



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
Email: legcon.sen@aph.gov.au

Dear Sir/Madam,

Submission into the Inquiry into the proposed bill for an Act to provide for ex gratia payments to be made to the stolen generations of Aboriginal children, and for related purposes

We welcome the opportunity to make a submission to this Inquiry.

Kingsford Legal Centre is one of over 38 community legal centres in New South Wales. The Centre provides advice and assistance to people who live, work or study in the municipalities of Randwick and Botany on selected legal problems, and a state wide service on matters of Discrimination Law. All advice is free, with services jointly funded by the University of New South Wales's Faculty of Law and the Legal Aid Commission of New South Wales.

Kingsford Legal Centre also runs an outreach service for Aboriginal clients at La Perouse community. During the 1990s we also ran the first Australian litigation on behalf of a member of the stolen generations, Joy Williams.

We have advised other Aboriginal clients about their remedies to sue the State for negligence in relation to their removal.

In this submission we will:

1. Compare the proposed Bill with the recommendations from the Human Rights and Equal Opportunity Commission's Inquiry into the Removal of Aboriginal and Torres Strait Islander Children from their Families, the "Bringing them Home Report" with comments on specific provisions of the Bill
2. Provide a brief summary of the Joy Williams case and discuss problems with litigation and the need for a compensation scheme.

Kingsford Legal Centre Recommendations

These are the recommendations of Kingsford Legal Centre based on the discussion below comparing the proposed bill with the recommendations outlined in the Bringing Them Home Report. They are also based on our experience representing Joy Williams in her claim against the State of New South Wales.

Recommendation 1 : We recommend that provision should be made for compensation to communities from which children were forcibly taken

Recommendation 2: We recommend that the Bill cover children who were “forcibly removed from their communities” and not refer to specific legislative provisions.

Recommendation 3: The Bill does recognise the claims of family members of removed children to compensation (s5(2)(b)), in line with Recommendation 4(2) of the Bringing Them Home Report. We support this inclusion.

Recommendation 4: The Bill also recognises the claims of the descendants of those who were forcibly removed (s5(3)(b)), in line with Recommendation 4(4) of the Bringing Them Home Report. We support this inclusion.

Recommendation 5: We submit that use of the term “duress” is misleading. We recommend that the range of injuries outlined in the Bringing Them Home Report Recommendation 14 should be used in deciding loss or injury.

Recommendation 6: We recommend that the Bill include the full range of ways in which children were removed, under various legal powers of Federal, State and Territory bodies and include the full range of placements experienced by children.

Recommendation 7: We recommend that the Bill recognise the complexity of ways in which children were removed as outlined in the Bringing Them Home Report.

Recommendation 8: We recommend that the categories recommended in the Bringing Them Home Report be followed in awarding payment and include an amount for being removed and not refer to an additional amount for institutionalisation as this does not directly correspond to the experience in Australia.

Recommendation 9: We recommend that the Bill provide for legal representation for any claimant under the Scheme.

Recommendation 10: We support the inclusion of Indigenous people in the decision making of the Tribunal.

Recommendation 11: We recommend that the Tribunal function in a multi disciplinary way with non lawyers and lawyers. It should sit with at least 2 members with at least one of them being Indigenous.

Recommendation 12: We recommend that the burden of proof be on the balance of probabilities.

Recommendation 13: We recommend that common law rights to pursue damages or compensation should not be extinguished and that the Bill should state this clearly.

Recommendation 14: We recommend that the Bill include a specific level of funding for the creation of healing centres and services.

1. Comparison between the proposed Bill and the Recommendations of the Bringing them Home Report

The Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, 'Bringing Them Home', made a number of recommendations in relation to Reparation for Aboriginal children who were forcibly removed from their families.

Components of reparation

The Bringing Them Home report recognises that reparation is not limited to monetary compensation. Accordingly, **Recommendation 3** states that reparation should follow the van Boven Principles and consist of:

1. acknowledgment and apology,
2. guarantees against repetition,
3. measures of restitution,
4. measures of rehabilitation, and
5. monetary compensation.

Claimants

The Bringing Them Home Report makes the following recommendation on potential claimants:

Recommendation 4. That reparation be made to all who suffered because of forcible removal policies including,

1. individuals who were forcibly removed as children,
2. family members who suffered as a result of their removal,

3. communities which, as a result of the forcible removal of children, suffered cultural and community disintegration, and

4. descendants of those forcibly removed who, as a result, have been deprived of community ties, culture and language, and links with and entitlements to their traditional land.

