THE UNFINISHED BUSINESS OF THE APOLOGY: SENATE REJECTS STOLEN GENERATIONS COMPENSATION BILL 2008 (CTH)

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Prime Minister Kevin Rudd’s apology to Indigenous Australians on 12 February 2008 is a welcome and long overdue development in the struggle for recognition of the injustices suffered by members of the stolen generations. An apology to the stolen generations was part of the policy platform of the newly elected Labor federal government¹ and stands in stark contrast to expression of ‘deep and sincere regret’ offered to Indigenous Australians by former Coalition Prime Minister John Howard.²

However in the whirlwind of local and international media attention given to the apology, the tabling of the Stolen Generation Compensation Bill 2008 (Cth), and subsequent Senate inquiry, has largely slipped under the radar. The Bill was introduced in the Senate the day after the apology as a private members bill, by then Senator Andrew Bartlett of the Australian Democrat Party. This article will review the Stolen Generation Compensation Bill 2008 (Cth), the Senate Standing Committee on Legal and Constitutional Affairs’ inquiry into the Bill and, in particular, the federal government’s response.

BACKGROUND
In 1997 the Human Rights and Equal Opportunity Commission released the Bringing Them Home³ report (BTH) which documented the tragic history of forced removals of Indigenous Australian children from their families. The report identifies five elements of reparation necessary to provide redress for the harm inflicted on members of the stolen generations, their families and communities:⁴

- acknowledgement and apology;
- guarantees against repetition;
- restitution;
- rehabilitation; and
- monetary compensation.

⁴ Ibid, recommendation 3, 282.
These elements comply with international standards for reparations for gross violations of human rights as expressed in the van Boven principles.\(^5\) According to these principles, reparations must contain the following components: restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition.\(^6\)

The former Coalition government responded to BTH in 1999 by committing $63M over four years for services aimed at providing ‘practical assistance’ to members of the stolen generations. This included Link-Up family tracing and reunion services, Indigenous mental health counsellors, family support and parenting programs, improved access to Commonwealth records, language and cultural maintenance programs and oral history projects.\(^7\)

The Senate’s Legal and Constitutional References Committee conducted an inquiry into the implementation of BTH in 2000. The inquiry’s key recommendations were for the establishment of a reparations tribunal based on a model presented by the Public Interest Advocacy Centre, to inter alia, administer individual compensation payments.\(^8\) These recommendations were rejected by the former Coalition government, which again responded by committing an additional $53.8M in 2001-02 for services to meet the most acute needs of the stolen generations.\(^9\)

THE CURRENT SITUATION

The Labor government’s apology to the stolen generations gives effect to one aspect of reparations recommended by BTH: formal acknowledgement and apology.\(^10\) Arguably the government’s apology also provides some guarantee against repetition, with Prime Minister Rudd stating that “the injustices of the

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\(^5\) Ibid, 281.
\(^6\) Ibid, 649-650.
\(^7\) Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, 9 May 2008, 2, (Department of Families, Housing, Community Services and Indigenous Affairs).
\(^9\) Department of Families, Housing, Community Services and Indigenous Affairs, n7, 2.
past must never, never happen again”.11 However, the federal government has refused to implement a key aspect of HREOC’s suggested reparations package: monetary compensation for the stolen generations. As Prime Minister Rudd stated on 29 January 2008:12

We will not be establishing any compensation fund. I said that before the election, I say it again. And since the stolen generation report came out years and years ago, it has been open for any individual, Aboriginal person affected by that to engage their own legal actions through the courts of their State or Territory. That’s fine. But at the level of national government, we will not be establishing any compensation fund.

To date, Tasmania is the only state government to fund a specific compensation scheme for the stolen generations.13 In January 2008 a total of $5M was distributed to 84 living members of the stolen generations and 22 descendants.14 Queensland15 and Western Australia16 have also introduced compensation schemes for those who suffered abuse whilst in state care, which includes members of the stolen generations.

