



## Victorian Aboriginal Legal Service Co-operative Ltd.

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**VALS' submission to the Standing Committee on Legal and Constitution Affairs in response to the Inquiry into the Stolen Generation Compensation Bill 2008 – sent 11 April 2008**

### INTRODUCTION

Thank you for the opportunity to comment on the Stolen Generation Compensation Bill 2008. VALS agrees with the spirit of the Bill and has some suggestions on how it can be enhanced as there appears to be some gaps. VALS argues that there are positive elements of the Bill, particularly the aspects of it that relate to the “Bringing them Home Report”. It also, marks a significant improvement on aspects of the compensation scheme in Tasmania, however, improvements can still be made.

### NEED:

There is need for the Bill in light of the following:

- Argument made in the “Bringing Them Home Report” that: “*an appropriate and adequate response to the history and effects of forcible removals requires reparations which include, as one form of reparations, monetary compensation for defined victims*”.<sup>1</sup> The Bringing Them Home Report concurs with Van Boven principles as does VALS.
- In Tasmania, the Stolen Generations of Aboriginal Children Act 2006 only applied to institutions in Tasmania, not other States or Territories, so there is need for a Federal Act to cover all jurisdictions. VALS is aware of a case where siblings were taken away from their family and then split up, some remaining in Tasmania others being sent to Victoria. The latter were not able to apply for compensation under the Tasmanian compensation scheme whereas the former were.
- People are reluctant to litigate due to the cost involved and the destruction of evidence about members of the stolen generation.

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<sup>1</sup> Bringing Them Home, Part 4 as at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html>

- Australia is lagging behind other countries that have provided compensation to people who were taken away from their families (ie: Canada).
- The amount of people who have approached the Aboriginal Legal Rights Movement (ALRM) since the success of Bruce Trevorrow in 2007 (\$500,000 in compensation). The ALRM says it now has a barrister assessing 156 claims.<sup>2</sup>

## **Purpose**

There should be a purpose section to the Bill that outlines what it is trying to achieve. This section could perhaps be a Preamble and outline what happened to the stolen generations and why there is need for compensation (ie: context).

## **Definition**

The Bill should provide a definition of a member of the stolen generations and a living descendant. Section 3 which states that stolen generations means a person who is eligible is unhelpful to someone who does not know who is a member of the stolen generations. VALS suggests that Indigenous Australians should be consulted about the definition and consideration should be given to the “Bringing them Home Report” approach.

## **ELIGIBILITY**

### **Clarity**

Section 5(b) should make it clear that the legislation that a person may have been subjected to, other than the Aborigines Ordinance (1911 or 1918) was State or Commonwealth legislation for purposes of clarity.

### **Extended family**

The extended nature of family within the Indigenous Australian community should be reflected in the Bill. VALS considers that confining the notion of descendant to blood relative may be too limited and that the definition should be broader in light of the fact that often Indigenous Australians are parented by people who are not blood relations (ie: Aboriginal adoption practices). It could be argued to be unjust if person A, a blood relative who is 35 years old raised by Y and Z since birth, and person B, who is the same age and was raised by Y and Z since birth have different rights, the former only being eligible for compensation. Perhaps the requirement should be that a person is eligible for compensation if the person they consider their parent or grandparent is a member of the Stolen Generations. Alternatively, perhaps cases involving Aboriginal adoption should be heard on a case by case basis. Such an approach would comply with recommendation 17(7) of the “Bringing them Home Report” that VALS agrees with: cultural appropriateness.

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<sup>2</sup> ‘SA Stolen Generations claims increase’ Tuesday, 25 March 2008 as at [http://www.abc.net.au/message/news/stories/ms\\_news\\_2198335.htm](http://www.abc.net.au/message/news/stories/ms_news_2198335.htm)

## **Term**

The Tribunal should not have a fixed term of operation, but remain operating for as long as it is required. At the very least, the continuance of the Tribunal should be reviewed in 7 years time rather than stating in the Bill that the Tribunal ceases operations in 7 years. Consultation should occur at this time to determine if sufficient time has been provided in order for people to access their right to compensation. The need for flexibility about the term of the Tribunal stems from the fact that Indigenous Australians face barriers to accessing Western structures. Understandably the Government desires to provide a fixed term of compensation rather than an indefinite term so that budgeting can occur. Perhaps the Government should be prepared to budget for longer than 7 years. Perhaps compensation can be provided to a certain number of generations on from the generation that was removed from their family. Whilst 7 years is better than other timeframes (ie 6 months in Tasmania, section 6 ) it is foreseeable that some people may not apply in time such as discovering their Aboriginality in 7 years and 1 days time from the enactment of the Legislation. This is a possible event given the fact that connection to Indigenous Australian descendants has been broken by the practice of taking children from their families.