The Bringing Them Home report calls for compensation to be made not only to individuals and their immediate families, but also to ‘communities which, as a result of the forcible removal of children, suffered cultural and community disintegration’ (Recommendation 4). The Bill makes no provision for compensation payable to Aboriginal communities who have suffered as a result of the forcible removal of children. The Bringing Them Home Report highlighted submissions to the Inquiry that included ‘recognition that the removals affected more than the individuals actually taken, but also the communities they were taken from’ (Stolen Generations *National Workshop 1996* submission 754 p50).

Kingsford Legal Centre Recommendation 1 :We recommend that provision should be made for compensation to communities from which children were forcibly taken.

Section 5 (1) (a) and (b)

To be eligible for an ex gratia payment, the bill requires that the applicant must have been either:

1. Removed from their family subject to the Aboriginal Ordinance 1911 or 1918: *s5(1)(a)*;
or
2. If not removed subject to the Aboriginal Ordinance 1911 or 1918, was *subject to similar legislation* which resulted in them being forcibly removed from their family prior to 31st December 1975: *s5(1)(b)*

We are concerned about the narrowness of these provisions. The Bringing Them Home Report is broad in its approach to potential claimants, calling for reparation to be made to those who ‘suffered because of forcible removal policies’. However, the Bill uses language that is much narrower. Given that Aboriginal children were often removed under generic race-neutral child welfare legislation, the phrase “subject to similar legislation” in *s5(1)(b)* may have a prohibitively narrow effect. Further, the use of ‘race-based policies’ in section 5(2)(a) does not reflect the situation that Aboriginal children were often removed under generic race-neutral child welfare legislation. It is unclear whether the combined effect of this terminology in the eligibility criteria would be to deny otherwise potential claimants. We submit that the phrase “subject to similar legislation” is an imprecise and overly narrow term which is not reflective of the circumstances in which children were taken from their families. The proposed Bill makes it unclear whether they would be covered by *s5(1)(b)*.

Kingsford Legal Centre Recommendation 2: We recommend that the Bill cover children who were “forcibly removed from their communities” and not refer to specific legislative provisions.

Kingsford Legal Centre Recommendation 3: The Bill does recognise the claims of family members of removed children to compensation (s5(2)(b)), in line with Recommendation 4(2). We support this inclusion.

Kingsford Legal Centre Recommendation 4: The Bill also recognises the claims of the descendents of those who were forcibly removed (s5(3)(b)), in line with Recommendation 4(4). We support this inclusion.

Compensation

The Bringing Them Home Report states that compensation should recognise the full range of harms and losses caused by the removal policies. It has therefore recommended that damages may be calculated under specific heads of damage:

Recommendation 14. That monetary compensation be provided to people affected by forcible removal under the following heads.

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.

Section (2) (a)

This proposed section refers to the Stolen Generations Tribunal being satisfied that a person was “subject to duress by a state agency”.

We submit that use of “duress” will be ineffective. The Bringing Them Home Report describes the range of impacts and injuries that children experienced as a result of being removed. The word “duress” does not cover this and has its own legal connotation which could be misleading. We submit that “injury” or “harm” would be better terms to use.

Kingsford Legal Centre Recommendation 5: We submit that use of the term “duress” is misleading. We recommend that the range of injuries outlined in the Bringing Them Home Report under Recommendation 14 should be used in deciding loss or injury.

Further section (2)(a) refers to duress by “a state agency”. It is unclear whether this refers to a governmental body or organisation. Many children were placed in organisations which were church-based rather than state-based. Some were placed with families. For example, at four weeks old, Joy Williams was first placed in the custody of the United Aborigines Mission at its Aboriginal Children’s Home at Bomaderry and, at four years old, was transferred to Lutanda Children’s Home in Wentworth Falls. Lutanda Children’s Home was run by a church organisation. Thus this provision is unclear whether the harm experienced in these placements would be covered by this provision.

Kingsford Legal Centre Recommendation 6: We recommend that the Bill include the full range of ways in which children were removed, under various legal powers of Federal, State and Territory bodies and include the full range of placements experienced by children.

