

Making a Claim



Connecting Home

a service for the Stolen Generations

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1. Introduction

Redress for the Stolen

Generations has been an ever-present issue since the release of the Bringing Them Home report. Many people see it as the Government's responsibility to provide compensation to those who were removed from their families, communities, culture, land and language.

At this time, unfortunately, a national or state compensation scheme seems a very distant possibility.

However, there have been two landmark cases in recent years that give hope to survivors of the Stolen Generations seeking redress. Both Bruce Trevorrow (2007) and Neville Austin (2011) received damages for harm caused by

their removal and care after starting court proceedings.

This brochure has been written to assist people who are considering starting court proceedings for the losses they suffered as a result of their experiences as removed Indigenous children.

This brochure is intended to provide commentary and general information only. It should not be relied upon as legal advice - only a lawyer can give legal advice.

Please contact Connecting Home to arrange support and further assistance should you have any further inquiries about making a legal claim.



2. Legal proceedings

In Victoria, commencing legal proceedings is currently the only way to claim redress (unless the person was the victim of a crime).

There is no State compensation scheme similar to those which have been available in Tasmania or Western Australia.

It is important to understand that damages will not be awarded simply because a person was removed from their family under laws which applied at the time.

As distressing as it is, most children were removed under laws, which applied at the time of removal. A Court cannot award damages for acts that were legal under the laws and policies, which applied at the time.

Damages **may** be awarded:

a) if you were removed from your family unlawfully or the care you received after removal was unlawful (eg. legal or duty of care procedures were not followed correctly);

b) you can show that your difficulties in life are directly linked to harm you suffered as a result of your unlawful removal from your family or whilst in care (eg. severe mental or physical health issues)

Depending on a person's circumstances, you may then be able to file a claim against the institution responsible for your care and/or the State.

and

EXAMPLE:

In 2007, Stolen Generations survivor Bruce Trevorrow was awarded \$525,000 by the South Australian Supreme Court.

Mr Trevorrow proved that procedures required under the laws and policies which applied in South Australia at the time had not been followed.

The Court found that the **negligence** of the State of South Australia (through the Aborigines Protection Board) while he was in care had caused him to suffer injury and loss, including ongoing depression in his adult life.

3. Thinking about making a claim?

Cases can be very difficult to prove and can take a long time to resolve. Cases can be especially hard to prove if the events happened a long time ago.

To prove a claim, you will probably need to present evidence about a number of very personal topics, which some people find very difficult to discuss. For example, very detailed evidence is likely to be needed about:

- a)** your life story (through both documents and evidence from witnesses, including from you);
- b)** illnesses, injuries or other harm suffered (through medical evidence); and
- c)** your family and their Aboriginal culture (which might be given by family members or cultural experts).

If the claim is for injuries or illness, you will need to be examined by medical practitioners who will prepare reports for the Court. Your lawyer will arrange those examinations. You may also be

asked to attend examinations by medical practitioners retained by the State or the organisation responsible for your care as a child.

Many survivors experience severe health difficulties and emotional trauma. Stress and trauma may worsen during legal proceedings, because your lawyers (and, most likely, the defendant's lawyers) will ask to be provided with detailed and sensitive information.

You may be asked what appear to be unreasonable and upsetting questions about very personal things. You will probably need to tell your story a number of times to different people during the process. If you commence proceedings Connecting Home recommends that you seek counselling and ongoing support to help you through what will be a difficult time.

Legal proceedings are a very difficult and emotional journey. If you decide to go ahead, it is very important that you have support from your family and if possible community.

Counselling services can also be arranged to help people considering or bringing their claims. Connecting Home strongly encourages clients to have support in place before starting court proceedings.

4. Getting started

If you believe that you may be entitled to damages for harm suffered because of your removal from your family, or because you were raised in care and/or as a child of someone who was removed, there are a number of things you will need to do.

Were you a state ward?

If you believe you may be entitled to damages for harm, which you suffered because of your removal, or because you were raised in care, there are a number of things you will need to do.

