

Legislative Council—No 34

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South Australia

Stolen Generations Reparations Tribunal Bill 2010

A BILL FOR

An Act to establish the Stolen Generations Reparations Tribunal and to define its functions and powers; and for other purposes.

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The Parliament of South Australia enacts as follows:

Part 1—Preliminary

1—Short title

This Act may be cited as the *Stolen Generations Reparations Tribunal Act 2010*.

2—Commencement

5 This Act will come into operation on a day to be fixed by proclamation.

3—Interpretation

In this Act, unless the contrary intention appears—

Aboriginal person means a person of the Aboriginal race of Australia;

10 *claimant* means a person by whom, or on whose behalf, an application for reparation or an ex gratia payment is made;

eligibility criteria means the criteria in section 19 that determine whether an indigenous person is eligible for reparation or an ex gratia payment;

ex gratia payment means a payment referred to in section 18;

15 *forcible removal* means the removal of a person from his or her family in the circumstances specified in section 19(a);

Fund means the Stolen Generations Fund established under section 25;

indigenous person means an Aboriginal person or a Torres Strait Islander;

reparation means reparation under Part 3;

20 *Stolen Generations* means the persons eligible for ex gratia payments or reparation under this Act;

Torres Strait Islander means a descendant of an indigenous inhabitant of the Torres Strait Islands;

Tribunal means the Stolen Generations Reparations Tribunal established under section 4;

25 *Van Boven Principles* means the *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law (UN Doc E/CN.4/Sub.2/1996/17, 24 May 1996)* drafted in 1996 by Professor Theo van Boven.

Part 2—Stolen Generations Reparations Tribunal

30 Division 1—Establishment of Tribunal

4—Establishment of Tribunal

The *Stolen Generations Reparations Tribunal* is established.

Division 2—Functions and principles

5—Functions of Tribunal

The Tribunal has the following functions:

- 5 (a) to determine whether a claimant is eligible for reparation or an ex gratia payment of compensation and, if so, to determine the appropriate reparation or compensation;
- 10 (b) to provide a forum for indigenous persons affected by forcible removals, and the policies underlying forcible removals, to talk about their experience, and the effects, of forcible removal, to have those experiences acknowledged and, where appropriate, to provide an apology for the suffering caused by those policies;
- (c) other prescribed functions (if any).

6—Principles

In carrying out its functions, the Tribunal is to have regard to the following principles:

- 15 (a) policies condoning or encouraging forcible removals were racist and caused emotional, physical and cultural harm to the Stolen Generations;
- (b) indigenous children should not, as a matter of general policy, be separated from their families;
- (c) the distinct identity of the Stolen Generations should be recognised;
- 20 (d) members of the Stolen Generations should have a role in shaping the nature of the reparation to which they are entitled;
- (e) indigenous persons affected (whether directly or indirectly) by forcible removals should be given information to facilitate access to the Tribunal and other options for redress;
- 25 (f) reparation for the effects of forcible removals should be guided by the Van Boven Principles.

Division 3—Members of Tribunal

7—President and Deputy Presidents

- (1) There will be—
 - 30 (a) a President of the Tribunal; and
 - (b) 1 or more Deputy Presidents of the Tribunal.
- (2) The President and any Deputy President will be appointed by the Governor on the recommendation of the Minister.
- (3) A person is not eligible for appointment as President or Deputy President unless he or
35 she is—
 - (a) a legal practitioner of not less than 7 years standing; or
 - (b) a magistrate designated under subsection (4).

- (4) A magistrate may, after consultation between the Attorney-General, the Minister and the Chief Magistrate, be designated by the Attorney-General as being eligible for appointment under this section.
- (5) A President or Deputy President will be appointed—
- 5 (a) unless paragraph (b) applies—for a term of office not exceeding 5 years, specified in the instrument of appointment;
- (b) in the case of a magistrate appointed under subsection (3)(b)—for 7 years, and will be eligible for reappointment on the expiry of a term of office.
- (6) A President or Deputy President is appointed on conditions specified in the instrument
- 10 of appointment.
- (7) Subject to the conditions of appointment, the office of President or Deputy President may be held in conjunction with another office or position.
- (8) A magistrate is not precluded by appointment under this section from performing other judicial functions.
- (9) The Governor may remove the President or a Deputy President from office for—
- 15 (a) mental or physical incapacity to carry out official duties satisfactorily; or
- (b) neglect of duty; or
- (c) dishonourable conduct.
- (10) A person ceases to hold office as President or Deputy President if the person—
- 20 (a) dies; or
- (b) completes a term of office and is not reappointed; or
- (c) resigns by written notice to the Minister; or
- (d) is removed from office under subsection (9); or
- 25 (e) in the case of a person appointed under subsection (3)(b)—ceases to hold office as a magistrate.