THE STOLEN GENERATION COMPENSATION BILL 2008 (CTH)
The Bill proposes the establishment of a Stolen Generation Tribunal comprising six members – half of whom are Indigenous - to decide claims for compensation,17 funded from a Stolen Generation Fund.18

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11 Commonwealth of Australia, Apology to Australia’s Indigenous Peoples, House of Representatives, 12 February 2008, (Kevin Rudd, Prime Minister),
12 Prime Minister of Australia, Interview, Network Seven Sunrise Program, 29.1.2008,
13 Stolen Generations of Aboriginal Children Act 2006 (Tas).
17 Stolen Generation Compensation Bill (Cth), s 14.
18 Stolen Generation Compensation Bill (Cth), s 10.
The compensation proposed is a one-off *ex-gratia* payment of $20,000 as a ‘common experience payment,’ together with a further $3,000 for each year of ‘institutionalisation’.\(^{19}\) To be eligible for compensation, an applicant must be an Aboriginal or Torres Strait Islander person who:

- was removed from their family under the *Aboriginals Ordinance 1911 or 1918* (NT);\(^{20}\) or similar legislation prior to 31 December 1975\(^{21}\)
- was removed from their family in circumstances of ‘duress by a state agency as a consequence, in whole or in part, of race-based policies’ prior to 31 December 1975\(^{22}\) or
- was subject to the *Aboriginals Ordinance 1911 or 1918* (NT), or similar legislation which permitted forcible removal of children from their family\(^{23}\)
- is a living descendant of a deceased person who meets the above criteria.\(^{24}\)

People who have received compensation from a state-based stolen generations compensation scheme are not eligible to apply.\(^{25}\)

The Tribunal’s functions are limited to determining claims\(^{26}\) and other prescribed functions.\(^{27}\) The Tribunal is empowered to do all things necessary to carry out its role.\(^{28}\) Applications to the tribunal can be made orally\(^{29}\) and are limited to a period of seven years from the commencement of the Act.\(^{30}\) Tribunal decisions are subject to judicial review.\(^{31}\) The Bill also proposes other services for the stolen generations, including funding for healing centres.\(^{32}\)

THE INQUIRY

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\(^{19}\) Stolen Generation Compensation Bill (Cth), s 11.
\(^{20}\) Stolen Generation Compensation Bill (Cth), s 5(1)(a).
\(^{21}\) Stolen Generation Compensation Bill (Cth), s 5(1)(b).
\(^{22}\) Stolen Generation Compensation Bill (Cth), s 5(2)(a).
\(^{23}\) Stolen Generation Compensation Bill (Cth), s 5(2)(b).
\(^{24}\) Stolen Generation Compensation Bill (Cth), s 5(3)(b).
\(^{25}\) Stolen Generation Compensation Bill (Cth), s 4(3).
\(^{26}\) Stolen Generation Compensation Bill (Cth), s 16(a).
\(^{27}\) Stolen Generation Compensation Bill (Cth), s 16(b).
\(^{28}\) Stolen Generation Compensation Bill (Cth), s 17(1)(a).
\(^{29}\) Stolen Generation Compensation Bill (Cth), s 6(2).
\(^{30}\) Stolen Generation Compensation Bill (Cth), s 6(3).
\(^{31}\) Stolen Generation Compensation Bill (Cth), s 13.
\(^{32}\) Stolen Generation Compensation Bill (Cth), s 22.
The Bill was referred to the Senate Standing Committee on Legal and Constitutional Affairs on 12 March 2008, for inquiry and report by 16 June 2008.\textsuperscript{33} The inquiry was advertised in the national press on 26 March inviting public submissions by 9 April 2008.\textsuperscript{34} The inquiry conducted two public hearings, one in Darwin on 15 April and one in Sydney on 16 April 2008.\textsuperscript{35} Despite its short timeframe, the inquiry received a total of 85 written submissions, and 35 witnesses appeared at the public hearings.\textsuperscript{36}

Whilst it is not within the scope of this article to discuss submissions to the inquiry in detail, a number of common themes can be identified, including:

\begin{itemize}
  \item the majority of submissions expressed broad support for the payment of monetary compensation to the stolen generations,\textsuperscript{37}
  \item the bill presented a ‘real and immediate opportunity’ to provide compensation, particularly given that many of the stolen generations are now elderly,\textsuperscript{38}
  \item compensation should reflect internationally recognised standards\textsuperscript{39}, including damages for specific harms suffered,\textsuperscript{40}
  \item the need for a holistic program of reparations including services aimed at restoring communities that have suffered collective harm arising from the removal of children and a forum for ‘telling story’ for the stolen generations.\textsuperscript{41}
\end{itemize}

