



Castan Centre for Human Rights Law

7 April 2008

Mr Peter Hallahan  
Committee Secretary  
Senate Legal and Constitutional Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Mr Hallahan

Please accept the enclosed submission from the Castan Centre for Human Rights Law regarding the Inquiry into the Stolen Generation Compensation Bill 2008.

This submission was prepared on behalf of the centre by Ms Melissa Castan, Mr Jay Tilley and Mr David Yarrow.

We are glad, of course, to answer any questions you may have regarding the submission, and should you require, we would be happy to provide oral evidence to the Committee.

Yours sincerely

Professor Sarah Joseph  
Director



**Castan Centre for Human Rights Law  
Monash University  
Melbourne**

**Submission to the Standing Committee on Legal and  
Constitutional Affairs**

***Inquiry into the Stolen Generation  
Compensation Bill 2008***

**Prepared by Ms Melissa Castan, Mr Jay Tilley  
and Mr David Yarrow**

Throughout the national debate of whether compensation should be paid to those Indigenous people removed from their families, it has been said by both leaders of the major parties that money cannot compensate the terrible wrongs that have been suffered. It appears this rationale is the basis for denying compensation, yet such a rationale is contrary to the Australian common law, which does provide monetary compensation for loss and damage, even if not entirely commensurable with the harm suffered. In an effort to overcome the inefficiencies and indignities of proof of fault many Australian jurisdictions have adopted 'no fault' schemes (such as Victoria's Transport accident Scheme). The accumulated wisdom and experience of management of these schemes should be applied to the circumstances of Indigenous children separated from their parents or families. Australian law and contemporary society acknowledges that financial compensation is the best form of recognition available for those who have suffered harm through the actions of others. Compensation should be duly provided.

The Castan Centre for Human Rights Law fully endorses the establishment of a 'no fault' compensation scheme. Obliging those who have suffered harm at the hands of past governments to seek recompense through a court system that requires extensive resources, patience, a mosaic of often unattainable evidence and immense personal integrity for a *chance* of compensation is at odds with the content of the sincere national apology by Parliament in February 2008. A 'no fault' compensation scheme will help provide justice and a measure of recognition more effectively than any other means possible and avoids the further humiliation of Indigenous claimants trying and failing to obtain justice through an adversarial legal process.

A 'no fault' compensation scheme, in contrast to a system of 'ex gratia' payments, by necessity creates an obligation for the government to compensate when an applicant meets the requisite criteria. "Ex gratia" payments are not satisfactory because they create no ongoing obligation to meet the needs of the applicant.

Contained below are recommendations the Castan Centre wishes to make on the Stolen Generation Compensation Bill 2008 in order to make its operation fairer and clearer.

## **Payments**

Clause 11 sets out a limit on ex gratia payments. There are two issues regarding this clause. First, it is ambiguous and we recommend clarification as to whether the total payment cannot exceed \$20,000 or the 'common experience' cannot exceed \$20,000 and the additional payments for each year of institutionalisation can in total be higher. If the latter

is parliament's intention, the Centre submits that the words 'an additional' be inserted before '\$3000'. In our submission, a capped total that is not responsive to the components of compensation provided undermines the compensation for individual components. In addition please note out comments on the nature of 'ex gratia' payments above.

Second, the Centre also submits that there should also additional payments available, on top of the 'common experience and institutionalised' payments if applicants are able to prove excessively harsh and damaging treatment and harm directly arising from their removal. We draw the committee's attention to the recent compensation payment by the federal government to Ms Cornelia Rau of \$2.6 million dollars for her wrongful ten-month detention in Baxter immigration centre as a gauge when considering contemporary scales of compensatory amounts. The Castan Centre submits that the cap of \$20,000 is too low for those cases in which the harm suffered has had a tremendous impact on the mental and physical health of the claimant and his or her family.

The Castan Centre also suggests that clause 12 should expressly provide for the ex gratia payments to also take the form of pension or annuity payments where appropriate. This is comparable to workers compensation schemes which provide weekly or lump sum benefits. While clause 12 provides that payments may take any form the Secretary determines, express provision for such periodic payments may circumvent the frustration of the claimant, if he or she perceives that the Secretary is arbitrarily dictating the form that his or her payment will take.

Another issue that requires clarity is contained within clause 4(3) which excludes those who have already received compensation from 'like legislation'. While it is highly unlikely, it is important to clarify that State compensation schemes in New South Wales and Queensland for 'stolen wages' will not be considered 'like legislation'.

### **Assessing Claims**

Clause 5 addresses the manner in which the Stolen Generations Tribunal would conduct its investigations. The Castan Centre is concerned that clause 5(2)(a) would greatly restrict an applicant's claim; it requires a claimant to prove that he or she was removed 'in whole or in part, by race-based policies operating at the time.' The ease with which a government agency may claim the removal was based on 'welfare' and had nothing to do with race, places a difficult evidentiary burden upon the claimant.. This provision could easily deny a legitimate claimant from access to fair compensation.

Clause 6: it will be impractical for many Indigenous people to submit their claims as provided for in clause 6(2). This requires some explanation as to how issues of geographical remoteness and/or low income issues can be overcome. Some potential claimants may have difficulty accessing the resources to make an effective claim. How these resources can be efficiently provided through public servants and public services needs to be further considered. The bill and the government should make clear how access to the scheme will be facilitated.

While clause 13 allows for judicial review, there is no opportunity to appeal to an administrative tribunal for a review of the merits of the claim. Given that much of the evidence will be presented orally, the weight given to this evidence depends entirely on how the Stolen Generations Tribunal assesses it. If a tribunal member was very strict and orthodox in how they accepted evidence, some inequitable results may arise. Similarly, a tribunal member may be excessive in his or her award and award payments to a non-legitimate claim. Such a wide subjective discrepancy cannot be balanced within the narrow confines of judicial review alone. Access to the Administrative Appeals Tribunal should be provided for in the legislation.

In conclusion, the Castan Centre commends this Bill and the motivation that created it. Our recommendations are intended to improve the operation and equity of claims processes and their associated payments. We thank the Legal and Constitutional Affairs Senate Committee for the opportunity to contribute to this important piece of legislation.

Ms Melissa Castan  
Deputy Director, Castan Centre for Human Rights Law  
Senior Lecturer, Faculty of Law, Monash University

Mr Jay Tilley  
Research Assistant, Castan Centre for Human Rights Law  
Faculty of Law

Mr David Yarrow  
Barrister at Law, Research Associate  
Faculty of Law, Monash University