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Reply To: Adelaide

9th 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 Secretary

re: Inquiry Into Stolen Generations Compensation Bill 2008

The Aboriginal Legal Rights Movement (ALRM) of South Australia makes a submission to the Committee. ALRM is the Aboriginal and Torres Strait Islander legal aid service for South Australia, and has been in operation for in excess of 30 years. This submission refers to the Bill and the terms of the Bill but makes some specific observations regarding the position in South Australia.

The Senate, and in particular Senator Bartlett, should be congratulated for having introduced the Bill, and this Committee should be commended for its efforts in holding hearings and reporting upon the Bill. It is the only Bill in mainland Australia, and it is the only attempt that has been made in Federal Parliament to address the issue of compensation for the Stolen Generations, notwithstanding the 'Bringing Them Home' report of April 1997. We are now in the 11th year after the 'Bringing Them Home' report.

In the matter of *Trevorrow v State of South Australia No 5 [2007] SASC 285*, a single Judge of the South Australian Supreme Court found the State of South Australia liable to make substantial compensation to a South Australian victim of the Stolen Generation.

The judgement refers in particular to historical circumstances. They include that between 1950 and 1962 the Aboriginal Protection Board and the Child Welfare and Public Relief Board took action in relation to Aboriginal children which, in Mr Trevorrow's case amounted to misfeasance in public office, breach of statutory duty, breach of fiduciary duty, and in all the circumstances, was negligent. Compensation was awarded under all of these heads, and as well as that, punitive damages were awarded not least because of the illegality of the conduct which gave rise to Mr Trevorrow's removal from his family.

The damages were substantial, as were the punitive damages. The judgement is subject to appeal to the Full Court of the Supreme Court of South Australia, and it is not clear how long it will take to resolve all appeals, which could potentially go to the High Court.

ALRM has reason to estimate that there are up to 250 people who were taken away from their parents under the regime described in the Trevorrow judgement, between about 1950 and 1962. Those removals all occurred in circumstances that are potentially liable to be found wrongful and to sound in damages. Nevertheless it is also estimated that of those 250 odd people, their files which had been held by the Children's Welfare and Public Relief Board and the Aboriginal Protection Board,- in 95% of the cases the files have been culled and destroyed.

These are rough figures. It is clear however, that a compensation scheme cries out to be created in South Australia. Nevertheless, no such announcement has been made by the South Australian Government, rather the South Australian Government, as litigant has elected to appeal the Trevorrow decision.

We refer to the Van Boven principles for reparations in cases of breaches of fundamental human rights. Those Van Boven principles specify that:

> "reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non repetition".

The point we draw from the particularities of South Australia, having regard to the Trevorrow judgement, is that one size does not fit all. Even allowing for the appeal in Trevorrow, which has not yet been set down for hearing, South Australia is the only mainland State in which there has been a specific judicial finding of Government illegality in relation to a Stolen Generations case. It is the only State in which a court has awarded substantial damages and indeed punitive damages to reflect the seriousness of the conduct of the State.

This suggests that any compensation scheme that applies for South Australia should reflect the Van Boven principles and make substantial provision for compensation, having regard to the findings of misfeasance and illegality and the fact that punitive damages were awarded.

Yet this could not be applied across the Board to the other States and Territories and this raises delicate questions, particularly in light of the fact that the Northern Territory legislative scheme, which was held by the High Court in the Kruger & Gunner litigation to have been lawful, not withstanding that it had important similarities to the South Australian legislative scheme. One size does not fit all.

ALRM notes that the Bill proposes a basic regime of compensation which under clause 11 is to be fixed as an amount not exceeding $20,000 as common experience payment, together with $3,000 for each year of institutionalisation. It is submitted that the amount of ex-gratia payment proposed in clause 11 of the Bill needs to be increased, at least in so far as it reflects South Australia. It would need to reflect the Trevorrow judgement and the specific findings in that judgement of illegality, breach of statutory duty, negligence, misfeasance, and breach of fiduciary duties, all requiring

punitive damages. That is consistent with the Van Boven principle that reparations be proportionate to the gravity of the violations and the resulting damage.

In addition, ALRM notes that in South Africa, the Truth and Reconciliation Commission adopted monetary grants to victims and their families paid around a benchmark amount of median annual household income, to be paid for a period of six years. It is submitted that this would be appropriate for creating a benchmark for a compensation figure.

We now move to specific points of comment and criticism in relation to the text of the Bill itself.

1. Definition of Aboriginal or Torres Strait Islander Person

The Bill adopts the definition of Aboriginal or Torres Strait Islander person found within the *Aboriginal and Torres Strait Islander Act2005.* It is noteworthy that this definition is not the same as the definition which had been applied for example in the Royal Commission Into Aboriginal Deaths In Custody, namely a definition based around (1) genetic Aboriginal heritage, (2) self identification as an Aboriginal or Torres Strait Islander person, and (3) recognition as such by a community which the person belongs to. Rather, the *Aboriginal and Torres Strait Islander Act* has been read as implying such a definition, with, as we say unfortunate consequences. The definition is:-

> *"Aboriginal person means a person of the Aboriginal race of Australia and Torres Strait Islander means a descendant of an indigenous inhabitant of the Torres Strait Islands.*

ALRM is concerned that the definition proposed in the Bill may have the effect of discouraging or defining out appropriate claimants.