## **Loss**

The amount of an ex gratia payment may not go far enough as it does not cover the issue of abuse or loss of land or culture. VALS agrees with a common experience payment (s11) and payment for each year of institutionalization. However, these payments are about quantity not quality. Admittedly it is hard to quantify compensation for experiences of abuse, but there is a precedent where Governments have made this available to all Australians (ie Victoria, Queensland which recently announced a redress scheme). It is positive that it is not a requirement that the person be removed from his or her family for more than 12 months as is the case in Tasmania.<sup>3</sup> It is also positive that the application is for an individual and family members do not need to share a lump sum as is also the case in Tasmania (s11).

## **Parents**

There is nothing available by way of compensation for parents who had their children taken away. It is possible that some parents are still alive today given that the practice of taking children away from their families operated until 1975.

## **Membership of Tribunal**

Indigenous Australians should represent more than half of the total membership of the Tribunal as recommended in the “Bringing Them Home Report”. VALS agrees with recommendation 17(4) of the “Bringing them Home Report” in relation to procedural principles that should be applied in the operations of the monetary compensation mechanism: independent decision-making which should include the participation of Indigenous decision-makers. Also, the

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<sup>3</sup> Stolen Generations of Aboriginal Children Act 2006 section 5

following options for appointing members to the Tribunal, other than an appointment by the Governor-General following nomination by the Attorney-General (s14), should be considered:

- Indigenous Australians suggest nominations to the Attorney-General.
- Indigenous Australian vote on the membership.
- There be a combination of appointment and voting.
- If appointment occurs a consultation process with the Indigenous Australian community about what type of person should be appointed should occur and Indigenous Australians should contribute to the code of practice of the Tribunal.
- If appointment occurs it should be ensured that Indigenous Australians are on the interview panel and involved in the selection process (ie: community appointment in a similar manner to the way a Magistrate was appointed to the Neighbourhood Community Justice Centre in Collingwood, Victoria).

It is positive that there are multiple members to the Tribunal rather than having one member as is the case in Tasmania (Stolen Generations Assessor, s15).

## **PROCESS**

### **Application**

There should be the ability to bring joint applications by family members rather than require that each of them lodge an individual claim. It is positive that an application can be presented through oral evidence (section 6). VALS agrees with recommendation 17(6) of the “Bringing them Home Report” in relation to procedural principles that should be applied in the operations of the monetary compensation mechanism: minimum formality and not bound by the rules of evidence.

### **Advocate**

There is need to introduce advocacy roles in order to ensure Indigenous Australians have the support they need when going through the application process.

### **Awareness**

There is a need for education so people are aware of their options in terms of applying to the Tribunal for compensation. VALS agrees with recommendation 17(1) of the “Bringing them Home Report” in relation to procedural principles that should be applied in the operations of the monetary compensation mechanism: widest possible publicity.

### **Onus**

The application process should not place the onus on the Indigenous Australian claimant to prove their case as often relevant paperwork has been destroyed. Instead the onus should be on the Government to prove that it did not remove a child from a family and no abuse occurred and so does not need to provide redress.

## **Not Liable**

It is positive that the Bill does not contain a similar provision to the Tasmanian legislation (s21) that states that payment does not render the State liable for any action taken in respect of the applicant. This complies with recommendation 20 of the “Bringing them Home Report”: *“That the proposed statutory monetary compensation mechanism not displace claimants’ common law rights to seek damages through the courts”*.<sup>4</sup>

## **Legal Advice**

VALS agrees with recommendation 17(2) of the “Bringing them Home Report” in relation to procedural principles that should be applied in the operations of the monetary compensation mechanism: free legal advice and representation for claimants. This is made available in other redress schemes (ie: QLD). Legal advice is important because Indigenous Australians may be confused about their rights and feel pressure to make a decision promptly due to their advanced age.

## **Review**

It is positive that judicial review of a decision of the Tribunal is available as this is not the case in Tasmania (s13).

## **SUPPORT/COMPLEMENT**

### **Counseling**

The model of counseling should be available to individuals, but also families in terms of helping them to reconnect with one another in light of the fact that they may have been apart for so long. The counseling should be community controlled as it is important that it is provided by Indigenous Australians. Perhaps more Indigenous Australians should be trained up in psychology/wellbeing. It is important that the counseling is for free and that there is no limit to it and that people can disengage and re-engage in it.

### **Link-up**

There is still further need for funding to link up services and awareness about them.

### **Parenting skills**

There is also need for support in relation to parenting. An outcome of the Stolen Generations policies is that persons concerned did not learn parenting skills, and the effects of this are still felt today.

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<sup>4</sup> Bringing Them Home, Part 4 as at <http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/stolen29.html>

## **Foster**

To implement the Aboriginal placement principle in relation to child protection more Indigenous Australians should be supported to be foster parents.

## **CONCLUSION**

VALS suggestions relate to purpose, definition, eligibility (in terms of breadth and clarity of relevant legislation), tribunal (ie: appointment, membership and term), process in terms of application and evidence. VALS makes further suggestions about how to support or complement the compensation scheme (ie: counseling, advocacy, awareness raising, parenting skills, link up services, fostering).