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18 April 2008

Mr Peter Hallahan
Committee Secretary
Senate Standing Committee on
Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: legcon.sen@aph.gov.au

Dear Mr Hallahan,

Re: Inquiry into the Stolen Generation Compensation Bill 2008

Thank you for your letter of 17 March 2008 and the opportunity to provide comment to the Senate Legal and Constitutional Affairs Committees Inquiry into the Stolen Generation Compensation Bill 2008 ("Bill"). The Committee strongly supports the establishment of a Stolen Generations Tribunal to decide applications for compensation. The Committee submission to the 2000 Inquiry into the Stolen Generation proposed that:

> *"..an effective means of implementing the need for compensation could be to establish a tribunal similar to the New South Wales Victims Compensation Tribunal ("the VCT")... The VCT considers claims, has a ceiling on amounts that can be claimed, and includes other services such as counseling."*

The Committee also believes that the viability of the Tribunal would be assisted by offering grief counseling, assistance with connecting families and accessing birth certificates as well as providing monetary compensation.

The Society's Human Rights Committee has reviewed the Bill and submits the following:

1. While Senator Bartlett states that the Bill is closely modelled on the Tasmanian *Stolen Generations of Aboriginal Children Act 2006* ("Act")[1] there are significant differences which have the potential to create problems for most applicants.

[1] Commonwealth of Australia, *Parliamentary Debates*, Senate, 14 February 2008, 12. (Andrew Bartlett, Senator).

For example, clause 6 requires application to the department even though there is a Tribunal set up. This has the potential to erode the separation of powers between what is effectively a Court (the Tribunal) and the executive government. The Tasmanian Legislation by comparison does not provide for Court or Tribunal based payments, because they are ex gratia payments and they are simply given after an application is made to a public servant. The consequence of this may be to render the Bill invalid as so far as it is contrary to the principles enunciated in the 1956 Boilermakers' Case (*R v Kirby; Ex parte Boilermakers Society of Australia* (1955-56) 94 CLR 254; (1956-57) 95 CLR 529; (1957) AC 288.

As you will be aware conciliation and arbitration machinery underwent a fundamental change in 1956 following the decision of the High Court in the *Boilermakers case*. The High Court held that it was unconstitutional for the Commonwealth Court of Conciliation and Arbitration to be vested with both arbitral and judicial powers because of the acceptance in the Constitution of the separation of legislative and judicial powers. As a result, *the Conciliation and Arbitration Act 1904* was amended to establish two separate bodies.

Clauses 8 and 9 and 10 continue this confusion. Either the Court should make the orders independently or the Department should, but they should not both be involved.

2. Clause 11 of the Bill requires further specificity. It provides for a $20,000.00 payment to all eligible claimants and it then goes on to add $3,000.00 "for each year of institutionalisation". However, there is no definition of "institutionalisation". A specific description of "institutionalisation" should be included to promote certainty and to avoid protracted disputation on this point.

3. Clause 13 allows judicial review of a Tribunal decision, but there are no review processes articulated, with the likely practical effect that judicial review is effectively unavailable. This needs to be clarified.

4. Clause 15 sets out criteria for appointment of Tribunal members but is unclear and would benefit from further explication.

5. Clause 22 refers to funding for "healing centers and services of assistance". While this seems to be laudable in principle, further definition of the services and, scope to determine the terms for ordering or facilitating access to them is critical.

6. Clause 5 concerning eligibility criteria is substantially different to the Tasmania Legislation. The Committee does acknowledge that Senator Bartlett admitted amendment to this section, however the changes appear to make the criteria confusing and imprecise. In some cases forcible removal is required and in others not.

   Sub clause (1)(a) allows compensation to be given to somebody who was not forcibly removed and sub clause (b) refers to persons subject to "*similar legislation*" but does require forcible removal.

   Sub clause (2) refers to a person being eligible who was "*subject to duress by a State agency as a consequence of race-based policies*". The Committee feels that it would

be particularly difficult to prove eligibility under this subclause. It also does not insist on forcible removal in subclause (a).

Sub clause (3) then gives any living descendant compensation if the ancestor was eligible under either subclauses (1) or (2). It also deletes the qualifications in sub clauses (4) and (5) of the Tasmanian Act. These were to the effect that children properly removed for child welfare purposes or because they had been convicted of an offence were not eligible and would possibly be retained.

Stolen Generations Tribunal

The Committee suggests that the model created by the Tasmanian Legislation be adapted to include the provision of a Tribunal. This is clearly preferable to ex gratia payments being made by the Executive. It will be subject to consistent application policies and guidelines, and principles of quantification. Generally, it would be a more transparent process for dealing with such matters.