Firstly, you will need to determine whether you were (or your parent was) a “ward of the State”. A State ward of Victoria is someone:

- a) who was a child who lived in Victoria;
- b) who was removed from their family’s care; and
- c) for whose care and upbringing the State took legal responsibility.

If you were removed from your family, but did not become a ward of the State, you should try to obtain records from the agency that was responsible for your care as a child. Many of these agencies will provide assistance to you to get the records they hold.

Do you have your records?

Wards of the State need to obtain a copy of their file. If you do not already have your file, you can apply to the Family Information, Networks and Discovery (**FIND**). FIND can assist former wards to obtain records, and provide search, counselling and support services:

Family Information, Networks and Discovery

20/570 Bourke Street,
Melbourne

Phone: 1300 769 926

Email: findduty@dhs.vic.gov.au

available to clients to use in our office. Copies are also available from the Public Records Office of Victoria
www.prov.vic.gov.au

It is also possible to apply for access to files held by the State of Victoria under the Freedom of Information Act 1982. An application needs to be made to the relevant government agency or department. The relevant department (other than FIND) is likely to be the Department of Human Services, which is contactable as follows:

Freedom of Information Team

Department of Human
Services

GPO Box 4057

Melbourne VIC 3001

Phone: 1300 650 172

If you do not know which organisation was responsible for your care, the Finding Your Story resource manual can help track down the responsible organisation.

Connecting Home has copies of this manual, which are

If, after gathering the relevant information and considering potential causes of action, you wish to pursue a legal claim, you should speak to a lawyer as soon as possible.

5. Types of legal claims

Once you have your records, you may wish to consider commencing legal proceedings against either the State or the organisation that had responsibility for your care as a child.

To be entitled to damages, you will need to prove that an agency, department or person responsible for your care acted unlawfully, and that you suffered injury or harm as a result.

You cannot file a claim simply for being removed, if your removal was legal at the time, nor can you make a claim for injury or harm suffered as a result of a lawful removal.

As this may be difficult to understand, it may be worthwhile asking for clarification on your particular circumstances.

of action. Some examples of causes of action that could be relevant are:

a) Negligence – a failure to act with reasonable care, where a person has a duty to do so

b) Misfeasance in Public Office - where public officials knowingly act beyond their powers

c) False Imprisonment
- where someone's movements are unlawfully restricted

d) Breach of Fiduciary Duty
- the breach of a special relationship of trust and confidence where one person is required to act in the interests of another

e) Breach of Statutory Duty
- where damage is caused by a person's failure to carry out their legal obligations

There are different types of claims that can be made depending on what occurred in each case. Courts describe those types of claims as **causes**

These claims can be extremely complicated, and it is best if you can tell your story and show your records to a qualified Lawyer. Staff at Connecting Home can assist in setting up an appointment with a lawyer, and also assist in counseling and support along the way. Staff at Connecting Home cannot give advice (or an opinion) as to whether you have a claim, only a Lawyer can do so.

EXAMPLE:

In 2011, Victorian Indigenous man Neville Austin received an undisclosed amount, after reaching a settlement with the State of Victoria. The State acknowledged it had failed to take sufficient steps to find out if Mr Austin could have been reunited with his mother.

Mr Austin was made a ward of the State in 1965 (aged 15 months) and did not see his natural mother for the next 12 years. However, between 1970 and 1978, his mother wrote letters to the Department of Social Welfare asking about the

wellbeing of her son and asking whether they could be reunited.

Mr Austin made a claim against the State, alleging negligence, breach of statutory duty and breach of fiduciary duty.

Mr Austin alleged that the Department of Social Welfare breached its duties to adequately investigate whether:

- a)** his mother had a suitable home;
- b)** his mother was in a suitable financial position to care for him;
- c)** his mother could have provided emotional support;
- d)** his mother had sufficient parenting skills; or
- e)** returning him to his mother was in his best interests.

