
From: Allan Hall
Sent: Thursday, 5 June 2008 3:04 PM
To: Legal and Constitutional, Committee (SEN)
Subject: Stolen Generation Compensation Bill 2008

Dear Julie. As suggested, I am setting out, as briefly as possible, some of my major concerns about this Bill. The list is by no means comprehensive. I apologise for being so late in bringing my concerns to the Committee's attention, but better late than never. Hopefully, the Committee will already be aware of the problems to which I advert.

I should also mention that I am a (long) retired former Deputy President of the Administrative Appeals Tribunal (C'wth) and have had extensive experience in construing legislation.

In my view, the Bill is so poorly drafted that it would require substantial amendment before it could be enacted, so as to remove inaccuracies, inconsistencies and unnecessary confusion as to its intended operation. I leave aside the numerous instances of sloppy drafting, such as the references throughout to the "Aborigines Ordinances of 1911 and 1918" instead of to the "Aboriginals Ordinance 1911" and the "Aboriginals Ordinance 1918" and the infelicitous expression "Aboriginal or Torres Strait Islander person".

The overall intention of the Bill is clear enough, namely to enable ex gratia payments to be made to eligible persons who satisfy the criteria laid down by the Act. But the detailed provisions are, in my view, totally inadequate. According to the Explanatory Memorandum, each eligible person is to receive "an amount not exceeding \$20,000.00 as common experience payment" and an additional payment of \$3,000.00 for each year of institutionalisation. The reference to an ex gratia payment "not exceeding \$20,000.00" seems to have been copied from the Tasmanian Act without any appreciation of the reasons why that provision was necessary under the scheme of compensation established in that State. As the Bill stands, there is no mechanism, nor are any criteria established, by reference to which the amount of the "common experience payment" in any individual case is to be determined. Moreover, s.11 of the Bill, as drafted, only sets the amount of compensation payable to persons eligible under subsection 5(3), namely to a "living descendent" (sic) of a person who would have been eligible under s.5(1) or 5(2) of the proposed Act, if still alive. The compensation payable to persons eligible under the main criteria laid down by subsections 5(1) and (2), is not specified.

One of the biggest problems with the Bill, however, is the difficulty in finding any coherent policy underlying the different "eligible persons" criteria specified in section 5 of the Bill. A person who satisfies the eligibility criteria in this section is entitled to an ex gratia payment under the proposed Act (s.4)(1). If the person satisfies more than one of the eligibility criteria, the person is entitled to only one ex gratia payment (s.4(2)). It follows that the eligibility criteria specified in subsections 5(1) and (2) stand independently of each other. It is sufficient to satisfy any of the four criteria listed in these subsections. If the person has already received a payment "under State or Territory Stolen Generation Compensation legislation or like legislation", the person is not eligible for an ex gratia payment under the Act (s.4(3)). There could be difficult questions as to whether payments made under either the WA or Queensland Redress schemes would be caught by this subsection, as neither scheme is statute based, as far as I am aware. But even if they are, the Queensland scheme is not directed to compensating "Stolen Generations" as such. Thus, if the Queensland scheme did extend to aborigines removed from their families as children (which is not entirely clear), double dipping may be possible.

The most puzzling of the four criteria in subsections 5 (1) and (2) is the criterion provided in subsection 5 (2) (b), namely that the applicant must be "an Aboriginal or Torres Strait Islander person who was subject to the Aborigines Ordinance 1911 or 1918 or similar legislation which permitted forcible removal of children from their family."

On the face of it, this subsection is saying that every aborigine in the Northern Territory who, at some stage of his or her life, was

"subject to" an Ordinance that permitted forcible removal of children is entitled to compensation for that reason alone. It is not necessary to prove that the person was actually removed from his or her family as a child.

If, as might be argued, the subsection also applies to an aboriginal "subject to" similar legislation in any of the States, this criterion has the potential to make virtually every aboriginal person in this country who has ever been subject to legislation permitting such removal (whether or not the person was ever removed) eligible for a "common experience payment" not exceeding \$20,000.00.

If that is the proper construction of the criterion, the other three eligibility criteria in s.5 (1) and (2) are rendered otiose. No one need try to qualify under the more restrictive criteria, given that it suffices to satisfy only one of them.

If, on the other hand, subsection 5 (2) (a) is only intended to apply to a person who was "subject to the Aborigines Ordinance 1911 or 1918 or similar legislation" (in the Northern Territory) "which permitted forcible removal of children from their family", then the Bill discriminates unfairly against aboriginals removed as children under State legislation. To be eligible, such persons will need to satisfy the more prescriptive requirements of either subsection 5 (1) (b) or subsection 5 (2) (a), including proof that they were actually removed (or forcibly removed?) from their families. The Explanatory Memorandum offers no explanation as to why these different criteria are necessary or appropriate, nor does it give any indication that the drafter of the Bill has appreciated the inconsistencies created. As it stands, the Bill goes far beyond anything recommended by the HREOC and seems devoid of any clear policy justification.

Where a person who would have satisfied one or other of the criteria specified in subsections (1) or (2) of section 5 has died before the commencement of the proposed Act, the Bill is obviously intended to provide for an ex gratia payment to a "living descendent" (sic) of the deceased person. (s.5(3)) However, once again, the drafting is sloppy, with the subsection providing that "to be eligible for a payment under this subsection, an applicant must be one of the following...". It then proceeds to specify two obviously cumulative criteria linked by "and".

A far more serious criticism, however, is that the subsection, when read in conjunction with s.11 of the Bill, authorises an ex gratia payment not exceeding \$20,000.00 plus \$3,000.00 for each year of institutionalisation to be made to each person who establishes that he or she is a "living descendant" of a deceased person who would, if still alive, have satisfied one or other of the criteria in subsections 5(1) or 5(2). Unlike the Tasmanian Act, on which it is said to be based, the Bill does not impose a cap on the total payment that may be made to the descendants of a deceased person in the one family. This creates the potential for enormous disparities between the compensation payable to a surviving member of the Stolen Generations, who is able to make a claim during his or her lifetime, and that payable, in total, to the (potentially numerous) living descendants of a person who died before being able to make a claim. As a matter of policy, this seems indefensible.

Finally, the use of the expression "similar legislation" creates unnecessary potential for argument. If the Bill is intended to apply to children removed under aboriginal protection laws in all States and Territories, the "similar legislation" that is intended to be embraced by this expression should be listed in a Schedule to the proposed Act. Most, if not all, of this legislation was collated by the HRC in its Report.

In these hastily compiled comments, I have barely scratched the surface of what I believe is wrong with this Bill. However, I hope that my comments may be of belated assistance. My home phone number, if needed, is

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