8—Allowances and expenses

A member of the Tribunal is entitled to such remuneration, allowances and expenses as the Governor may from time to time determine.

9—Validity of acts of Tribunal

- 30 An act or proceeding of the Tribunal is not invalid by reason only of a vacancy in the membership of, or a defect in the appointment of a person to, the Tribunal or a panel from which members of the Tribunal are drawn.

10—Registrar of Tribunal

- 35 (1) A person may be appointed to be the Registrar or a Deputy Registrar of the Tribunal on a basis determined by the Minister.
- (2) The office of Registrar or Deputy Registrar may be held in conjunction with another office or position.

11—Immunities

- (1) A member of the Tribunal has the same immunities from civil liability as a Judge of the District Court.
- (2) A Registrar, Deputy Registrar or other member of the staff of the Tribunal incurs no civil or criminal liability for an honest act or omission in carrying out or purportedly carrying out official functions.

Division 4—Proceedings of Tribunal

12—Conduct of proceedings

- (1) The Tribunal will be constituted in relation to the hearing of any proceedings of the President or a Deputy President, as determined by the President.
- (2) The Tribunal may sit at any time (including a Sunday) and at any place.
- (3) The Tribunal must hear and determine proceedings as expeditiously as possible.
- (4) The Tribunal—
- (a) is not bound by the rules of evidence and may inform itself on any matter as it thinks fit; and
 - (b) must act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.
- (5) A party to proceedings before the Tribunal is entitled to be represented at the proceedings.
- (6) Subject to any contrary provision of an Act or regulation, the Tribunal's proceedings must be open to the public.
- (7) However, the Tribunal may, in an appropriate case, order that proceedings be held in private.
- (8) The Tribunal may determine an application without holding a hearing if—
- (a) the Tribunal is satisfied that the application can be adequately determined in the absence of the claimant on consideration of documents or other material lodged with the application; and
 - (b) the claimant consents to this course of action.

13—Offices of the Tribunal

Offices of the Tribunal will be maintained at such places as the Minister may determine.

14—Powers of Tribunal

- (1) For the purposes of any proceedings, the Tribunal may—
- (a) by summons signed on behalf of the Tribunal by a member of the Tribunal or the Registrar, require the attendance before the Tribunal of any person whom the Tribunal thinks fit to call before it; or

(b) by summons signed on behalf of the Tribunal by a member of the Tribunal or the Registrar, require the production of any relevant documents or records and, in the case of a document or record that is not in the English language, require the production of—

5 (i) a written translation of the document or record into English; and

(ii) a certificate signed by a translator approved by the Tribunal certifying that the translation accurately reproduces in English the contents of the document or record; or

10 (c) inspect any documents or records produced before it, and retain them for such reasonable period as it thinks fit, and make copies of the documents or records or their contents; or

(d) require a person to make an oath or affirmation (which may be administered by a member of the Tribunal) to answer truthfully questions put by a member of the Tribunal or a person appearing before the Tribunal; or

15 (e) require a person appearing before the Tribunal (whether summoned to appear or not) to answer a question put by a member of the Tribunal or by a person appearing before the Tribunal.

(2) A person who—

20 (a) fails without reasonable excuse to comply with a summons issued to attend, or to produce documents or records, before the Tribunal; or

(b) having been served with a summons to produce—

(i) a written translation of the document or record into English; and

25 (ii) a certificate signed by a translator approved by the Tribunal certifying that the translation accurately reproduces in English the contents of the document or record,

fails, without reasonable excuse, to comply with the summons; or

(c) misbehaves before the Tribunal, wilfully insults the Tribunal or 1 or more of the members in the exercise of the members' official duties, or wilfully interrupts the proceedings of the Tribunal; or

30 (d) refuses to be sworn or to affirm, or refuses or fails to answer truthfully a relevant question when required to do so by the Tribunal,

is guilty of an offence.

Maximum penalty: \$10 000 or imprisonment for 6 months.

35 (3) A person who appears as a witness before the Tribunal has the same protection as a witness in proceedings before the Supreme Court.