Furthermore s (2)(a) refers to the reason for duress experienced “As a consequence, in whole or in part, of race- based policies operating at the time”. Some children were removed explicitly because of the colour of their skin. However many were removed by child welfare authorities applying a standard of care which failed to value the importance of family and culture to Indigenous children. This provision therefore potentially fails to cover the broad range of children who were removed.

Kingsford Legal Centre Recommendation 7: We recommend that the Bill recognise the complexity of ways in which children were removed as outlined in the Report.

Sections 9 and 11, Amount of ex gratia payment

The Bill does not specify on what grounds an ex gratia payment is payable, other than that the Tribunal be ‘satisfied’ that a payment is payable (section 9). Nor does the Bill specify how quantum is to be calculated, other than provision of a maximum payment of ‘\$20,000 as a common experience payment and \$3000 for each year of institutionalisation’ (Section 11). The Bill does not address any of the specific heads of damage recommended by the Report.

The Bringing Them Home report recommends that claimants be entitled to a ‘minimum lump-sum payment in recognition of the fact of removal’ (Recommendation 18). We support a base payment for removal rather than “common experience”. However the additional amount for institutionalisation would be problematic. This is because, as previously discussed, some children were placed in families and thus arguably not institutionalised. Furthermore it was common practice for girls at the age of 15 years to enter into domestic service and for boys to start agricultural work. Many never received their wages for this work as they were supposedly paid into Trust funds and never paid out to individuals.

The question remains of the definition of institutionalisation. We submit that children working from age 15 until 21 were still suffering the impact of being removed and were still

wards of the state, unable to connect with their families. They should not be disadvantaged because they were not in a formal institution setting.

Kingsford Legal Centre Recommendation 8: We recommend that the categories recommended in the Report be followed in awarding payment and include an amount for being removed and not refer to an additional amount for institutionalisation as this does not directly correspond to the experience in Australia.

Procedural Requirements

Recommendation 17: That the following procedural principles be applied in the operations of the monetary compensation mechanism.

1. Widest possible publicity.
2. Free legal advice and representation for claimants
3. No limitation period
4. Independent decision making which should include the participation of indigenous decision makers.
5. Minimum formality
6. Not bound by the rules of evidence
7. Cultural appropriateness

The Bill does not provide for free legal advice or representation for clients, or any level of funding whatsoever. Interestingly, the Canadian Government pays a 15% premium on compensation payouts under the Independent Assessment Process where a claimant retains a lawyer. We submit that it is essential both for the fair representation of Indigenous people and for the smooth and effective running of the Tribunal that Indigenous people are represented.

Kingsford Legal Centre Recommendation 9: We recommend that the Bill provide for legal representation for any claimant under the Scheme.

Section 15, Procedures for merit selection of appointments under this Act

The Bill provides for the participation of indigenous decision-makers by requiring ‘at least three persons on the tribunal must identify as Aboriginal or Torres Strait Islander (section 15 (1)(b)).

Kingsford Legal Centre Recommendation 10: We support the inclusion of Indigenous people in the decision making of the Tribunal.

Section 16, Functions of Stolen Generations Tribunal

This section does not explain in detail how the Tribunal should function. We submit that the Tribunal should function in a multi disciplinary way so that a lawyer and non lawyer should sit on the Tribunal together. It should sit with at least 2 members or alternatively 3 members with the majority being Indigenous.

Kingsford Legal Centre Recommendation 11: We recommend that the Tribunal function in a multi disciplinary way with non lawyers and lawyers. It should sit with at least 2 members with at least one of them being Indigenous.

Standard of Proof

The Bringing Them Home Report recommends that the required standard of proof for claims should be on the balance of probabilities. There is no explicit standard of proof in the Bill. A payment is payable when a claimant meets the eligibility requirements in section 5, and the Tribunal must be 'satisfied that an ex gratia payment is payable' (section 9). The phrase 'satisfied' is also used within section 5(2)(a).

Kingsford Legal Centre Recommendation 12: We recommend that the burden of proof be on the balance of probabilities.

Right to common law remedy

Some members of the Stolen Generation may be able to successfully claim compensation under common law. The Bringing Them Home report in Recommendation 20 recommends that a successful claim for monetary compensation should not extinguish the claimants right to seek a common law remedy. The Bill does not explicitly preserve common law rights. We submit that the existence of a statutory scheme should not exclude claimants from pursuing this legal avenue.