Consideration of existing domestic and international compensation models

As discussed in "*Sorry': the unfinished business of the Bringing Them Home* report'[2] the only State government to offer compensation to Indigenous stolen children to date is the Tasmanian Labor government by way of the *Stolen Generations of Aboriginal Children Act 2006*.

The Committee notes that although some individuals have sought compensation through the Courts, only one successful plaintiff, Bruce Trevorrow[3], has been able to obtain monetary compensation.

It is noted that in Mr Trevorrow's case, Justice Gray said that in the 1950s when Mr Trevorrow was removed in less, a precise procedure has been followed otherwise in South Australia removals were illegal. This gives rise to the possibility that some more South Australian plaintiffs may be successful in being compensated in circumstances where the great majority of possible plaintiffs elsewhere would not be compensated (simply because the same means of removal used outside South Australia may have been legal).

Now that some people in Tasmania and South Australia have been or will be compensated, it is submitted that only a statutory scheme could remedy the injustice arising from generous compensation being available to a minority of victims (based on the nuances of the law in the jurisdiction in question) but none in all other cases.

It would also seem unwise not to take the existing domestic and international models into consideration when developing such a framework for Australia.

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[2] See Parliamentary Background Note – '*Sorry': the unfinished business of the Bringing Them Home report*. Coral Dow. February 2008. http://www.aph.gov.au/library/pubs/BN/2007-08/BringingThemHomeReport.htm

[3] Trevorrow v. State of South Australia (No 5) [2007] SASC 285 (1 August 2007). http://www.austlii.edu.au/au/cases/sa/SASC/2007/285.html

The Canadian experience, where Indigenous children were forcibly removed from their homes by church and government officials , found that civil action claims were not a suitable process for compensation as the Courts became congested and the State was forced to initiate an alternative dispute resolution scheme ("ADR")[4]. This ADR scheme also proved unsuccessful and ineffective as it caused extensive grief for survivors and did not avert the large amounts of litigation[5].

The Indian Residential Schools Settlement Agreement ("Settlement Agreement"), entered into effect on 19 September 2007, made over three billion Canadian dollars available for a variety of compensation. The Settlement Agreement proposes a Common Experience Payment to be paid to all eligible former students who resided at recognised Indian Residential Schools, an Independent Assessment Process for claims of sexual and serious physical abuse, as well as measures to support healing, commemorative activities, and the establishment of a Truth and Reconciliation Commission[6].

Having considered the models above the Committee supports the establishment of a Stolen Generations Tribunal to hear applications for compensation from those Indigenous peoples forcibly removed from their families and communities.

Relevant unimplemented recommendations of the *Bringing Them Home* report

One of the key recommendations of the 1997 *Bringing Them Home* report was that '*reparation be made in recognition of the history of gross violations of human rights*' where reparation is understood to consist of acknowledgement and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation.

In February this year the formal apology by the Prime Minister both acknowledged and apologised for the laws and policies of previous parliaments and governments he also made assurances that such mistreatment would never be repeated. This has been a significant development towards reconciliation and implementing the recommendations of the *Bringing Them Home* report. However to address the socio-economic disadvantage, discrimination and general human rights abuses suffered by the stolen generation it is vital to implement all the recommendations, including that of monetary compensation preferably by way of a tribunal as discussed above.

Other Observations

In 2004, NSW established a fund to compensate indigenous people for stolen wages (Aboriginal Trust Fund Reparation Scheme). Some of the issues that have arisen in respect to that scheme could help inform this Bill.

The first issue is a statutory right to legal aid. Applicants will need legal advice to assist in the preparation of their applications. Consequential policy and budgetary issues also arise, including the provision of more resources for Legal Aid to provide solicitors. Government training for solicitors is also important, to ensure that legal practitioners can adequately advise their indigenous clients.

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[4] Popic, L. *Compensating Canada's Stolen Generations*. Indigenous Law Bulletin, December/January 2008, Volume 7, Issue 2, p15.
[5] See 4 above. p15.
[6] Government of Canada. *Highlights: Indian Residential Schools Settlement Agreement*. 2006. http://www.iacobucci.gc.ca/english/pdf/IRS_SA_Highlights.pdf

Another issue worth considering is provision for access to government archives for applicants. To best present their cases, many victims of the stolen generation might need to do considerable background research. The Bill should facilitate affordable, efficient and open access to information about an applicant that is held in government archives.

Thank you for the invitation to comment on the Stolen Generation Compensation Bill 2008. If you require any further information please contact Ms Sarah Sherborne-Higgins, Executive Officer, Human Rights Committee by email: ssh@lawsocnsw.asn.au or phone 02 9926 0354.

Yours sincerely

Hugh Macken
President