This case ended with a negotiated settlement. The State acknowledged that Mr Austin's mother's circumstances were not adequately followed up

(particularly after her letters were received), and that Mr Austin had suffered loss as a result of his separation from his mother. It was also acknowledged that he had been deprived of knowing his Aboriginal heritage through the experience.

Because the matter settled, the Court did not need to make a decision. As a result, Mr Austin's claim cannot be used as a legal precedent in future Stolen Generations' claims. Whilst the State settled Mr Austin's claim, is not required to settle any future claims made by survivors of the Stolen Generations. Each claim will be considered in the light of its own facts.

6. Costs

Some law firms will consider taking on cases on a pro bono basis, or under a no win no fee agreement. The terms of these types of agreement vary, and it is important to understand the terms before deciding to go ahead.

Any lawyer who is prepared to represent a person must give them details, in advance, about any costs which they may have to pay, and an estimate of how much those costs may be. They also need to provide details of additional costs (if any) as the claim progresses.

Under most **pro bono** or **no-win no-fee** agreements, you will be required to contribute to your lawyers' out of pocket costs which need to be paid to bring a case. These are known as **disbursements**, and can add up to **hundreds** or **thousands** of dollars.

However, under these agreements, you will not be required to pay for your lawyer's time upfront and you **may** not need to pay the lawyer at all (for example if the lawyer acts pro bono, or if your claim is not successful).

However, even if you do not have to pay all of your own lawyer's costs, **you may be liable to pay the costs of the other party** (which are likely to be tens of thousands of dollars), if you make a claim that does not succeed.

7. Time limits to bring claims

The law sets the period of time within which a person has to bring a legal claim, which starts when a “cause of action” arises. This period is called a “limitation period”.

Legal advice about a claim will be needed to determine whether a limitation period applies. The period that applies will depend on:

- a) the cause of action;
- b) the person’s age at the time;
- c) who the claim is against; and
- d) when the cause of action was discoverable.

In most Stolen Generation claims, the limitation period will have already expired. However, the Court can extend limitation periods, which have expired if it is just and reasonable to do so.

It is important that people who are considering a claim seek advice as soon as possible, because depending on their circumstances, the longer the delay, the more difficult it may be to have the Court extend the limitation period.

Your lawyer will advise you regarding any potential time limits that may affect your ability to make a claim.

8. If you lose your case

There are personal difficulties in bringing a case and these are likely to be made worse if you do not succeed in your case. Losing a case could expose you to:

- a) additional emotional distress at losing the case;
- b) the possibility that the Court might be critical of your evidence, or might not believe you, which could cause additional trauma; and
- c) potentially large financial consequences, as the “usual order” is that the losing party must pay the legal costs of the winning party

If you lose your case, you may be liable to pay the costs of the other party. It is important to discuss these details with your lawyer before proceeding with any type of claim.

9. If money is received

If you are awarded damages, there may be a significant change in your financial circumstances. Connecting Home recommends that anyone who receives an award of damages sees a financial advisor, as there will be number of financial issues which will need to be considered.

These issues may include:

a) whether you are liable to pay tax on any amount received;

b) whether Medicare will be entitled to claim part of the amount received, to repay amounts spent to care for any illnesses or injuries which you received and which the award of damages is meant to compensate you for; and

c) whether any payments will affect your ongoing access to government benefits (including Centrelink benefits, concession entitlements and public housing).

Depending on the agreement with the lawyer involved, some of the amount received may also need to be used to pay the lawyer's fees.

10. The Emotional Journey

Cases can be very difficult to prove and can take a long time to resolve (for example, Neville Austin's claim was filed in 2008 and was settled in 2011). Cases can be especially hard to prove if the events happened a long time ago.

To prove a claim, you will probably need to present evidence about a number of very personal topics which some people find very difficult to discuss. For example, very detailed evidence is likely to be needed about:

- a)** your life history (through both documents and evidence from witnesses, including the person bringing the claim);
- b)** illness, injuries or other harm suffered (through medical evidence); and
- c)** your family and their Aboriginal culture (which might be given by family members or cultural experts).

