



**Human Rights and Equal
Opportunity Commission**
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Submission of the

**HUMAN RIGHTS AND EQUAL OPPORTUNITY
COMMISSION (HREOC)**

to the

**SENATE LEGAL AND CONSTITUTIONAL AFFAIRS
COMMITTEE**

on the

**INQUIRY INTO THE STOLEN GENERATION
COMPENSATION BILL 2008**

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Human Rights and Equal Opportunity Commission

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Introduction

1. The Human Rights and Equal Opportunity Commission ('HREOC') welcomes the opportunity to make this submission to the Senate Constitutional and Legal Affairs Committee for its Inquiry into the Stolen Generations Compensation Bill 2008.
2. In the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) ('*Bringing them home*') HREOC recommended that reparations, including financial compensation, be made available to the Stolen Generations in recognition of gross violations of their human rights. The failure to adequately compensate Indigenous people who were removed from their families and communities remains a significant human rights issue in Australia and a matter of great concern to the Commission.

Summary

3. HREOC submits that the Bill should be passed. A national compensation scheme to make financial reparations to the Stolen Generations is long overdue.
4. HREOC encourages a co-operative, whole of government approach to measures involved in reparations for the Stolen Generations. In particular, compensation schemes must be nationally consistent across different state jurisdictions.

Recommendations

5. HREOC recommends:
 - (a) that the Commonwealth, through the Councils of Australian Governments, engage with State and Territory governments to develop a consistent approach with joint funding mechanisms in the provision of financial redress for the Stolen Generations; and

(b) that the Commonwealth encourages State and Territory governments, churches and non-government agencies that played a role in the removal of Aboriginal children from their families to generously contribute to the funding of any healing centres established for the Stolen Generations under the Bill.

Background

6. Since *Bringing them home* was released in 1997, both State and federal governments have implemented a number of responses to its recommendations. In particular, new funding and programs have been introduced for organisations such as Link-Up; mental health counselling; family reunion services; parenting support programs; programs to preserve Indigenous languages and culture; oral history recordings; and for the archiving of records. Parliamentary apologies have also now been made in every State and Territory, and in the Federal Parliament.
7. Despite this progress, a number of the recommendations of *Bringing them home* are yet to be implemented. There is also evidence that measures which governments have taken to implement the recommendations of *Bringing them home* have sometimes been inadequate. For example, the *Evaluation of the Bringing Them Home and Indigenous Mental Health Programs* undertaken in 2007 by Urbis Keys Young revealed that the Link-Up and Bringing Them Home Counselling programs are significantly under-resourced for the high workload that they experience.¹
8. In *Bringing them home*, HREOC recommended:

That, for the purposes of responding to the effects of forcible removals ‘compensation’ be widely defined to mean ‘reparation’; that reparation be made in recognition of the history of gross violations of human rights; and that the van Boven principles guide the reparation measures. Reparation should consist of,

¹ A Wilczynski, K Reed-Gilbert, K Milward, B Tayler, J Fear and J Schwartzkoff, *Evaluation of Bringing Them Home and Indigenous Mental Health Programs* (2007) Report prepared by Urbis Keys Young for the Office for Aboriginal and Torres Islander Health, Department of Health and Ageing, Canberra, p70.

1. acknowledgment and apology
 2. guarantees against repetition
 3. measures of restitution,
 4. measures of rehabilitation, and
 5. monetary compensation.²
9. The measures involved in reparations should be regarded as complementary, and need to be implemented as a whole. The recommendations made by HREOC in *Bringing them home* set out the **minimum** acceptable response required to heal the legacy that is borne by members of the Stolen Generations, their families and their communities.
10. A comprehensive response to the recommendations of *Bringing them home* also requires a fully coordinated approach by all levels of government. As Tom Calma, the Aboriginal and Torres Strait Islander Social Justice Commissioner, has commented, an appropriate and successful government response requires:
- committing to a partnership with Stolen Generations groups, as well as Link Ups and other service providers, with ongoing consultation and participation;
 - committing to a comprehensive government response to the needs of the Stolen Generations, as identified in the *Bringing them home* report; and
 - adopting a whole-of-government approach – across departments and across governments – to achieve this.³

Compensation

11. Compensation for members of the Stolen Generations is a central component of the *Bringing them home* report. HREOC notes that the final report of the 2000 Senate

² Human Rights and Equal Opportunity Commission, *Bringing them home: Report of the national Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (2007) Recommendation 3.

³ Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Let the healing begin: Response to government to the national apology to the Stolen Generations' (Speech delivered at the Members Hall, Parliament House, Canberra, 13 February 2008).

