Submissions of
Aboriginal & Torres Strait Islander Legal Services (Qld South) Ltd
to Senate Standing Committee on Legal and Constitutional Affairs on
Inquiry into the Stolen Generation Compensation Bill 2008

Background of our organisation - our capacity to comment

Aboriginal & Torres Strait Islander Legal Service (Qld South) Ltd ("ATSILS") provides legal services to Aborigines and Torres Strait Islanders throughout Queensland. Our predecessor organisation began doing this work in 1972.

Our primary role is to provide criminal, civil and family law representation and advice to Aborigines and Torres Strait Islanders throughout the southern half of the State. From 1 July 2008 we will also provide these services to our people in the northern half of the State. We are funded as well by the Commonwealth Government to perform a State-wide role in the following key areas:
- Law and Social Justice Reform
- Community Legal Education
- Monitoring Indigenous Australian Deaths in Custody

We thank the Committee for requesting us to make Submissions to the Inquiry.

Overview of Content in Submissions

We applaud Senator Bartlett for introducing the Bill and support its enactment. The comments in these Submissions are not to be seen as detracting from the aims of the Bill. Rather, our comments are intended to suggest matters which could enhance the aims of the Bill.

We see as the important issues:
- The Quantum of the compensation
- Communication - dialogue with Aborigines and Torres Strait Islanders
- The role of the bureaucracy to process claims for compensation
- The role of a 'tribunal' to overseer payouts
- Minimising the difficulties of proof to support a claim for compensation
- Giving people the chance to tell their story and bring them closure.

Quantum

It is difficult to determine what would be a fair amount of compensation for the people who would be eligible to claim. While it is true that no amount of money can compensate for the injury these people have suffered, the law does attempt to determine a fair and realistic amount. The Courts do this when determining "common law" claims and legislatures do this in setting a scale of compensation in workers compensation legislation. For this reason the 2007 South Australian Supreme Court decision of Trevorrow is instructive. While we do not suggest that that quantum is to be the level of compensation in the Bill, it sets a benchmark.

In the Trevorrow case (2007 SASC 285), the Court applied the criteria of "heads of damage" as is done in a common law claim. The judgment was quantified at $475,000 for general damages and $75,000 for exemplary damages. In addition to the total award of $525,000 there was interest.

The Queensland government budgeted for $55.6 million for claims under the compensation scheme that it proposed in 2002 ("the 2002 Qld Scheme"). That scheme was intended for our people whose wages had been stolen. It had two tiers of compensation. The 1st tier was $4,000 for those over 50 years of age and the 2nd tier of $2,000 was for younger survivors. Descendants were precluded from making a claim. Of the budgeted amount, only about half has been distributed. The scheme deadline has expired and no more claims can be made.

In 2007 the Queensland Department of Communities announced another scheme of compensation which was specifically for victims of mistreatment in Queensland institutions ("the 2007 Qld Scheme"). It was not solely for our people, but many of the possible claimants are Aborigines or Torres Strait Islanders. The deadline for claims under this scheme is mid 2008. It also sets different levels of compensation, ranging from $7,000 to $40,000.

We know that Senator Bartlett has had extensive consultation with community. At times these meeting would have triggered emotional responses from people and again we want to note our appreciation of the Senator's efforts. There will always be someone who wants what a court would award under a Common Law claim. But most people are realistic of the difficulties of litigation and are prepared to negotiate a compromise. We have to assume that the figures ($20,000 plus $3,000 per year of institutionalisation) in the Bill reflect what the Senator has gleaned from these meetings with community.

The nub of the matter is how to fix an amount which is both realistic and equitable for victims. The sums fixed under the 2002 Qld Scheme were seen as contemptuously low. Rosalind Kidd, in her various publications on *Stolen Wages,* carefully details her research of original material on how ethnic Queenslanders were mistreated. She projects sums in line with the Trevorrow case. The 2002 Qld Scheme payout brought bitterness, not resolution, to victims. We are anxious that such an unfortunate attempt at compensation (reconciliation) is not repeated.

In other countries, where indigenous people had situations similar to ours, claims for billions have been locked into litigation or seemingly endless negotiations.

Inevitably the sum set in the Bill must be determined by the legislature. However, the Committee will make its recommendations after taking advice from Treasury and noting the suggestions as to quantum that will be made in submissions. We ask that the Committee revise upwards the sums of $20,000 and $3,000.