Submissions also identified some issues regarding the eligibility criteria, namely:

\begin{itemize}
  \item a narrow interpretation of ‘institutionalisation’ may exclude those people who were adopted or in foster care from accessing the additional payment of $3,000 per annum.\textsuperscript{42}
\end{itemize}

\textsuperscript{33} Senate Legal and Constitutional Committee, n 13, 1.
\textsuperscript{34} Ibid, 2.
\textsuperscript{35} Ibid.
\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid, 15.
\textsuperscript{38} Ibid.
\textsuperscript{39} Ibid, 16.
\textsuperscript{40} Ibid, 26.
\textsuperscript{41} Ibid, 32-34.
\textsuperscript{42} Ibid, 32.
• the ambiguity of the term ‘similar legislation’ may prevent people who were removed under race-neutral welfare legislation from seeking compensation. 43
• support for a broad definition of ‘Aboriginal and Torres Strait Islander’ given the difficulties that members of the stolen generations may have in proving Indigenous descent.44

The Bill was also seen to lack detail as to the Tribunal process. 45

The joint submission from the Public Interest Advocacy Centre and Australian Human Rights Centre (PIAC/AHRC) presented an alternative compensation model in their draft Stolen Generations Reparations Tribunal Bill. This bill was developed following extensive consultations with members of the stolen generations,46 and as stated above was previously endorsed by the Senate’s Legal and Constitutional References Committee. The PIAC Bill addresses many concerns raised in submissions to the inquiry, namely:

• a broader definition of eligibility that enables claims for all forms of removals without a requirement to prove force or duress;47
• compensation for specific harms suffered;48
• a comprehensive package of measures to address the specific needs of stolen generations for healing services;49
• creation of a process for ‘truth and reconciliation’,50
• a supportive tribunal process for claimants.5152

THE FEDERAL GOVERNMENT SUBMISSION

44 Ibid, 3.
46 Evidence to Senate Legal and Constitutional Committee, Parliament of Australia, April 2008, (Public Interest Advocacy Centre/Australian Human Rights Centre).
47 Ibid,16.
48 Ibid, 14.
49 Ibid,12
50 Ibid.
51 Ibid, 17.
The Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) made a submission to the inquiry on behalf of the federal government.\(^{53}\) The submission reaffirms the federal government’s policy of not paying compensation to the stolen generations.\(^{54}\) It justifies its position by drawing on BTH’s findings that monetary compensation can never adequately compensate the grief and trauma experienced by the stolen generations.

The federal government shuns any responsibility for compensation in relation to state laws and policies, indicating that this is a “decision for each state to make”.\(^{55}\) It also denies liability for the Northern Territory, citing the Federal Court’s decision in *Cubillo and Gunner v Cth*\(^{56}\) as authority that the Commonwealth has no duty of care and hence no obligation to pay compensation.\(^{57}\)

FaHCSIA’s submission reiterates the federal government’s commitment to funding Link Up services, family history programs and BTH counselors with $15.7M allocated for 2007-08.\(^{58}\) It also identifies the government’s *Closing the Gap* initiative as a means of restitution to all Indigenous Australians, including the stolen generations.\(^{59}\)

FaHCSIA also highlights the recent formation of the Working Group on Stolen Generations. This Group is charged with responsibility for advising the federal government on the specific needs of the stolen generations in relation to ‘restitution and rehabilitation’.\(^{60}\) This Group includes representatives from two stolen generations peak bodies, the Stolen Generations Alliance (SAG) and the National Sorry Day Committee Inc (NSDC).\(^{61}\)

**CRITICISMS OF THE FEDERAL GOVERNMENT RESPONSE**

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\(^{53}\) Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, 9 May 2008, (Department of Families, Housing, Community Services and Indigenous Affairs).

\(^{54}\) Ibid, 1.

\(^{55}\) Ibid, 3.

\(^{56}\) (2000) 174 ALR 97

\(^{57}\) Ibid.

\(^{58}\) Ibid, 2.

