



**Submission to
*Stolen Generations Compensation Bill 2008***

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Background

The Australian Lawyers Alliance is the only national association of lawyers and other professionals dedicated to protecting and promoting justice, freedom and the rights of individuals. We have some 1,500 members and estimate that they represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief. The Lawyers Alliance started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

Corporate Structure

The Australian Lawyers Alliance is a company limited by guarantee with branches in every state and territory of Australia. We are governed by a board of directors made up of representatives from around the country. This board is known as the National Council. Our members elect one director per branch. Directors serve a two-year term, with half the branches holding an election each year. The Council meets four times each year to set the policy and strategic direction for the organisation. The members also elect a president-elect, who serves a one-year term in that role and then becomes national president in the following year. The members in each branch elect their own state/territory committees annually. The elected office-bearers are supported by ten paid staff who are based in Sydney.

Funding

Our main source of funds is membership fees, with additional income generated by our events such as conferences and seminars, as well as through sponsorship, advertising, donations, investments, and conference and seminar paper sales. We receive no government funding.

Programs

We take an active role in contributing to the development of policy and legislation that will affect the rights of the injured and those disadvantaged through the negligence of others. The Lawyers Alliance is a leading national provider of Continuing Legal Education/Continuing Professional Development, with some 25 conferences and seminars planned for 2008. We host a variety of Special Interest Groups (SIGs) to promote the development of expertise in particular areas. SIGs also provide a focus for education, exchange of information, development of materials, events and networking. They cover areas such as workers' compensation, public liability, motor vehicle accidents, professional negligence and women's justice. We also maintain a database of expert witnesses and services for the benefit of our members and their clients. Our bi-monthly magazine, *Precedent*, is essential reading for lawyers and other professionals keen to keep up to date with developments in personal injury, medical negligence, criminal, human rights, immigration, indigenous, public interest and other, related areas of the law.

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Introduction

The term 'Stolen Generations' refers to a policy that involved the forcible removal of indigenous children from their families for placement into foster homes, internment camps or institutions between the mid nineteenth century up until the 1970s in Australia.

It is estimated that at least 100,000 children were taken from their families during that period,¹ with the aim of culturally assimilating indigenous children into white colonial Australia, and the phasing out of the Aboriginal culture and ethnicity.

All states and territories within Australian passed legislation authorising the forced removal of indigenous children from their families, with the exception of Tasmania, which removed children under child welfare laws.

The forced removal of children from their families has had a severe effect on the individuals themselves, their families and the indigenous population at large. This was explicitly recognised by the Full Court of the Family Court when it recognised: "...the devastating long term effect on thousands of Aboriginal children arising from their removal from their Aboriginal families and their subsequent upbringing in a white environment."²

International law relating to compensation

The right to reparation for abuses of human rights is a recognised principle in international law. Reparations include restitution, monetary compensation, recognition, rehabilitation and guarantees that abuses will not occur again.

Articles within the International Covenant on Civil and Political Rights (ICCPR)³, the International Covenant for the Removal of All Forms of Racial Discrimination (ICERD),⁴ The Convention on the Rights of the Child (CROC)⁵ and the Convention Against All

¹ Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, April 2007 ('*Bringing Them Home Report*')

² *In The Marriage of B and R* (1995) 19 Fam LR 594 per Fogarty, Kay and O'Ryan JJ

³ Article 2(3)(a).

⁴ Article 6.

⁵ Article 39.

Forms of Torture (CAT) ⁶ all hold that where an individual's human rights have been violated, they are entitled to an adequate and effective remedy.

Reparation for human rights abuses has also consistently been affirmed within international courts and tribunals, arguably making it part of international customary law.

The United Nations has also supported reparation for human rights abuses and commissioned a report on the right to restitution in 1989. The author, Professor Theo van Boven held: "In accordance with international law, States have the duty to adopt special measures, where necessary, to permit expeditious and full effective reparations."⁷

⁶ Article 14.