An important issue is how people feel as to the adequacy of the quantum. The recent Western Australia redress scheme sets amounts from $10,000 to $80,000. Given that a State government has set this level of compensation, we suggest that the Commonwealth could not pay less.

However, we do not agree with a wide difference in the payouts, as in the WA scheme. A person who has been mistreated for a short time or only on one occasion is still traumatised. We suggest that the basic payout be $50,000.

We agree with the Bill in not trying to quantify trauma in that it applies an empirical formula of number of years of separation. We believe that there has to be recognition of the period of separation. Thus for people separated for between 2 and 5 years a further $15,000 on top of the basic payout and for those separated for more than 5 years a further $30,000. Thus the maximum payout would be $80,000 with steps of $50,000 and $65,000.

Section 4(3) of the Bill – ineligibility for payment

We strongly disagree with the provisions of this section and ask for it to be amended. Instead of this section, we recommend that any payments under other schemes be taken into account in assessing a payment under the Bill but that such payments not become a bar to a claim under the Bill.

It follows from our comments on the 2002 Qld Scheme, that it would be a travesty if payment of a grossly inadequate amount under that scheme or other schemes, were to be a bar under the Bill.

Communication - dialogue with Aborigines and Torres Strait Islanders

There needs to be an ‘education exercise’ throughout our communities to explain (a) how the Bill (as enacted) will work in practice and (b) why it is so drafted.

To elaborate on point (b): People who think that they are also entitled to the same level of compensation as Mr Trevorrow, should know of the time limits in Statute of Limitation legislation which all jurisdictions have enacted. That legislation makes it legally impossible to bring an action after a time frame has elapsed from the date when the wrong was done to the victim. Mr. Trevorrow was able to bring his claim within the limitation period by showing that the wrongful act was within the time frame. In his case, the government had wrongfully withheld information and when it was eventually released to the claimant, the time frame started then, rather than from when he had been abused.

It should be pointed out to those who want a Trevorrow settlement, that the case is on appeal and he is still awaiting payment. Claimants also need to understand a little about legal issues of proof and that Trevorrow had the evidence needed to make a civil claim. There are also issues of legal costs and the stress of litigation.

Wages are also hard to calculate because of lack of records. Rosalind Kidd details how the situations of abuse and theft varied enormously from place to place and over different periods. A litigant making a claim like Trevorrow is an extraordinarily unfair situation because they would have been denied access to information about their own funds and often the person who was in a fiduciary position to the claimant was abusing that trust. These problems with litigation need to be explained to claimants so that they understand why a monetary figure is stated in the Bill to cover, in a generic way, this multiplicity of situations.

Administration – role of the bureaucracy

Another strong criticism of the 2002 Qld Scheme was of the bureaucracy that administered the scheme. It was described as faceless and unhelpful. Enquiries to it were not addressed and claims were rejected without good reason. We list some of the criticisms of it to point out what should be avoided when the scheme under the Bill is administered.

It is important that the bureaucracy have an overseer body (such as the Tribunal) to be a source of appeal when bureaucrats who administer the funds do not communicate with claimants, are arbitrary or just plain wrong.

Sections 6, 7, 8, 9 & 13 of the Bill

These sections describe how the Department will administer the claims e.g. applications are to be made to the Secretary of the Department. However, the Tribunal makes the decision as to payment. We hope that in administering the scheme, that the Department notes our comments on the 2002 Qld Scheme and will make its officers accessible to claimants. We also hope that the Tribunal exercises some review on how applications are processed and will develop protocols with the Department in that regard.

We welcome the inclusion of section 13. We see Judicial Review as an important mechanism to avoid abuse of power.

Administration -minimising the difficulties of proof to support a claim

It is most important to minimise the frustration of applicants. Frustration can come about because of a lack of documentation as to the fact of institutionalisation or in establishing who the appropriate claimant is.

It is necessary for the Tribunal to not be confused with a court but rather a body that determines ex gratia payment.

Issues with identifying a claimant – no birth or other certificate

A core issue is for our people to provide identification – i.e. documentary evidence of who they are. Many Aboriginal and Torres Strait Islander people do not have a birth certificate.