\(^{59}\) Ibid.

\(^{60}\) Ibid.

\(^{61}\) Ibid, 2
Witnesses to the inquiry were critical of the government’s emphasis on ‘practical initiatives’ aimed at addressing Indigenous disadvantage as a means of providing restitution to the stolen generations.62 As HREOC pointed out, the government’s focus on improving health and education services is not a suitable means of restitution; the government has an obligation to provide these services to all citizens.63

Whilst stolen generations representative bodies also acknowledge the limitations of compensation to adequately redress the harm caused by forcible removal policies, this is not a reason to deny reparations. As the SAG states, ‘we are all aware that financial compensation can in no way restore for such immense losses. But what can be done should be done, and financial compensation is one of way making restoration’.64

The NSDC also sees reparations, including monetary compensation, as a critical issue that must be addressed.65 It also notes that the federal government’s refusal to pay compensation is contrary to the Labor Party’s National Platform and Constitution 2007 which states that ‘Labor will provide a comprehensive response to the BTH report, including a formal apology.’66

A number of submissions to the inquiry regarded the payment of compensation as not only a legal obligation, but a moral obligation,67 especially given that the harm caused by removing Indigenous children from their families was clearly foreseeable.68

The federal government’s refusal to pay compensation to the stolen generations is also inconsistent with Labor’s publicly stated commitment to sign the United

62 Senate Legal and Constitutional Committee, n13, 36-38.
64 Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, 9 May 2008, 2 (Stolen Generations Alliance).
67 Senate Legal and Constitutional Committee, n13, 18-20.
68 Evidence to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, Canberra, undated, 1 (Julian Burnside).
Nations Declaration of the Rights of Indigenous Peoples.\textsuperscript{69} The Declaration requires states to provide mechanisms for redress for actions aimed at depriving Indigenous peoples of their distinct cultural identities, and other policies of forced assimilation or integration.\textsuperscript{70}

THE INQUIRY’S RECOMMENDATIONS

Whilst acknowledging that evidence before the inquiry demonstrated overwhelming support for compensation for the stolen generations, the Committee recommended the Bill not proceed in its current form. This was due to the ‘apparent difficulties’ with the proposed compensation scheme.\textsuperscript{71} The Committee declined to comment on the detail of the Democrats’ Bill,\textsuperscript{72} or PIAC’s alternative model. However, it did note that the Democrats’ Bill provides a ‘useful starting point for future discussion on the issue of reparations’ and the PIAC model may provide a framework for future development of a reparations scheme.\textsuperscript{73}

The Committee recommended that the government extend the Closing the Gap program to establish a National Indigenous Healing Fund to provide ‘health, housing, ageing, funding for funerals, and other family support services’ to the stolen generations as a matter of priority.\textsuperscript{74} It was recommended that the terms and conditions of such funding be determined by the Council of Australian Governments in consultation with the Stolen Generations Working Group.\textsuperscript{75}

The Committee also recognised the need to address the issue of reparations as a matter of urgency.\textsuperscript{76} It recommended that the Stolen Generations Working Group report to the federal government on the implementation of BTH by the end of 2008.\textsuperscript{77}

CONCLUSION

\textsuperscript{71} Senate Legal and Constitutional Committee, n 13, Recommendation 1, 48.
\textsuperscript{72} Ibid, 47.
\textsuperscript{73} Ibid.
\textsuperscript{74} Ibid, recommendation 3, 48.
\textsuperscript{75} Ibid, recommendation 4, 48.
\textsuperscript{76} Ibid, recommendation 2, 48.
\textsuperscript{77} Ibid.
Once again the issue of compensation for the stolen generations has been deferred, with the federal government to receive the report of the Stolen Generations Working Group at the end of 2008. The government’s current program of ‘practical initiatives’ differs little in substance from the former Coalition government’s policy of ‘practical assistance’. Similarly, Closing the Gap offers nothing by way of specific restitution to the stolen generations.

Given the federal government’s stated position on compensation, it seems unlikely that it will honour the recommendations of BTH to provide full reparations for the stolen generations. Indeed, it remains to be seen whether the apology will be an empty symbolic gesture, or if the Rudd Labor Government will deliver justice for the stolen generations.

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