40 (4) If a person summoned under subsection (1) fails to produce any documents or records or to appear before the Tribunal as required by the summons or, having appeared, refuses to be sworn or to affirm, or to answer a relevant question when required to do so by the Tribunal, a certificate of the failure or refusal, signed by a member of the Tribunal or by the Registrar, may be filed in the Supreme Court.

- 5 (5) If a certificate has been filed under subsection (4), a party requiring the production of documents or records or the appearance of a person before the Tribunal may apply to the Supreme Court for an order directing the production of the documents or records or that the person attend, or be sworn or affirm, or answer questions (as the case may require) and on that application the Court may make such orders as it thinks fit (including orders for costs).
- 10 (6) The Court may require that notice be given of an application under subsection (5) to the person against whom the order is sought or any other person (but an order may be made, if the Court thinks fit, although no notice has been given of the application).
- 15 (7) In the course of any proceedings, the Tribunal may—
- (a) receive in evidence a transcript of evidence taken in proceedings before a court, tribunal or other body constituted under the law of South Australia or of any other State or a Territory of Australia, of the Commonwealth or of another country, and draw any conclusions of fact from the evidence that it considers proper;
 - (b) adopt, as in its discretion it considers proper, any findings, decision, judgment, or reasons for judgment, of any such court, tribunal or body that may be relevant to the proceedings.

15—Power of Tribunal to make rules

20 The Tribunal constituted of the President and 2 other members selected by the President may make rules—

- (a) regulating the practice and procedure of the Tribunal; or
- (b) making any other provision that is necessary or expedient for carrying into effect the provisions of any law relating to the Tribunal.

Division 5—Appeals

16—Right of appeal

- 25 (1) An appeal lies to the Supreme Court against a decision made by the Tribunal.
- (2) An appeal against a decision of the Tribunal may be instituted by a party to the proceedings before the Tribunal.
- 30 (3) An appeal must be instituted within 1 month of the date of the decision appealed against.

17—Operation of order may be suspended

- 35 (1) If an order has been made by the Tribunal, and the Tribunal or the Supreme Court is satisfied that an appeal against the order has been instituted, or is intended, it may suspend the operation of the order until the determination of the appeal.
- (2) If the Tribunal has suspended the operation of an order under subsection (1), the Tribunal may terminate the suspension, and where the Supreme Court has done so, the Court may terminate the suspension.

Part 3—Applications for reparation or ex gratia payment

18—Entitlement to reparation or ex gratia payment

- (1) The Tribunal must award reparation to a claimant if the claimant satisfies 1 or more of the eligibility criteria.
- 5 (2) The Tribunal may award an ex gratia payment to a claimant if the claimant satisfies 1 or more of the eligibility criteria and indicates in his or her application that he or she is seeking an ex gratia payment.

19—Eligibility criteria

10 An Aboriginal person or Torres Strait Islander is eligible for reparation or an ex gratia payment—

- (a) if he or she was, as a child—
 - (i) removed from his or her family under legislation that applied specifically to Aboriginal persons or Torres Strait Islanders; or
 - 15 (ii) removed from his or her family prior to 31 December 1975 if the removal was carried out, directed or condoned by the State government or an agent of the State government,
unless the Tribunal is satisfied that the removal was in the person's best interests; or
- 20 (b) if he or she is a lineal descendant of a deceased person who would be entitled to reparation or an ex gratia payment under paragraph (a) if he or she were alive; or
- (c) if he or she—
 - 25 (i) is a relative, family member or descendant of a person who has received, is entitled to receive, or would, if he or she were alive, be entitled to receive, reparation or an ex gratia payment under paragraph (a); and
 - (ii) suffered harm as a consequence of the removal of that person from his or her family.

20—Reparation

- 30 (1) Subject to this section, reparation may take any form that the Tribunal considers appropriate.
- (2) Without limiting subsection (1), the Tribunal may award reparation in the form of—
 - 35 (a) funding for the establishment or maintenance of centres dedicated to the examination of Aboriginal or Torres Strait Islander culture and history, including funding for land or premises; or
 - (b) funding for the establishment of community education programs about the history of forcible removals; or
 - (c) funding for projects to assist indigenous communities to identify members of the Stolen Generations and their dependants; or

