PILCH VIC Public Interest Law Clearing House

Stolen Generation Compensation Bill 2008

Submission to the Legal and Constitutional Affairs Committee Inquiry into the Stolen Generation Compensation Bill 2008

Public Interest Law Clearing House (vic) Inc.
Level One, 550 Lonsdale Street, Melbourne Vic 3000 DX 38227/Flagstaff
Telephone: (03) 9225 6684 Fax: (03) 9225 6686 Email: projects.pilch@vicbar.com.au

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Kristen Hilton

Executive Director

Public Interest Law Clearing House (PILCH) Inc
Level One, 550 Lonsdale Street
Melbourne VIC 3000

Tel: (03) 9225 6680
Fax: (03) 9225 6686
Email: kristen.hilton@pilch.org.au

1. Executive Summary and Recommendations

1.1 Introduction

This submission is made by the Public Interest Law Clearing House (***PILCH***) to the Standing Commission on Legal and Constitutional Affairs in response to the Inquiry into the Stolen Generation Compensation Bill 2008 (the ***Bill***).

PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

PILCH coordinates the delivery of pro bono legal services through five schemes:

- the Public Interest Law Scheme ("PILCH Scheme");
- the Victorian Bar Legal Assistance Scheme ("VB LAS");
- the Law Institute of Victoria Legal Assistance Scheme ("LIV LAS");
- PILCH Connect ("Connect"); and
- the Homeless Persons' Legal Clinic ("HPLC").

PILCH's objectives are to:

- improve access to justice and the legal system for those who are disadvantaged or marginalised;
- identify matters of public interest requiring legal assistance;
- seek redress in matters of public interest for those who are disadvantaged or marginalised;
- refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- support community organisations to pursue the interests of the communities they seek to represent; and
- encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

1.2 Recommendations

Recommendation 1

PILCH supports the Bill's recommendation to establish a Stolen Generations Tribunal and regards this as a fundamental and necessary step in the reconciliation process.

Recommendation 2

PILCH recommends that a minimum 10 year window is appropriate for Stolen Generations compensation applications to the Tribunal.

Recommendation 3

PILCH recommends that the Tribunal should have additional powers to:

a) provide a forum in which Indigenous people who have been affected by forcible removal policies can tell their stories in safe and secure environment; and

b) make general appropriate recommendations to the relevant Minister arising from oral testimony.

Recommendation 4

PILCH recommends that the Committee consider how the Canadian reparations and healing scheme might be adapted to suit Australian circumstances, and recommends that clause 22 of the Bill should be amended to include greater detail regarding the nature and structure of the healing centres and the additional services to be established and funded.

2. Compensation and Reparations

PILCH supports the concept of monetary compensation as part of a reparations programme for gross violations of human rights. Monetary compensation, including ex gratia or lump sum payments of the kind provided for by the Bill under consideration, represents one of the five components of the reparations package recommended in the Human Rights and Equal Opportunity Commission's *Bringing Them Home* Report.[1]

PILCH broadly endorses the report's recommendation in relation to ex gratia compensation payments, being that any indigenous person who was forcibly removed from their family be entitled to a minimum lump sum payment in respect of that removal.[2]

However, PILCH considers that such ex gratia payments must form part of a considered reparations package of the kind recommended in the Public Interest Advocacy Centre's *Restoring Identity* Report.[3] Importantly, a reparations package should specifically address individual and cultural healing and restitution through counselling services and language and culture preservation initiatives such as those outlined in Chapter 14 of the *Bringing Them Home* Report. PILCH's views on such initiatives are discussed further below.

In this context, PILCH notes that the provision of reparations to indigenous peoples for violations of their human rights has been endorsed internationally as well as domestically. Article 8(2) of the United Nations *Declaration on the Rights of Indigenous Peoples* provides that States shall 'provide effective mechanisms for prevention of, and redress for' certain actions, including 'any action which has the aim or effect of depriving [indigenous peoples] of their integrity as distinct peoples, or of their cultural values or ethnic identities', and 'any form of forced assimilation or integration'. The language of Article 8(2) clearly

[1] Human Rights and Equal Opportunity Commission, *Bringing Them Home* (1997), Recommendation 3.