There are real legislative and administrative difficulties to obtaining certificates. Most of these difficulties have some of these elements:

1) The individual was not born in a hospital.
2) The individual was born in a remote area and the professional person obliged to register the birth did not.
3) The parent did not know about the legal requirement to register a birth.
4) The memory of the *Stolen People* - *Stolen Wages* and with it the fear of children being removed from their parents, deters parents from registering births. The fear persists. As well as this fear in regard to children, there is a more generalised aversion to contact with authority figures.
5) Delay further excavates the situation for an adult when they belatedly realise that their birth has not been registered. State legislation that deals with registering births also provides substantial monetary penalties for tardiness in providing the relevant particulars to the registering authority.
6) In many cases we have found that the lack of registration can be put down to a simplistic, but understandably so, view to the effect: “Everyone around here knows who I am. I don’t need a piece of paper to prove I exist.”

The requirements of the Queensland legislation are such that it is rarely possible to give administratively, exemption to particular requirements. These requirements have often proved insuperable in trying to register a birth of (and issue a certificate for) an Aboriginal person who is now adult.

Issues with identifying a claimant – cost of application to obtain certificate
While the Queensland Supreme Court may make an order directing that a child’s birth be registered, that is an expensive exercise for our people. However, in those cases compelling evidence can be adduced by affidavits from such people as the mother, a person (albeit not a medical person) who assisted at the birth, or a respected Elder who knows the individual and their family. In practice, such applications to the Supreme Court are beyond our scarce resources.
Similar comments apply to obtaining marriage certificates and even death certificates though with these two examples, the difficulty may be due to multiple name changes of the persons concerned.

The issue of Indigenous people obtaining a birth certificate is not unique to Australia. The same issue has come up in other countries when a system of recording population information has been introduced into a population with an oral, as opposed to a literate tradition of counting such information. Our nearest neighbour, Papua New Guinea, is an example. What makes their solution to this issue particularly relevant is that the Australian Government worked out the solution both prior to and at the time of hand-over to PNG Independence.

Because most births of Papua New Guineans are not registered, the pragmatic solution that was devised is to accept other evidence as the alternative to a

person producing a certificate. This other evidence is Statutory Declaration given by respected persons who know the applicant and the relevant facts.

With claims by next of kin for compensation, the problem is both the documentation and the cost of obtaining probate. To get probate there has to be a will. Few of our people make wills. If there is not a will the next of kin have to establish who they are by producing birth, death and marriage certificates. Again, few of our people can do this. Processing an application for probate through the Supreme Court is also expensive. Again, a genealogy chart that is attested to by people of standing could be admitted, as evidence to support a claim.

To summaries this issue of proof:
It would be a travesty if genuine claimants were unable to access compensation because they cannot establish who they are. If other evidence is not procurable, then evidence of the fact of institutionalisation or of being part of the *Stolen Generation* or having been abused by the practices of *Stolen Wages* can be supplied by way of Statutory Declaration. A Statutory Declaration given by respected persons who know the applicant and can confirm who they are, or can give details of lineage or can state their knowledge of the facts of abuse.

Closure - giving people the chance to tell their story
After the Apartheid regime in South Africa ended, the Mandela government set up the Truth & Reconciliation Commission to hear the stories of people. The Commission also addressed the needs of future generations. The Commission recognised that it was not just a situation of monetary compensation but rather an opportunity for people to let out their grief and anger.

This cathartic effect is psychologically important. It is also important for the personal history of the applicant and collectively Australian history. We do not suggest that there be hearings like that Commission or a Royal Commission. There are, less costly and personal mechanisms that achieve these goals.

Making an application for compensation should be an opportunity for people to have their say and for what they say to be recorded. For example, rather than just process of making a claim on a one-page form, let people detail their story over as many pages as it takes. The officer who processes the application, when responding might note aspects of the application to show it has been read and acknowledged, even call the person in to go over matters. After the application has been processed, the officer or the Tribunal can invite the individual people to call and elaborate on the matters that they detail in the application.

These responses should be catalogued and later released (or with the requisite approval of the applicant) for examination by later generations.

Other Reparation
We see the payment under the Bill as separate from such issues as establishing a fund for (say) Education, Health Services, Healing Centres for those affected by separation or further generations. We regard those services as what should be delivered by governments as an ongoing commitment. With the 2002 Qld. Scheme, some $20 million is unallocated. Understandably, those who were directly affected by separation are concerned that money which they should receive is being used for other purposes.

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