Committee Inquiry into the Federal Government's implementation of *Bringing them home* also recommended the establishment of a reparations tribunal.⁴

12. It is HREOC's position that a reparations tribunal will provide the Stolen Generations with a welcome alternative to seeking compensation through court processes.
13. The case of *Trevorrow v South Australia*⁵ demonstrates that redress for some members of the Stolen Generations is possible through the court system, although it takes a significant toll on individuals. Other cases have proven protracted, expensive, and have potentially played a role in revisiting trauma of removal and subsequent harms done to individuals.
14. As Justice O'Loughlin noted in the case of *Cubillo v Commonwealth*⁶ litigation brought by members of the Stolen Generations will also often have a number of inbuilt barriers to success, including lack of availability of critical evidence; difficulties in establishing the required onus of proof with the passage of time; the prejudice to the defendant given the frailty, illness and death of key witnesses; and the loss and or destruction of records and material documents. In jurisdictions such as the Northern Territory, for which the Commonwealth has a specific responsibility, the High Court has also found that the scope of government's power to enact legislation permitting the removal of children makes it extremely difficult to establish that any removal was unlawful.⁷
15. Accordingly, HREOC supports the model proposed in the Bill to develop a system of ex gratia payments for common experiences suffered by members of the Stolen

⁴ Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations*, the Senate, Canberra, 2000, Recommendations 7.

⁵ *Trevorrow v State of South Australia* (2007) SASC 285.

⁶ *Cubillo and Another v Commonwealth* (No. 2) [2000] FCA 1084.

⁷ *Kruger v Commonwealth* (1997) 190 CLR 1.

Generations. Such a system would provide a swifter, more appropriate and less damaging alternative to court processes.

16. HREOC notes that a number of schemes have recently been introduced nationally which compensate or provide ex gratia payments to individuals, both Indigenous and non-Indigenous, who have variously been subject to institutional care or abuse in care; who have had their wages and savings controlled; or who have been forcibly removed from their families.
17. A table providing an overview of these schemes may be found at **Appendix 1**. There are a number of key features to these schemes that provide lessons for any federal compensation process. In particular:
 - **Evidentiary burden:** Each scheme acknowledges the difficulties for claimants in evidencing their claims, due to the state and scope of government records. They recognise the undesirability of setting a high standard of proof or requiring claimants to pursue their claims through formal legal processes. Each scheme provides a simplified process which requires claimants to meet basic criteria to be eligible, as assessed by an independent body. Some of the schemes provide that where there is more substantial evidence (such as of abuse), higher level payments may be possible.
 - **A minimum specified ex gratia payment:** All of the Schemes provide for a minimum ex gratia payment when the criteria for the scheme is met. Most also then provide a higher level of payment where evidence supports such claims.
 - **Descendent claims:** The Tasmanian and NSW schemes also provide for descendent claims. The Queensland stolen wages scheme explicitly rejected this on the basis of the complexity of intestacy laws among Indigenous families. The Tasmanian scheme sets out a relatively simple model, with an equal distribution of funds among all living biological children of the deceased. The NSW

- Scheme's criteria for descendent claims is much broader and accordingly much more complex to administer.
18. HREOC notes that it is difficult to place a monetary value on the grief and suffering experienced by individuals who were forcibly removed, and by their families. The Commission provides no view on the appropriateness of the amount included in the Bill on the basis that this amount should be determined in consultation with Stolen Generations members and their organisations.
 19. HREOC notes, however, that the \$20,000 amount proposed as a common experience payment under the Bill is a modest amount compared to the comparable redress schemes outlined at Appendix 1. This is particularly true of circumstances where individuals who were removed can demonstrate evidence of abuse while in care.
 20. HREOC also notes the importance of a nationally consistent approach to this issue. At present, there are variations between States and Territories as to whether ex gratia payments are available, in what circumstances, and as to the level of payments. Some Stolen Generations members will be able to claim under existing schemes, but others can not. The limits of existing approaches mean that access to schemes can appear arbitrary for Stolen Generations members, with some aspects of their life experiences being recognised as compensable and other experiences not.
 21. **HREOC therefore recommends that the Commonwealth, through the Councils of Australian Governments, engage with State and Territory governments to develop a nationally consistent approach with joint funding mechanisms in the provision of financial redress for the Stolen Generations.** This is to ensure compensation schemes are applied universally to all members of the Stolen Generations and can ensure consistency in outcomes so that some individuals are not disadvantaged.

The proposed model

22. HREOC commends a number of features of the model proposed in the Bill. In particular, the non-adversarial process of application for compensation outlined by section 6 of the Bill appears to provide a culturally appropriate mechanism for the resolution of claims.
23. HREOC welcomes the absence of mandatory indemnity provisions under the Bill that might otherwise preclude individuals from making further or future claims. A compensation tribunal for the Stolen Generations is likely to provide a more supportive and cost-effective mechanism for the settlement of claims than would litigation in the courts, but HREOC believes that it would be inappropriate to block claimants from the option of seeking other methods of redress and remedy outside of the tribunal's framework.
24. HREOC also welcomes the provisions in section 5 of the Bill that allow descendants of deceased individuals who would have been otherwise eligible for an ex gratia payment to claim redress before the Stolen Generations Tribunal. In making reparations, it is essential that governments recognise the inter-generational nature of loss and trauma suffered by the children of those that were removed from their families and communities.
25. HREOC commends section 15(1)(b) of the Bill, which ensures the participation of Aboriginal and Torres Strait Islander peoples in the operation of the proposed Stolen Generations Tribunal. As recommendation 16(b) of *Bringing them home* stated, Aboriginal and Torres Strait Islander peoples must be closely involved with any service delivery associated with reparations.
26. HREOC also commends the allocation of funding to healing centres under section 22 of the Bill. Complementary measures to promote healing offer a collective

approach to redress in recognition of the harm suffered by whole families and communities affected by past laws and practices. However, HREOC cautions that healing programs should in no way be construed as an alternative to mechanisms for financial compensation.