⁷ Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117, UN Doc E/CN4/Sub 2/1996/17, 24 May 1996.

Comments on the Bill

Introduction

The Australian Lawyers Alliance wishes to congratulate Senator Andrew Bartlett for putting forward this private member's Bill, which recognises the suffering and injustice experienced by the Indigenous community as a result of former government policies.

The Lawyers Alliance approaches this submission through its general membership, which has considerable expertise and a history of working with members of the Stolen Generations to receive just compensation.

The Lawyers Alliance recognises the difficulty for Stolen Generations to receive just compensation based on a common law action. Bringing a common law action requires significant evidence to be gathered, is likely to incur substantial legal costs and is frequently characterised by a drawn out and traumatic experience for the claimant, with no guarantee of success. A federal compensation scheme would allow those parties who suffered as a result of child removal policies to receive compensation quickly, easily and without unnecessary legal complication.

While a monetary sum can never compensate those who suffered separation from a child, a mother, siblings, family, land, culture or a community, it is an important step in recognising the devastating effect such policies had on our Indigenous community.

Specific issues in the Bill

Section 4(3)

A person who has already received a payment under State or Territory Stolen Generation compensation legislation or like legislation is not eligible for an ex gratia payment under this Act.

The Australian Lawyers Alliance is concerned that s4(3) does not specify the scheme to which an applicant should defer when making an application, in the event that there is a similar scheme under state jurisdiction. It is unclear whether a claimant can choose the scheme with the highest compensation rate, or whether they should defer to an existing state scheme and apply only through the federal system if there is no state scheme in place. To promote consistency, the Lawyers Alliance would urge that the

federal scheme should class eligible parties who have received a lower payout under a state scheme to be paid the difference of what they would be entitled to under the federal scheme.

Section 5(a)

An Aboriginal or Torres Strait Islander person who was removed from their family prior to 31st December 1975 and was under the age of 21 years at the time of their removal, and who the Stolen Generations Tribunal is satisfied was subject to duress by a state agency as a consequence, in whole or in part, of race-based policies operating at the time;

In the absence of a definition, the Australian Lawyers Alliance submits that the term 'state agency' should be expanded and clarified. If limited, the Lawyers Alliance believes that the term 'state agency' could have the effect of excluding many members of the Stolen Generations from compensation if they were 'subject to duress' by other bodies, such as charitable or religious groups.

The Lawyers Alliance submits that the definition of 'state agency' should cover agencies of all the states and territories, as well as those of the federal government. If the definition covers only federal agencies, many claimants who were removed by a state body, in states without a compensation scheme, would be denied access to compensation.

Section 6(3)

An application must be made within 7 years commencing on the commencement of this Act.

The Australian Lawyers Alliance recognises that the government does not want to be financially liable to the Stolen Generations indefinitely, and can therefore understand the policy and rationale of a sunset clause.

However, it should be noted that there may be cases where members of the Stolen Generations or their descendants are unaware of their own or their parents' removal. Therefore, the Lawyers Alliance submits that the sunset clause should be extended or removed entirely⁸ to ensure that eligible applicants are given sufficient time to determine their eligibility.

⁸ As recommended in the *Bringing Them Home Report*.

Section 11

The amount of an ex gratia payment in respect of an applicant referred to in subsection 5(3), is an amount not exceeding \$20,000 as common experience payment and \$3,000 for each year of institutionalisation.

The Lawyers Alliance recognises that a realistic cap on payment is required to ensure the financial viability of the scheme. As mentioned, while monetary compensation cannot undo the wrongs of the past, it should not be tokenistic or trivialise the emotional and financial losses associated with a person's removal.