[2] Ibid, Recommendation 18.

[3] Amanda Cornwall (Public Interest Advocacy Centre Ltd), *Restoring Identity* (2002), pp 54-56.

encompasses the separation policies referred to in clause 5 of the Bill, including the Aborigines Ordinance 1911 and 1918 and similar legislation. As chapter 11 of the *Bringing Them Home* Report recognised, 'the objective [of those policies] was to absorb the children into white society', and '[m]any children experienced contempt and denigration of their Aboriginality and that of their parents or denial of their Aboriginality'.[4]

Countries such as Canada, New Zealand and South Africa have recognised the importance of reparations, including compensation, for violations of the human rights of their indigenous peoples. The experiences in these countries reflect a growing international recognition of the role of reparations in the reconciliation process. The schemes introduced in each of these countries acknowledge that while monetary compensation alone is not sufficient, it can nonetheless assist in redressing the harm done. While this submission touches on some of the content of those schemes, more detail is provided in chapter 6 of the Public Interest Advocacy Centre's *Restoring Identity* Report.[5]

3. Specific comments in relation to the Bill

3.1 Substantive Issues

(a) Clause 6 – Applications for ex gratia payment

PILCH applauds the inclusion of subclause 6(2) in the Bill which permits the presentation of oral evidence to the Stolen Generations Tribunal. PILCH considers that in order to enable judicial review of tribunal decisions it would be helpful if provision were made for transcription of oral evidence presented before the Stolen Generations Tribunal, subject to appropriate confidentiality provisions which permit the use of that information for the restricted purpose of (i) determining applications and (ii) any subsequent judicial review.

PILCH recognises the extension of subclause 6(3) from a 3 year application period, as initially drafted, to a 7 year application period from the time of commencement. However, PILCH submits that a minimum application period of 10 years is warranted. Indeed, the *Bringing Them Home* report recommended that there should be no limitation period for compensation claims.[6] That recommendation was in accordance with the United Nations *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1968* (not ratified by Australia). An extended application period is required to allow potential applicants to come to terms with the wrong done to them and to prepare themselves to make an application. In this regard, the *Bringing Them Home* report noted that '[t]he experience of victims of the Shoah (Holocaust) suggests that it can take some time before victims are mentally capable of filing claims or accepting

[4] *Bringing Them Home*, above n1, chapter 11.

[5] *Restoring Identity*, above n3, pp 40-43.

[6] *Bringing Them Home*, above n1, Recommendation 17.

compensation'.[7] Similarly, it may take some time and a number of successful applications before Aboriginal and Torres Strait Islander people who are eligible for an ex gratia payment learn of the Tribunal and gain confidence in its processes.

Recommendation 1:

PILCH recommends that a minimum 10 year window is appropriate for Stolen Generations compensation applications to the Tribunal.

(b) Clause 16 and 17 – Functions and Powers of Stolen Generations Tribunal

PILCH recognises the importance of the Tribunal's primary function in deciding applications as set out in clause 16. However, PILCH considers that the Stolen Generations Tribunal should be empowered to perform other specific functions above and beyond deciding applications for compensation. PILCH submits that clause 16 should additionally provide that the Tribunal is to:

(i) provide a forum in which Indigenous people affected by forcible removal policies can tell their story, have their experience acknowledged and be offered an apology;

(ii) make recommendations in its report to the Minister in relation to existing government and community activities that either cause or address the continuing high rate of Indigenous child separation, such as child welfare and juvenile detention policies; and

(iii) be required to be accessible and accountable and to take such actions as necessary to publicise its procedures and functions.