- (d) monetary payments to assist members of the Stolen Generations and their dependants or descendants to meet particular needs; or
- (e) funding for access to counselling services, health services or language and culture training; or
- 5 (f) funding for memorials that reflect the views of members of the Stolen Generations; or
- (g) monetary compensation.
- (3) Payments ordered by the Tribunal for the purposes of awarding reparation are to be made from the Fund.
- 10 (4) The following provisions apply in relation to awards of reparation:
- (a) subject to paragraph (b), the Tribunal may award any 1 or more of the forms of reparation set out in subsection (2) in response to a particular application;
- (b) monetary compensation under subsection (2)(g) is payable only to a claimant who can prove that he or she suffered abuse or neglect as a child following
- 15 his or her forcible removal from his or her family;
- (c) in determining appropriate forms of reparation, the Tribunal must have regard to the Van Boven Principles;
- (d) the Tribunal should, if practicable, award reparation that benefits groups rather than individuals;
- 20 (e) in determining whether a claimant is to receive reparation, and in determining the nature and extent of the reparation, the Tribunal must take into account the nature and extent of any ex gratia payment, reparation, damages or other compensation awarded to the claimant in connection with his or her forcible removal (whether at common law or under this Act or another Act of this
- 25 State, the Commonwealth or another State or Territory).
- (5) In this section—
- abuse or neglect***, in relation to a child, means—
- (a) sexual abuse of the child; or
- (b) physical or emotional abuse of the child, or neglect of the child, reasonably
- 30 likely to—
- (i) cause the child to suffer physical or psychological injury detrimental to the child's wellbeing; or
- (ii) place the child's physical or psychological development in jeopardy;
- sexual abuse*** means conduct that would, if proven, constitute a sexual offence;
- 35 ***sexual offence*** means a sexual offence within the meaning of section 4 of the *Evidence Act 1929*.

21—Ex gratia payments

- (1) An ex gratia payment is to comprise—
- (a) a lump sum payment (not exceeding \$20 000) to be made in recognition of the applicant's experience of being a member of the Stolen Generations and the impact of that experience; and
 - (b) in the case of a claimant who satisfies the eligibility criteria specified in section 19(a)—\$3 000 for each year, or part of a year, during which the claimant did not, as a child, reside on a permanent basis with his or her family as a consequence of having been forcibly removed.
- (2) A claimant is not entitled to receive more than 1 ex gratia payment.
- (3) In determining whether an ex gratia payment is to be made to a claimant, and in determining the amount of the payment, the Tribunal may take into account the nature and extent of any reparation, damages or other compensation awarded to the claimant in connection with his or her forcible removal (whether at common law or under this Act or another Act of this State, the Commonwealth or another State or Territory).
- (4) An ex gratia payment is to be made from the Fund.
- (5) If the Tribunal determines to award an ex gratia payment, the Tribunal must advise the Trustee of the Fund of the amount to be disbursed.

22—Time for determination of application

- (1) Subject to subsection (2), an application under this Act must be determined by the Tribunal within 12 months of receipt of the application.
- (2) The Tribunal must decide an application for an ex gratia payment as soon as practicable after receipt of the application.
- (3) If a claimant is seeking reparation in addition to an ex gratia payment, the Tribunal may defer determination of the application for reparation until after determination of the application for an ex gratia payment.

23—Joint application

A group of persons may make a joint application for reparation if all members of the group satisfy 1 or more of the eligibility criteria.

24—Form of application

An application to the Tribunal is to be made in a manner and form approved by the President.

Part 4—Stolen Generations Fund

25—Establishment of Stolen Generations Fund

- (1) The *Stolen Generations Fund* is established.
- (2) The Fund is to consist of—
- (a) money appropriated by the Parliament for the purposes of the Fund; and
 - (b) income from the investment of money belonging to the Fund; and

- (c) money paid into the Fund under any other Act; and
- (d) money received for the Fund from any other source.

(3) The Fund is to be applied towards—

- (a) the costs of reparation; and
- (b) the making of ex gratia payments.

(4) The Fund is to be administered by a Trustee to be appointed by the Minister.

(5) The Trustee of the Fund may, with the approval of the Treasurer, invest any of the money belonging to the Fund that is not immediately required for the purposes of the Fund in such manner as is approved by the Treasurer.

Part 5—Miscellaneous

26—Annual report

(1) The Tribunal must, on or before 31 October in each year, prepare and submit to the Minister a report on the performance of its functions under this Act during the preceding financial year.

(2) The Minister must, within 12 sitting days after receiving the Authority's report, have copies of the report laid before both Houses of Parliament.

27—Regulations

The Governor may make such regulations as are contemplated by, or necessary or expedient for the purposes of, this Act.