Victims of crime in NSW receive a maximum of \$50,000⁹ for an act of violence, with victims in other states receiving similar amounts. Although \$20,000 may in some cases appear to be adequate, when consideration is given to the possible heads of damage, as identified in the *Bringing Them Home Report*. The relevant heads of damage can be summarised as follows:

1. Racial discrimination.
2. Arbitrary deprivation of liberty.
3. Pain and suffering.
4. Abuse, including physical, sexual and emotional abuse.
5. Disruption of family life.
6. Loss of cultural rights and fulfilment.
7. Loss of native title rights.
8. Labour exploitation.
9. Economic loss.
10. Loss of opportunities.

The Lawyers Alliance believes that a sliding scale should be included, so that those most disadvantaged by past acts can receive just compensation.

⁹ *Victims Support and Rehabilitation Act 1996*, s19.

Section 13

All decisions made by the Stolen Generations Tribunal are eligible for judicial review.

The Australian Lawyers Alliance submits that members of the Stolen Generations who have a reasonable claim for judicial review should be entitled to legal representation for free or at a limited expense.

General Comments and Recommendations

General Comments

Calls for a compensation scheme for the stolen generations have increased in recent times. Bruce Trevorrow's lead barrister and Australian Lawyers Alliance member, Julian Burnside, said "Recovering compensation when you can prove that you've been stolen is incredibly arduous, a huge amount of work for the individual and for their legal team and very stressful psychologically for the plaintiff. The money isn't the issue, but you need to be careful that the gesture isn't an empty gesture. To go through the motions of saying, "We will acknowledge wrongs, "we will acknowledge you were harmed, and see you later", it may leave a lot of people feeling they've just been used as a political tool."¹⁰

The Australian Lawyers Alliance has spoken publicly on this issue in the past, with President, Ian Brown, stating "There is ample precedent for governments setting up compensation schemes for victims of abuse, most recently in Queensland for victims of medical malpractice with the Bundaberg Hospital scheme, where people who are affected are not required to go through the trauma of litigation to ... achieve an uncertain outcome."¹¹

The Human Rights and Equal Opportunity Commission, which published the *Bringing Them Home Report (1997)*, is still waiting for its recommendations to be implemented in full. Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma said "Australian governments have cherry-picked recommendations from the (*Bringing Them Home*) Report, but we are still waiting for an accessible, fair and just national

¹⁰ http://news.sbs.com.au/worldnewsaustralia/the_stolen_generation_136127

¹¹ http://www.lawyersweekly.com.au/articles/Stolen-generation-case-sparks-calls-for-compo-scheme_z70173.htm).

compensation scheme, as well as the all-important, and long-overdue, national apology from the Australian Parliament.”¹²

Unfortunately, Prime Minister, Kevin Rudd’s comments were “We will not under any circumstances, be establishing any compensation arrangements or any compensation fund, absolutely blunt on that.”¹³

Recommendations

The Lawyers Alliance submits that the *Stolen Generations Compensation Bill 2008* is a necessary and overdue piece of legislation.

We recommend:

- If a state scheme provides a payment which is less than that achievable under the federal scheme, this Act would allow for eligible persons to be paid the difference in accordance with the federal scheme.
- The term ‘subject to duress by a state agency’ should be expanded to include individuals and non-state institutions and agencies.
- An elimination or, at minimum, an extension, of the sunset clause
- Implementation of a sliding scale, so that those most disadvantaged by past acts can receive appropriate and just compensation.
- That members of the Stolen Generations be afforded legal representation when applying for judicial review.

The Australian Lawyers Alliance is a peak legal body of lawyers and has significant expertise in this complex area. The Australian Lawyers Alliance would like to offer its assistance to the Commonwealth to achieve the outcomes needed to address the issues that are the subject of this inquiry. This includes assistance in drafting, and representation on committees and forums.

It is in the interests of our members and our clients that solutions be found to this problem. The Australian Lawyers Alliance is committed to assisting the Commonwealth government to find a fair and reasonable solution.

¹² http://www.hreoc.gov.au/about/media/media_releases/2007/52_07.html

¹³ <http://www.abc.net.au/am/content/2008/s2152790.htm>