The *ATSI Act 2005* definition of Aboriginal person refers to a person "of the Aboriginal race of Australia". It provides no assistance, other than the broad biological definition. In addition the reference to "race" is arguably an outmoded concept. Judicial interpretations have not clarified it entirely.

A gloss of the definition was provided by the Federal Court in these terms;-

> A person who has some Aboriginal descent, but less than substantial Aboriginal descent may be Aboriginal if he or she genuinely believes himself or herself to be Aboriginal or his or her community recognises him to be such. Refer to *Gibbs v Capewell [1995]128ALR 577,* where this test was propounded.

It is noteworthy that in that case the Minister had submitted to the Court that the imposition of a cultural test, in addition to descent would wrongly exclude a number of Aboriginal people:

> "including those who, in accordance with official policies of past times, were removed from their Aboriginal families and

communities and brought up without any contact with their Aboriginal heritage" 128ALR@581.

ALRM submits that any definition of Aboriginal person for legislation dealing with compensation for the Stolen Generation must include the following considerations:

1. One of the effects of the Stolen Generation policies of assimilation and integration was that they were intended to remove Aboriginal children from their families and to deny their Aboriginal identity. There may thus be significant numbers of persons who ought to be eligible for the compensation scheme, but do not satisfy a criterion of specific self identification or acceptance within their community, simply arising from the fact of their having been taken away.
2. It would be inappropriate and unjust if persons in that position, who were regarded as having been Aboriginal persons at the time that they were taken away, or who are the descendants of such Aboriginal people but who have subsequently lost their Aboriginal identity and acceptance in their community as a result of having been taken away, could potentially be denied compensation.
3. Accordingly it is submitted that the Bill should explicitly exclude a cultural test and rely on a biological test, which would include Aboriginal people, even of the most rarefied but actual, Aboriginal biological descent.

It is submitted that this Senate Committee should recommend appropriate amendments to the definition section of the Bill to ensure that Aboriginal people who ought to be eligible for compensation, but who do not or are unable to identify themselves as being Aboriginal, as a result of having been taken away, should not be deprived of compensation, provided that they are Aboriginal persons by some, however rarefied biological descent.

2. Eligibility Criteria for Ex-Gratia Payment

Clause 5 refers to the eligibility criteria for ex-gratia payment.

Clause 5 (1)(a). provides for compensation for persons who were subject to the Aboriginal ordinance of 1911 and 1918,(which applied to the Northern Territory of Australia) and who were removed form their family.

Clause 5.1(b) provides a rather loose definition which refers to "similar legislation which resulted in their being forcibly removed from their parents prior to 31st December 1975".

In relation to the eligibility criterion in clause 5(1)(b), we make the following submissions.

(1) The ambiguity of the test of "similar legislation", which conceivably could apply to differing State or other Territory

legislation can give rise to anomalies. We have already referred in this submission to the dissimilarities between the court results in Trevorrow and Kruger and Gunner. Unless the bar on compensation is raised, that anomaly could work to the detriment of claimants.

(2) We assume that the cut off date of 31st December 1975 refers to the date of commencement of operation of the *Racial Discrimination Act.* It thus seems to be assumed that the *Racial Discrimination Act* could give rise to a remedy for events after the coming into operation of that legislation. This should be further investigated.

(3) The definition of forcible removal appears to be similar to that adopted in the 'Bringing Them Home' report. It encompasses in the notion of forcible removal, compulsion, including physical compulsion, duress or undue influence. For the sake of completeness it might be appropriate for the Bill to refer to those criteria within the concept of "forcible removal"

(4) The Senate might also consider whether or not there should be an exclusion based around the rare cases of children who had been orphaned and where the documents and oral testimony establish that, after proper inquiry, there had been found no Aboriginal kin or carers able to support them. Also cases of removal which were genuinely voluntary. ALRM has been made aware of the circumstances of a number of Aboriginal people in South Australia who had been voluntarily surrendered to the Colebrook Home in Quorn and whose circumstances do not now, on their account of the matter, give rise to a feeling of distress, or a desire for compensation. It is acknowledged that such people do not have to make a claim.

3. The Eligibility Criteria in Clause 5 Subsection 2

It is noted that the broad definition of forcible removal is imported by clause 5 (1) (b). In relation to clause 5 (2) (a) however, the only criterion for eligibility is that the Stolen Generations Tribunal be satisfied that a person was subject to duress by a State agency as a consequence of race based policies operating at the time.

It is submitted that there is no proper basis to limit the criterion in subsection 2 (a) to duress, and that it ought also to apply to the more general definition of forcible removal, as defined in the 'Bringing Them Home' report. Duress is a subset of forcible removal, but it is a narrower definition than forcible removal.

