Shoalcoast Community Legal Centre Inc
*Legal Advice & Advocacy*
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4 April 2008

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee,

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

Thank you for the opportunity to make a submission regarding the Bill introduced by Senator Andrew Bartlett.

Shoalcoast Community Legal Centre is a not-for-profit organisation, providing free legal services to disadvantaged residents of the Shoalhaven, Eurobodalla and Bega Valley Shires on the south coast of New South Wales.

Over the past few years we have received enquiries from several members of the Aboriginal Stolen Generations, in relation to possible avenues for legal redress. The range of harms suffered by these people include the long-term impacts of:-

(i) loss of immediate family and kinship networks;
(ii) loss of connection to culture and country;
(iii) childhood emotional and material deprivation;
(iv) childhood physical and sexual assault.

We strongly support the fundamental aim of the Bill, as beneficial legislation providing an alternative to the common law for members of the Stolen Generations to obtain financial remedy.

*Jurisdiction*
It is unclear to us, in perusing the Bill, explanatory memorandum and second reading speech, whether the Bill is intended to apply to people removed only under Commonwealth laws and policies or also to people removed under State government laws and policies.

If the former, the Bill would be unable to assist the existing clients of this Legal Centre, and presumably the large majority of Stolen Generations members in New South Wales, as they were taken from their families pursuant to legislation, policies and practices of the New South Wales government. We are uncertain whether constitutional jurisdictional hurdles are presented by Commonwealth legislation purporting to provide remedy for wrongs committed by the States. However, perhaps the States would be only too happy to have the Commonwealth foot the bill for ex gratia payments if this removed or reduced the incidence of claims against the States themselves.

If it is possible and practicable to establish a single nationwide system for reparations for the Stolen Generations, eradicating the need to lobby and convince the States and Territories to separately establish parallel schemes, then this is obviously a desirable route to take.

Some aspects of our submission are relevant only if the coverage of the Bill extends to people removed under the authority of the State of New South Wales.

*Inadequacy of existing legal avenues*
The difficulties and limits posed by the common law, for people seeking to make government and other institutions responsible for the effects of forced removal, are widely understood. We do not seek to re-state these here; other than to observe that our Legal Centre has on several occasions advised Stolen Generations members on their hypothetical common law options. We also submit that it can be safely assumed that many other people with potential claims have not come forward to seek advice, due to their awareness of the obstacles they would face in "going through the courts" and the (general) absence of encouraging precedents.*

We have, however, successfully assisted two people harmed by the forced removal policies to gain compensation under the New South Wales statutory victim's compensation scheme (*Victims Support and Rehabilitation Act 1996*). In one case the compensation was for psychological harm caused by long-term childhood sexual abuse by a foster father; in the other case the applicant had been subjected to a gang-rape whilst living on the streets after a series of failed foster, institutional and work placements. This second client of the Legal Centre had also been sexually abused in foster care, but this aspect of her claim failed due to the decision-maker's determination that there was insufficient evidence.

We wish to emphasise that the NSW victim's compensation scheme, whilst potentially providing a important source of redress for some people, does not and cannot compensate for all the harms caused by the forced removal policies and practices. It offers financial compensation for "actual" physical or psychological injury caused by specific criminal acts of violence. Thus the scheme can address only category (iv) of the harms summarised above; and only when sufficient evidence can be gathered to prove on the balance of probabilities both that the act of violence occurred and that medical injury resulted – a challenge in the best of cases of historic childhood assaults.

The victim's compensation legislation bears no explicit reference to the Aboriginal Stolen Generations, and cannot provide recognition of or redress for the severe damage associated with deprivation of parental care and family upbringing, loss of connection with culture, or sense of isolation and misplaced identity.

*Aspects of the Bill*
We support the creation of a specific Tribunal for the assessment and award of ex gratia payments to members of the Stolen Generations.

Eligibility:
We refer to 5(2)(a) of the Bill, being the clause which potentially might apply to people who have approached this Legal Centre, and to other people removed in similar circumstances in New South Wales. The phrase "race-based policies" may present difficulties for these people, and may require elaboration and definition. In the cases presented to us, young children were taken from their families during the 1950s and 1960s pursuant to laws which were **ostensibly race-neutral**. The

* While the recent *Trevorrow* decision in South Australia is encouraging, the particular facts in that case are readily distinguishable from the circumstances in which our own clients were removed and placed under New South Wales child welfare law

children were labelled neglected under generic child welfare legislation, and made Wards by the Childrens Court of New South Wales. In another case, generic adoption laws were applied. Neither the relevant statues, nor the Courts, nor the bureaucratic files, explicitly state at any point that this child is being removed "because s(he) is Aboriginal".