Kingsford Legal Centre Recommendation 13: We recommend that common law rights to pursue damages or compensation should not be extinguished and that the Bill should state this clearly.

Section 22 (1)

The Australian Bill provides funding for 'healing centres and services of assistance for people in receipt of compensation' (section 22(1), but there is no specific level of funding.

Kingsford Legal Centre Recommendation 14: We recommend that the Bill include a specific level of funding for the creation of healing centres and services.

2. Summary of the Joy Williams case and problems with litigation

In this section we will summarise the case brought by Joy Williams represented by Kingsford Legal Centre to demonstrate the pressing need for a statutory scheme for compensation.

Williams v Minister, Aboriginal Land Rights Act 1983 No 2 [1999] NSWSC 843 (26 August 1999)

The Williams Case involved a claim brought by a member of the "stolen generation" against the NSW government. It was the first case of its kind to reach trial in Australia.

Our client, Joy Williams, claimed damages for negligence, breach of fiduciary duty, breach of statutory duty and false imprisonment on the part of the Aborigines Welfare Board. In the 1940s, when she was a child, we argued that the Board was under a statutory responsibility to 'provide for the custody and maintenance of the children of aborigines'. We argued that this duty was breached and that as a result Joy Williams suffered severe injury.

Joy was removed from her mother shortly after birth and was placed in 2 children's homes while she was a child. Her application for transfer to Lutanda Children's Home stated as the reason for her admission "to take the child from the association of Aborigines as she is a fair skinned child". She claimed that having being placed in these homes, she was deprived of a maternal attachment figure, suffered depression, and was subjected to abuse and neglect. She alleged that her disturbed behaviour should have been apparent to the Board and it should have taken steps to refer her to a child guidance clinic. Once Joy was admitted to Lutanda Children's Home, the Board made no further inquiries about her progress. Left untreated, her mental health was severely affected. By the time she left the home she had developed a psychiatric illness known as borderline personality disorder and soon afterwards became addicted to drugs and, later, alcohol.

The case ran between 1989 and 2001. The first landmark in the litigation came in 1993 when the Court of Appeal allowed an extension of the limitation period in which to take legal action. In 1999 the matter went to trial in the NSW Supreme Court where the plaintiff was unsuccessful. A subsequent appeal in August 2000 was also unsuccessful.

In essence, the judges of the Supreme Court found that the behaviour of Joy at the children's home was sufficiently serious as to warrant referral for treatment, and that the Board could not be held liable for the disrupted life she led after she left the home. They also found that the way that our client was treated in the two homes was not wrong by the standards of the day. Both the trial judge and the appeal judges were also reluctant to impose any legal duties upon the Board to look after children in our client's position which would leave the Board open to a claim for damages.

An application was subsequently made to the High Court for special leave to appeal. The client argued that the Supreme Court judges were wrong in their assessment of her treatment and behaviour as a child, and that the Board, as an arm of the state, was under a legal duty to take active steps to look after the wellbeing of children in its care. The application for leave to appeal was heard in June 2001, however, was unsuccessful.

Problems with litigation

This case clearly demonstrates the challenges in bringing litigation. Because of the very history of removal and institutionalisation, claimants are likely to be psychologically damaged. This makes it exceedingly difficult for them to bring legal action. An example of this is that Joy Williams was unable to give oral evidence in her case because she was in hospital at the time of the trial. Furthermore the emotional damage of claimants who have been removed means their evidence may be less likely to be found "credible".

Additionally bringing legal action so many years after events have occurred means that gathering sufficient evidence of the facts is extremely difficult. The cost of litigating is also very high when each step of the way is challenged and appealed. The costs of both the

claimant, funded by Legal Aid and represented by a community legal centre as well as the costs of the State of NSW would have more than adequately been the foundation for a State compensation scheme.

Finally having to fit within the legal causes of action is extraordinarily difficult and is evidenced by the failure of Indigenous people in making out their claims in Australia.

For these reasons we are firmly convinced of the need for a statutory scheme based on the recommendations of the Bringing Them Home Report.

In conclusion we welcome the opportunity to make submissions on this draft Bill and commend Senator Bartlett for proposing this Bill. If you have any questions in relation to this submission, please do not hesitate to contact Anna Cody, on 02 9385 9566.

Yours sincerely,

KINGSFORD LEGAL CENTRE

Anna Cody
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