4. Additional Support – Clause 22

Clause 22 is very scant. It provides for funding to be allocated for Healing Centres and services of assistance to people in receipt of compensation as a

result of the removal from their families. Subsection 2 says that such Healing Centres and related services should be set up after consultation "in a variety of locations across Australia".

Provision is also made for a funeral trust fund under clause 22(3). Insofar as clause 22 appears to be a clause that deals with a broader question of reparations, it is submitted with great respect that it is inadequate. ALRM submits that one of the obvious consequences of the Stolen Generations was that its victims are in need of particular assistance from Government in terms of the provision of citizens entitlements. That includes educational, medical, psychological and psychiatric assistance, housing, and related measures. It is submitted that an appropriate expansion of clause 22 would include provision for accelerated and expedited assistance to compensation claimants to services of this sort in the States and Territories, through and by means of the Healing Centres referred to. Just as Indigenous Co-ordination Centres now provide "solution brokers", so also the Healing Centres should provide for accelerated and improved access to specific services needed by the Stolen Generations as a result of their experiences.

Ngarrindjeri Regional Authority Inc

ALRM has been provided with a submission made by the Ngarrindjeri Regional Authority Inc, made to the Premier of South Australia on 14th August 2007, shortly after the delivering of the judgement in the matter of Trevorrow No 5 .

Insofar as is relevant to this Inquiry, ALRM respectfully recognises and adopts the Ngarrindjeri Regional Authority's submission to the State of South Australia. We particularly note the excellent recommendations made in that submission.

In particular the Ngarrindjeri Regional Authority recommended the creation of a "Stolen Generations of Aboriginal Children Healing Foundation". It would appear that the Healing Foundation would carry out some functions similar to those of the proposed healing centres. The Ngarrindjeri Regional Authority submits that the foundation should provide opportunities for religious groups, citizens, corporations or institutions to make financial contributions as an act of practical reconciliation or to acknowledge their own involvement or participation in actions of practices affecting the Stolen Generations of children. It is submitted that this recommendation is worthy of consideration by the Senate, and that the provisions in elation to Healing Centres should include provision for donations, potentially tax deductible donations, to be made by individuals and institutions to Healing Centres throughout Australia, as a measure of practical reconciliation.

It is noted that the Ngarrindjeri Regional Authority also recommends commemoration of the legacy of the Stolen Generations by commemoration and education services throughout South Australia, including educational programs through schools and universities. That proposal is also respectfully adopted by ALRM.

Other functions of Healing Centres could include language preservation, and recording and preservation of oral histories. A national response might include school curriculum development to include the Stolen Generation as well as national scholarships, a National Sorry Day as a public holiday and the linking of academic Australian history to the history of Aboriginal people.

It is submitted that clause 22 should contain an inclusive definition section which includes reference to the functions referred to above as well as other appropriate functions

5. The Operation of the Stolen Generations Tribunal

Consistent with the submission made above ALRM submits that the Bill needs to provide for some level of legal assistance for applicants. It is also submitted that the Stolen Generations Tribunal provisions in the bill are inadequate. Whilst ALRM fully understand and agrees with the proposition that the process should be as simple as possible, nevertheless there are basic criteria for procedural fairness which have not been found in the Bill.

The Bill provides in clause 6 for the basis for an application for an ex-gratia payment, in clause 7 for referral of applications from the Department to the Tribunal, in clause 8 for a time limit for completion of assessments, and in clause 9 for the Stolen Generations Tribunal to decide applications.

It is submitted that the Bill itself needs to be expanded somewhat to include provision for procedural fairness to applicants through the process.

In particular there should be specific requirements that applicants who are refused an ex-gratia payment on application should be given written reasons for the decision and also for applicants who receive less than the amount for which their application related. Similarly the processes of the Tribunal should become more transparent to allow for procedural fairness during the process of deliberation in relation to applications, and for amendment of applications through the actual process of hearing, if necessary. We note that an application for an ex-gratia payment may only be amended with the consent of the Secretary of the Department, not with the consent of the Tribunal. It may be that there are deficiencies in an application which may come to light in the course of Tribunal deliberations which were not apparent on the face of the application as presented to the Secretary of the Department.

Procedural fairness to applicants and transparency of process ought to be a higher priority than is made in the somewhat bare bones approach of clauses 5 to 9. It is noteworthy that the Administrative Appeals Tribunal, which is manifestly not a Court, and so is not subject to the effects of the High Court Decision in Brandy v HREOC (1995)183CLR245, provides for procedural fairness and the giving of reasons.

It is also the experience of ALRM that distressed victims of the Stolen Generation need support, including legal as well as moral support through

the process and there should be a provision for legal assistance, even if it is capped.

We note also with some concern that the effect of clause 4 subsection 3 is that a person who has already received a payment under a State or Territory compensation scheme is not eligible for a payment under the Bill.

ALRM thanks the Committee for the opportunity of making this submission.

Yours faithfully

Neil E Gillespie

Neil E. Gillespie
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