Reading between the lines however, and with knowledge of the social and historic context, it is clear in each case that racism was a key factor in the decisions made – eg in the judgments and assumptions made about the quality of care within an extended family in a Aboriginal town "fringe" camp setting; the hasty perfunctory nature of the decisions; the placement of the child with non-Aboriginal foster families; the complete failure to consider other options for the child's placement and care; and the continuing refusals over the years to allow parents and other relatives to have contact with the child. We believe there is no reasonable ground to deny that these children were members of the Aboriginal Stolen Generations; however, we fear that the "race-neutral" façade, and particularly the fact that Court Orders were made, may create a dispute if a narrow approach is taken to interpretation of the Bill or if the State government chose to voice opposition to some of the ex gratia claims.

We therefore suggest that, in any future re-drafting of the Bill, close consideration be given to the differing aspects of the various historical State and Territory systems that resulted in removal of Aboriginal children. If the proposed scheme is to operate as beneficial legislation and to truly reflect the magnitude of the removals, then care must be applied to ensure the wording of the legislation does not exclude anyone who was affected.

The phrase "race-based policies" might perhaps be defined in the Bill along the lines of:-

*Commonwealth, State or Territory laws, policies, or administrative practices which explicitly or implicitly were informed by, or reflective of socio-historic views that*
*(i) Aboriginal and Torres Strait Islander children, or children of partial Aboriginal or Torres Strait Islander decent, benefit from being raised away from Aboriginal and Torres Strait Islander families, communities, and culture; AND/OR*
*(ii) Aboriginal and Torres Strait Islander family environments and culture are inherently inferior to that of the dominant mainstream Anglo-Australian environment and culture; AND/OR*
*(iii) failed to recognize the importance to the welfare of Aboriginal and Torres Strait Islander children of being raised in or in close connection to their family, community or culture of origin.*

Entitlement

We refer to s4(3) of the Bill, which excludes from the scheme people who have received a payment from equivalent State or Territory legislation "or like legislation". While it appears entirely reasonable that no-one be able to "double-dip" from two parallel schemes, we do have reservations about the application of the phrase "or like legislation". Our concern is that this might operate to exclude from the ex gratia scheme a person who has received a payment under the NSW victim's compensation scheme, discussed above. We submit that such an exclusion would be unjust, as victim's compensation addresses only actual medical harm arising from criminal acts of violence, whereas the scheme envisaged by the Bill clearly is intended to recognise the wider, inherent damage arising from the forced removals of Aboriginal children, and is not restricted to compensation for specific injuries. We therefore suggest that this provision of the Bill be re-worded to clarify that "like" legislation refers to laws created to provide redress specifically for, or specifically inclusive of, people affected by the past policies for separation of Aboriginal and Torres Strait Islander children from their families

Burden of Proof?
We note that applications may be presented via oral evidence, and that the Stolen Generations Tribunal is to have broad power to obtain information from departments and agencies. There does not appear, however, to be guidance as to the basis on which a decision is made, other than that the Tribunal is "satisfied". We suggest that perhaps a civil "balance of probabilities" test would be appropriate.

Amount of ex gratia payment
We refer to s11 of the Bill, which provides for a "common experience" payment of $20,000 and "$3000 for each year of institutionalisation".

We tentatively support the application of a global common experience sum, as this may be preferable to the complicated and inevitably subjective task of individually assessing the appropriate quantum of payment that each applicant's particular life-story is "worth".

The additional payment provision appears to have been sourced from the Canadian model, which provides reparations for former residents of the "Indian Residential Schools" system. It is our understanding that, despite many similar factors, the Canadian history differs from the Australian in that its indigenous children were removed from family under a uniform federal policy placing them in what were known as "residential schools". In Australia indigenous children were subjected to a whole raft of removals policies, differing over time and between jurisdictions. Some children were placed in institutions for neglected or wayward children, while others were in foster care, adopted, or in live-in employment (paid or otherwise). Thus the provision for an additional payment "for each year of institutionalisation" is irrelevant to many potential claimants under the proposed scheme.

We suggest that, instead, a common experience payment be supplemented by an additional sum for people who experienced physical or sexual assault as a result of their removal.

Death of applicant
We refer to s21(2), and suggest that there be provision for the Tribunal to make the payment to the next-of-kin, rather than to the estate, in appropriate circumstances. While we appreciate that determining who is next-of-kin might involve family conflict in some cases, our concern is that a payment to the estate may in some cases mean a payment to creditors. A provision for the next-of-kin rather than the estate might also avoid the need for the family to have to arrange probate or letters-of-administration.

We thank you for the opportunity to make this submission, and sincerely hope that the inquiry will lead to further and timely progress with regard to this important issue.

Yours faithfully,

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Shoalcoast Community Legal Centre Inc.
Per: Meredith McLaine
Solicitor