27. **HREOC recommends that the Federal Government encourage State and Territory governments, churches and non-government agencies that played a role in the removal of Aboriginal children from their families to generously contribute to the funding of any healing centres established for the Stolen Generations under the Bill.**

Conclusion

28. The issue of compensation for the Stolen Generations, their descendents and communities is one that is yet to be resolved satisfactorily. HREOC encourages a commitment by all levels of government to implementing the full recommendations of *Bringing them home*, and supports the establishment of a Stolen Generations Tribunal as proposed by the Bill.
29. Loss, grief and trauma experienced by the victims of gross human rights violations can never be adequately compensated. However, for many victims compensation can make a practical difference and improve the lives of communities and individuals. It is incumbent upon government to address the physical and psychological experiences of the Stolen Generations in a way that recognises and validates trauma if the process of healing is to be executed effectively.
30. HREOC urges the Committee to recognise the importance of compensation to achieving just outcomes for Indigenous people who, because of past government practices, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land.

31. HREOC commends the passage of the Bill.

Appendix 1- Comparison of schemes providing redress for past practices relating to Indigenous people

Scheme and purpose	Form of ex gratia payment	Other features
<p><i>Stolen wages scheme (QLD)</i></p> <p>Reparation payments made to individuals whose wages and savings were controlled by the authorities under government 'Protection Acts'.</p>	<p>Ex gratia payments of \$2,000 or \$4,000 depending on date of birth.</p> <p>Decisions on eligibility are based on records confirming that claimants were subject to wage controls under protection legislation.</p> <p>Individuals must provide indemnity against further legal action.</p>	<p>Total funds: \$55.4 million.</p> <p>At the end of the process in 2004, 5,559 claims had been approved. \$35.87 million was unspent.</p> <p>Government has conducted consultations about the disbursement of the balance of funds, but has not announced its decision as yet. Two options have been put to consultations:</p> <p>Option 1: Disbursing balance among successful claimants (increasing the lump sums from \$2,000 to \$5,673; and from \$4,000 to \$11,346).</p> <p>Option 2: Increase repayments by \$3,000 (to \$5,000 or \$7,000) accompanied by other projects.</p>

<p><i>Redress Scheme (QLD)</i></p> <p>Redress for harm suffered by children in State care.</p>	<p>Ex gratia payments:</p> <p>First level payments: \$7,000. Based on ‘eligibility’ established through available records.</p> <p>Second level payments: up to \$33,000 (total not to exceed \$40,000) for more serious neglect or abuse, and assessed by panel of experts.</p>	<p>Total funds: \$100 million.</p> <p>Applications for payment must be lodged between 1 October 2007 and 30 June 2008.</p> <p>Requires a deed of release to be signed to prevent further legal action.</p> <p>The scheme is available to Indigenous and non-Indigenous applicants.</p>
<p><i>Redress Scheme (WA)</i></p> <p>Redress for harm suffered by children in State care (whether in institutions or other care arrangements).</p>	<p>Claims may only be brought by direct claimants, rather than their descendents.</p> <p>2 levels of payment:</p> <p>i) \$10,000 ex gratia payment – must demonstrate a ‘reasonable likelihood’ of</p>	<p>Total funds: \$114 million.</p> <p>Scheme is open to Indigenous and non-Indigenous claimants. It specifically addresses the needs of the Stolen Generations.</p> <p>The Scheme provides opportunity for claimants to formally record their stories on their written files (similar to protocol with NSW Archives through the ATFRS); formal apology and commemoration through memorials.</p>

	<p>abuse and/or neglect in State care;</p> <p>ii) Up to \$80,000: provide medical and/or psychological evidence of abused and/or neglect in State care.</p>	<p>Payments to be determined by independent assessor.</p>
<p><i>Stolen Generations Compensation Scheme (Tas)</i></p> <p>Compensate for effect of forcible removal policies.</p>	<p><i>- Descendent claims:</i> One off ex gratia payment of \$5,000 per person, with cap of \$20,000 per family (distributed equally among all living biological children of deceased)</p> <p><i>- Direct claims:</i> Balance of fund (after descendent claims finalised) divided evenly among direct claimants.</p> <p>Media reports estimate direct payments at \$58,000 each.</p>	<p>Total funds: \$5 million.</p> <p>Claims were assessed by an Independent Assessor who was supported by a Unit that conducted record/archive searches.</p>