the specific intent to destroy the conditions necessary for the group's continued existence as a group (which includes the transmission of cultural practices and identity from parent to child). Finally, no finding of criminal liability in an Australia is necessary prior to recognising State responsibility to make reparation for genocide.

At common law, compensation potentially attaches to a number of distinct causes of action in particular cases of removal, including unlawful deprivation of liberty (without statutory authorisation), abuse of power during removals, and breach of guardianship obligations following removal: see, eg, HREOC, *Bringing Them Home* (1997), chapter 13.

In our view, any scheme to compensate members of the stolen generation must, at a minimum, provide for compensation to be awarded which responds to the legal harm(s) suffered in individual cases of removal. This in turn requires an individualised claims assessment process.

2. Effective Remedies for Rights Violations at International Law

States responsible for breaches of the international human rights identified above are required to make reparation for injury, pursuant to the obligation to provide effective remedies for violations (ICCPR, art 2). Reparation should include measures of restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition: see, eg, the United Nations (Van Boven-Bassiouni) *Principles on The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*,[2] which consolidate the relevant human rights jurisprudence, treaties and State practice. Such principles were adopted by HREOC in Bringing Them Home in supporting measures of restitution, compensation and rehabilitation. We note here that the right to reparations of indigenous peoples have, for instance, been recognised in Canada[3] and through the Waitangi Tribunal in New Zealand.[4]

Satisfaction, as an element of reparation, can include a State's expression of regret or a formal apology. We note that the Prime Minister's apology to the stolen generations in Parliament in 2008 accordingly constitutes a measure of satisfaction for rights violations caused by child removals. We note, however, that an apology alone cannot discharge the obligation to make full reparation, and therefore it does not take the place of the pressing need also to render monetary compensation.

3. Ex Gratia Payments under the Bill

The Bill provides for ex gratia payments to those forcibly removed, comprised of a lump sum of $20,000 plus $3,000 for every year of separation from families. The Canadian Indian Residential Schools Settlement Agreement similarly offers a 'Common Experience Payment' of $10,000 and an additional $3000 for every year, beyond the first, in which an applicant remained institutionalised.[5]

On the one hand, an ex gratia payment is not the most appropriate response to forced removals, since it carries no admission or acceptance of legal liability for past wrongs. On the other hand, it is a convenient device for circumventing the evidentiary and legal difficulties involved in establishing specific legal liabilities in individual cases, which would hinder compensation in many cases.

The Lump Sum Payment

In principle we support the proposal to pay a common lump sum to recognise the wrongfulness of removal, and we agree that $20,000 is a reasonable amount for this purpose. Such a payment should be stipulated to be in acknowledgement of the wrongfulness (legal or otherwise) of removal.

The Additional Payment

We note, however, that the circumstances of removal, and the consequences of removal, varied significantly in individual cases. The additional payment for each year spent separated from families recognises only one aspect of individuation – that is, the duration of separation. As noted above, depending upon the circumstances, individual experiences of removal may engage violations of a wide range of human rights, the commission of genocide, and common law liabilities.

Consequently, any additional payment beyond the lump sum should be determined on an individualised basis, taking into account the personal circumstances and experiences of the applicant. To that end, we support compensation for the heads of damage noted by HREOC in 1997: racial discrimination, arbitrary deprivation of liberty, pain and suffering, abuse, including physical, sexual and emotional abuse, disruption of family life, loss of cultural rights and fulfilment, loss of native title rights, labour exploitation, economic loss and loss of opportunities.

In particular, compensation should address not only the forcible removal legislated in government policy, but also the unlawful acts (especially abuse and sexual assault) inflicted on Indigenous children in foster homes and institutions. For example, the Canadian Indian Residential Schools Settlement Agreement offers applicants the opportunity to undergo an Independent Assessment Process to pursue a sexual or serious physical abuse claim.[6]

4. Persons Entitled to Compensation

There is no basis in human rights law for limiting compensation to those forcibly removed. Legal entitlement to compensation flows from the nature of the human right violated. Thus, for instance, to the extent that the forced removal of a child violates the rights to family life, and cultural life, as identified earlier, all affected by the violation of such rights are entitled to reparation.

Accordingly, the Bill should also make payments available for families and kin of those removed, especially mothers, who suffered harm from the forcible removal of their children. We support HREOC's recommendation that reparation be made to all who suffered due to removal policies, including: (a) individuals forcibly removed as children; (b) family members who suffered as a result; (c) communities which suffered cultural and community disintegration in consequence, and (d) descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land.

5. Need for a National Compensation Fund

A Federal-State reparations system that is funded by all levels of government and covers all Indigenous children forcibly removed would be the most effective model for addressing the broad loss to the Stolen Generations in a holistic and well-resourced manner. The consistency of the Stolen Generations policies and ramifications across Australian jurisdictions warrants a grand response to this national tragedy.

In addition, churches should be required (or encouraged) to contribute to this Fund to recognised their joint-wrongfulness in many cases. For example, the Canadian Indian Residential Schools Settlement Agreement includes a Presbyterian-Canada Apportionment Agreement. In 1994, the Canadian Presbyterian Church issued a public confession for wrongs committed in residential schools, including physical, psychological and sexual abuse. In applications in which both the Government and a church operated a school, the Government will provide 70 per cent of compensation for successful claims, and the Presbyterian Church pays the remaining 30 per cent (until it has paid a total of $2.1 million). After that, the Government will pay 100 per cent of the compensation.[7] The Church also provided $100 million for 'healing' initiatives.[8]

6. Need for Wider Reparation Initiatives

A national body should also be established to implement 'healing' initiatives. For example, the Canadian Government has invested $125 million in an Aboriginal Healing Foundation which is responsible for, among other tasks, organising events and memorials to commemorate the legacy of these schools, for which it has an additional budget of $20 million.[9] One further initiative in Australia could be the declaration of a National Sorry Day. In addition, funded programs to support family reunion in each State and Territory would also be an important means of making reparation.