PILCH submits that the above functions, as recommended in chapter 8 of the *Restoring Identity* Report,[8] are integral to the proper performance of the Tribunal's duties. These functions significantly increase the worth of the compensation regime both to applicants and the wider community, and should be expressly provided for in the text of clause 16 and 17 of the Bill.

PILCH recognises and supports subclause 15(1)(e) as being fundamental to the functioning of the Tribunal insofar as it provides that the Tribunal must include at least three persons who identify as Aboriginal or Torres Strait Islander. PILCH submits that this inclusive approach should be extended to the ongoing operations of the Tribunal. That is, the Bill should specifically ensure that there is an ongoing involvement of, and consultation with, Aboriginal and Torres Strait Islanders with respect to the Tribunal's functions and operations.

Recommendation 2:

PILCH submits that the Tribunal should have additional powers to:

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[7] Ibid, chapter 14, citing Theo Van Boven, *Final Report of the Special Rapporteur of the United Nations, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms*, UN Doc. E/CN.4/Sub.2/1993/8 (1993), p 14.

[8] *Restoring Identity*, above n3, pp 55-56.

a) provide a forum in which Indigenous people who have been affected by forcible removal policies can tell their stories in safe and secure environment; and

b) make general appropriate recommendations to the relevant Minister arising from oral testimony.

The Tribunal should also be required to promote and publicise its functions.

(c) Clause 20 – Report to Minister

Clause 20 of the Bill provides that the Stolen Generations Tribunal must provide the Minister with a report on the performance of their functions within 30 days after the day on which a decision on the final application for an ex gratia payment is made.

As it is contemplated that applications for an ex gratia payment are to be made within seven years of the commencement of the Act, and the Tribunal is to make its decision within 12 months after receiving an application, it is conceivable that the Tribunal will not reach a decision on the final application until eight years after the commencement of the Act (or longer if, as PILCH proposes, the period for making applications is extended to ten years from the commencement of the Act). PILCH is concerned that this period is too long, and will allow problems with the compensation system to go unresolved. Accordingly, PILCH suggests that the Tribunal should be required to report to the Minister after the first [two years] of its operation. By this time, it is expected that the Tribunal would have sufficient experience in dealing with applications to identify any difficulties and recommend resolutions, resulting in a more effective compensation process.

(d) Clause 22 – Additional support

PILCH strongly supports clause 22 of the Bill, which provides for the allocation of funding for and the establishment of healing centres and services of assistance for those in receipt of compensation under the proposed Act. Healing centres play an important role in facilitating the healing process, by providing resources for healing initiatives and promoting awareness of healing issues and needs. However, PILCH considers that elaboration is required as to the nature of such 'healing centres' and their role. If the Bill remains in its current form, without firm guidelines as to how such centres might be established and the nature of the initiatives for which they are to be responsible, there is a real risk that no constructive steps will be taken towards this important aspect of the reconciliation process.

In this regard, the Canadian experience is instructive. In Canada, since colonisation, schools for First Nations children were established by missionaries and were later run by the churches. A Residential Schools System was introduced by the Government in 1923. Many of the children sent to Residential Schools were subject to severe neglect or abuse.

In January 1998, the Government of Canada made a Statement of Reconciliation, in which it announced a strategy for a process of reconciliation and renewal with the aboriginal peoples of that nation. One of the key initiatives of the strategy was the Aboriginal Healing Foundation (the ***AHF***), which was established in March

1998. The AHF provides an example of the type of scheme that might be established in Australia.

In essence, the AHF is an Aboriginal-managed, national, not-for-profit private corporation, whose mission is to encourage and support Aboriginal people in building and reinforcing sustainable healing processes that address the legacy of physical and sexual abuse in the residential school system in Canada. The AHF is governed by a Board of Directors consisting of Aboriginal people from across Canada. The members are appointed by Aboriginal political organisations, the Canadian Federal Government and Aboriginal people at large. It is accountable through its Funding Agreement with Canada and through By-Laws.