If the claim is for injuries or illness, you will need to be examined by medical practitioners who will prepare reports for the Court. Your lawyer will arrange those examinations. You may also be asked to attend examinations by medical practitioners retained by the State or the organisation responsible for your care as a child.

You should also be aware that:

- a)** after investigating your claim, your lawyer may advise you that you are not able to pursue the claim. For example, this may be because the people responsible cannot be identified, or because there is not enough evidence;
- b)** your lawyer may advise you that it is impossible to show that your removal was unlawful, which may be because it is impossible to reconstruct the events that occurred decades ago which led to the removal; and

c) if you were removed from your family as a result of a Court order, it is extremely difficult to prove that these orders were wrongly made.

Many survivors of the Stolen Generations experience severe health difficulties and emotional trauma. Stress and trauma may worsen during legal proceedings, because their lawyers (and, most likely, the defendant's lawyers) will ask to be provided with detailed and sensitive information.

You may be asked what appear to be unreasonable and upsetting questions about very personal matters. You will probably need to tell your story a number of times to different people during the process. If the case relates to abuse or neglect, Connecting Home recommends that you seek counselling and ongoing support to help you through what will be a difficult time.

Glossary

Causes of action: the different types of claims that can be made in legal proceedings

Court order: the official statement by a Court which records the Court's decision

Defendant: a person or company or government agency which is sued by another person

Disbursements: a lawyer's out of pocket costs. Common examples of disbursements are photocopying costs, fees paid to Courts, fees paid to barristers, and travel expenses. Disbursements do not include the lawyer's own fees

Duty of care: a duty of care is owed where a person is able to predict that their conduct could cause another person to suffer loss or damage.

False imprisonment: where a person's movements are restrained and there is no reasonable way to escape or the person did not know the

way to escape

Fiduciary duty: a legal obligation to act in the best interests of another person

Intended: the outcome which a person wanted to happen

Legal proceedings: a case in a Court

Limitation period: the period of time after an event during which legal proceedings may be commenced.

Loss (or Damage): harm which a person suffers. Examples include financial losses, physical injuries, psychological injuries (including depression and other recognised mental illnesses) and non-economic losses.

Misfeasance in public office: a type of legal claim which can be made where a public official:

a) acted unlawfully;

b) knew their action was unlawful; and

c) intended to cause harm, or ignored a risk of harm which was able to be predicted.

Negligence: a type of legal claim which can be made where:

a) a person owed another person a duty to take reasonable care;

b) the person breached that duty by failing to take reasonable care;

c) the other person suffered injury or damage;

d) the breach of the duty of care caused the injury or damage; and

e) the injury or damage was closely connected to the breach of the duty of care.

No-win no-fee: a type of agreement with a lawyer, where the lawyer agrees not to charge fees unless their client is successful. If the client is not successful, they may still be required to pay some or all of the lawyer's disbursements, as well as any legal costs of the

defendant if the claim is unsuccessful

Non-economic loss:

losses which are not money or financial in nature. Examples of non-economic losses include loss of cultural identity and "pain and suffering"

Pro bono: a type of agreement with a lawyer, where the lawyer agrees not to charge fees (or agrees not to charge fees unless another person, such as the defendant, is required to pay the fee). If the client is not successful, they may still be required to pay some or all of the lawyer's disbursements, as well as any legal costs of the defendant if the claim is unsuccessful

Reasonable care: the care which a reasonable person would take in the same circumstances

Significant injury: an injury which results in a person permanently losing:

a) more than 5% of their physical functions as a result of injuries to their body; or

b) more than 10% of their mental functions as a result of psychological injuries.

State ward: a person who was removed from their family's care, if the State took legal responsibility for their care and upbringing

Statutory duty: an obligation to do something (or to not do something) because of a law made by Parliament

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