Further, given the immense, complex and ongoing loss that the Indigenous community suffered as a result of the stolen generation, there must be a mechanism that empowers Indigenous people to have their grievances aired and play a role in moving forward. The achievements of the Truth and Reconciliation Commissions in South Africa provide useful models for Australia to consider. Such a Commission would not only administer a reparations program, but also provide an avenue for Indigenous people to have their experiences of injustice expressed, heard and addressed.

A Truth and Reconciliation Commission should publicly reveal the truth about past atrocities. It would have a broader scope and ambit than the 1997 HREOC Inquiry and report. A Truth and Reconciliation Commission could incorporate culturally appropriate mechanisms to allow truth-telling and healing for victims and their families. There would be an absence of legal rules and inclusiveness for Indigenous communities at large. For instance, the Truth and Reconciliation Commission under the Canadian Indian Residential Schools Settlement Agreement is responsible for implementing public education and awareness programs as well as providing opportunities for indigenous students, families and communities to share their experiences of Indian Residential Schools.[10]

B PROCEDURAL ISSUES

In our view, any compensation tribunal should be governed by the following principles:

(a) *Indigenous participation*: Any tribunal administering the payments should be constituted by both Indigenous and non-Indigenous people. Appointments should be made in consultation with Indigenous organisations in each State and Territory having particular responsibilities to people forcibly removed in childhood and their families. The president of the tribunal should be an Indigenous person; and the tribunal's independence of government must be guaranteed;

(b) *Assistance to claimants, based on HREOC's recommendations*: The compensation mechanism should be given the widest possible publicity to ensure access to justice; claimants should receive free (or means-tested) legal advice and representation; and no limitation period should be specified.

In this respect, a study of indigenous Canadians who received lump sum payments through a court case settlement or advance Common Experience Payments found that potential applicants were sometimes hesitant to apply under the Canadian Indian Residential Schools Settlement Agreement because of the significant legal costs.[11]

(c) *Minimal procedural formalities*: The tribunal should not be bound by formal rules of evidence, or strict legal or evidentiary burdens; the tribunal should be culturally-appropriate (including in its use of language); and there should be sensitivity to the those of have experienced sexual abuse (as well as counselling available).

In this regard, New Zealand's Waitangi Tribunal accepts evidence in Maori, and holds hearings in *kainga* (villages or traditional meeting houses) near the communities who carry the grievance. Hearings also involve features of Maori practices, such as traditional greeting ceremonies at the beginning of each session.[12]

Please be in touch if you require any further information or clarification.

Yours sincerely

Dr Thalia Anthony
Associate, Sydney Centre

Dr Ben Saul
Director, Sydney Centre

Ms Naomi Hart
Researcher, Sydney Centre

NOTES

[1] Declaration on the Rights of Indigenous Peoples art 8: art 40: 'Indigenous peoples have the right to access to … effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.' See also the Declaration of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, art 104.
[2] See: United Nations Human Rights Commission, The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: Final Report of the Special Rapporteur, M Cherif Bassiouni, submitted in accordance with the Commission resolution 1999/33, E/CN.4/2000/62 (Jan. 19, 2000).
[3] In 2005 the Canadian Race Relations Foundation Board of Directors unanimously adopted in 2005 a policy of 'acknowledg[ing] the right of discriminated communities to seek redress, including reparations, among viable options of recourse and remedy for injustices committed against their groups, including historical injustices': B Morse, 'Reconciliation Possible? Reparations Essential'', in *From Truth to Reconciliation: Transforming the Legacy of Residential Schools*, Aboriginal Healing Foundation, at 238; see also Indian Residential Schools Resolution Canada, 'Settlement Agreement: Backgrounder', at http://www.irsr-rqpi.gc.ca/IRSSA-eng.asp?action=Backgrounder [viewed 2 April 2008].
[4] This Tribunal, established in 1975, is designed to provide reparations for grievances relating to the Treaty of Waitangi, entered into by the British Crown and 539 Maori leaders in 1840. Most claims relate to land or resource loss. Whole tribes or communities, rather than individuals, apply for reparations. See J. Williams, 'Reparations and the Waitangi Tribunal: Paper to the "Moving Forward" Conference', HREOC, at www.hreoc.gov.au/social_justice/conference/movingforward/speech_williams.html.
[5] Indian Residential Schools Resolution Canada, 'Settlement Agreement: Backgrounder', at http://www.irsr-rqpi.gc.ca/IRSSA-eng.asp?action=Backgrounder [viewed 2 April 2008].
[6] Ibid.
[7] Indian Residential Schools Resolution Canada, 'Settlement Agreement: Presbyterian Apportionment Agreement', at http://www.irsr-rqpi.gc.ca/newsroom-eng.asp?action=info-feb-13-2003 [viewed 2 April 2008].
[8] Indian Residential Schools Resolution Canada, 'Settlement Agreement: Backgrounder', at http://www.irsr-rqpi.gc.ca/IRSSA-eng.asp?action=Backgrounder [viewed 2 April 2008].
[9] Ibid.
[10] Ibid.
[11] Aboriginal Healing Foundation, 'Lump Sum Compensation Payments Study', 2007, p. 13.
[12] J. V. Williams, 'Reparations and the Waitangi Tribunal: Paper to the "Moving Forward" Conference', HREOC, at http://www.hreoc.gov.au/social_justice/conference/movingforward/speech_williams.html [viewed 2 April 2008].