The AHF has an 11 year mandate to encourage and support community-based Aboriginal directed healing initiatives to address the abuse, and was provided at the outset with $350 million to distribute as grants to community-based healing initiatives. That funding was to be allocated over a five year period and expended over 10 years. The AHF funds various programs, including drug and alcohol abuse and parenting skills programs, thereby taking solid steps towards addressing the trauma affecting Aboriginal peoples in Canada.

Recommendation 3:

PILCH recommends that the Committee consider how the Canadian reparations and healing scheme might be adapted to suit Australian circumstances, and recommends that clause 22 of the Bill should be amended to include greater detail regarding the nature and structure of the healing centres and the additional services to be established and funded.

3.2 Drafting issues

It is vital that the language, intent and effect of the Bill is clear and unambiguous, such that it provides a workable system for the provision of ex gratia payments.

It is PILCH's view that the Bill would benefit from amendments to the drafting of certain clauses. We set out some examples below.

(a) Clause 3 – Interpretation

PILCH considers that the definition in clause 3 of 'Stolen Generations Tribunal' as 'a group of 6 persons, half or more of those persons being of Aboriginal or Torres Strait Islander descent' is insufficiently specific. In its current form, it could refer to any group of 6 persons of whom half are of Aboriginal or Torres Strait Islander descent. PILCH recommends that this definition should be amended to specify that the Stolen Generations Tribunal means the group of 6 persons appointed by the Governor-General in accordance with section 14, half or more of those persons being of Aboriginal or Torres Strait Islander descent.

(b) Clause 5 – Eligibility criteria for ex gratia payment

In PILCH's view, there are some difficulties with the eligibility provisions of the Bill.

On its face, subclause 5(2)(b) provides that any Aboriginal or Torres Strait Islander person who was subject to legislation permitting forcible removal of children from

their family is eligible for an ex gratia payment, notwithstanding that they were not in fact removed from their family. This interpretation gives the Bill and the accompanying Stolen Generations Fund a very broad operation, and it is not apparent from the Explanatory Memorandum or Second Reading Speech that this is the intended operation of clause 5(2)(b).

Further, the words 'one of the following' in subclause 5(3) suggest that pursuant to subclause 5(3)(a), any applicant who is an Aboriginal or Torres Strait Islander person is eligible for an ex gratia payment. PILCH assumes that this is not the intention of the provision, as demonstrated by the word 'and' at the end of subclause 5(3)(a). The ambiguity would be easily remedied by removing the words 'one of the following' from subclause 5(3).

(c) Clause 11 – Amount of ex gratia payment

Clause 11 provides that the amount of an ex gratia payment is an amount not exceeding $20,000 as common experience payment, in addition to the $3,000 payment for each year of institutionalisation. This drafting suggests that the 'common experience payment' component of an ex gratia payment can be made for an amount less than $20,000. However, there is no apparent provision in the Bill for powers to assess, nor criteria by which assess, the quantum of an ex gratia payment.

The Explanatory Memorandum states that '[clause 11] sets the payment… at $20,000 as common experience payment…'. This suggests that the 'common experience payment' is intended to be a fixed payment to all eligible applicants in recognition of their 'common experience' as members of the Stolen Generation, in addition to the $3,000 payment for each year of institutionalisation. PILCH recommends that the wording of clause 11 be amended to specify the amount of an ex gratia payment as being 'equal to $20,000 as common experience payment and $3,000 for each year of institutionalisation'.

Additionally, clause 11 only provides for the amount payable in respect of those applicants eligible under subclause 5(3) as opposed to those applicants eligible under subclauses 5(1) or 5(2). The description of clause 11 in the Explanatory Memorandum does not so limit the application of the clause. Instead, clause 11 appears to be intended to cover all applicants eligible under clause 5. PILCH submits that the proposed section 11 should be amended to replace the words 'subsection 5(3)' with 'section 5'.