

Reparations for the Stolen Generations in
New South Wales

*Legal Aid NSW submission to the
Legislative Council General Purpose Standing
Committee No. 3*

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1. Executive Summary

Legal Aid NSW welcomes the opportunity to provide a submission to the General Purpose Standing Committee No. 3 in relation to the Inquiry into reparations for the Stolen Generations in New South Wales.

The submission is drawn from the experiences of Legal Aid NSW practitioners and Aboriginal and Torres Strait Islander clients, although it does not attempt to state the views of Aboriginal communities. Legal Aid NSW has included a number of case studies in support of our recommendations. These personal and powerful accounts have been provided to by our clients directly and disclosed with their permission and support.

Legal Aid NSW supports the case for reparations for the Stolen Generations and their descendants. Broadly, Legal Aid NSW supports the system of reparations tribunal set out in the *Stolen Generations Reparations Tribunal Bill 2010* (Cth) ('the Bill'). The Bill was drafted to reflect the extensive consultations of the Public Interest Advocacy Centre Ltd (PIAC) and PIACs' original draft of a Bill proposing legislation, namely the *Stolen Generations Tribunal Act 2008*. The 2010 Bill envisaged a tribunal equipped to make flexible forms of reparation to individual members of the Stolen Generations, their descendants and wider Aboriginal and Torres Strait Islander communities.

This submission contains a review of historic methods for the seeking of remedies and recompense by the Stolen Generations. Legal Aid NSW identifies the shortcoming of those systems (part 5). The submission also contains a brief assessment of the harm caused to the Stolen Generations (part 6) and recommendations in relation to the forms of reparation that the Reparations Tribunal should consider (part 7). Part 8 of this submission is a discussion of the systemic arrangements for a future reparations tribunal model.

Throughout this submission Legal Aid NSW makes a number of recommendations (summarised in part 2) to assist the Standing Committee in its deliberations and in the preparation of the report. Legal Aid NSW would like to continue to contribute to the process of establishing a system to provide reparations to the Stolen Generations and their descendants and looks forward to providing further information as required.

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2. Recommendations

Legal Aid NSW recommends the following:

1. Evidentiary thresholds for proving removal and individual harm should be made considerably lower than those required by the civil jurisdiction. When reflecting on the strength of evidence, consideration should be given to the historical and moral context for policies of removal, and the traumatic impact of such policies on oral traditions and cultural memory in Aboriginal communities.
2. The space and opportunity must be provided to Aboriginal people to share their version of what they experienced and its impact on them, where individuals wish to tell their story.
3. The duration of the reparations scheme must be long enough to enable Aboriginal people sufficient time to make their claims. The period should be not less than 6 years.
4. A detailed, targeted and culturally appropriate communications strategy must form an integral part of the scheme to ensure that communities are aware and informed of the relevant processes.
5. Adequate social and psychosocial supports, including Counselling, must be provided to achieve full participation and minimise the re-traumatisation of claimants to the greatest extent possible.
6. Funding should be provided for more culturally appropriate mechanisms for disposition of Aboriginal Offenders, including Koori Courts, and funding should be increased for Circle Sentencing, Aboriginal correctional programs, and other diversionary programs including drug and alcohol treatment, behavioural change and anger management programs which have an Aboriginal focus.
7. Reparations should be available to meet both individual and collective needs and sufficiently adaptable to address the specific circumstances of each individual case or application. Community organisations should be given standing to make applications on behalf of groups of individuals where appropriate.
8. Individual claimants must be empowered to seek the reparations most suitable to their circumstances and information must be available to enable this to happen.
9. The reparations scheme should have the capacity to make recommendations as to the need for review of legislation and Government policies where particular cases demonstrate the need for systemic change. In turn, these law reform recommendations should be given upmost priority by the Government.
10. The model proposed by PIAC which formed the basis of the *Commonwealth Stolen Generations Reparation Tribunal Bill* in 2010 is the preferred model.
11. A team of field workers, including Aboriginal Liaison Officers, should be established to ensure community engagement with the process, and adequate, culturally appropriate support.
12. Consideration must be given to funding for legal representation.
13. The threshold requirement for establishing a claim should be based on a rebuttable presumption in favour of the applicant having been removed forcibly, where removal is established.

14. Lump sum compensation in the form of a recognition payment should be available to all those who can establish removal under the *Aborigines Protection Act 1909* (NSW), rather than an 'ex gratia' payment.
15. Applicants who can establish additional and individualised harms under particular heads of damage, as outlined in Recommendation 14 of the *Bringing Them Home* report, should be able to obtain monetary compensation and/or other appropriate forms of reparation to redress that particular harm.
16. Descendant claims for reparations should be treated differently to those under the Aboriginal Trust Fund Repayment Scheme (ATFRS) by acknowledging that the direct harm suffered by some descendants as a result of their parent's removal should give rise to an independent claim.

3. About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance to people, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation through in-house and private legal practitioners. Legal Aid NSW also administers funding for 36 community legal centres, 28 Women's Domestic Violence Court Advocacy Program (WDVCAP) services, three Aboriginal Legal Service (ALS) care and protection solicitors and two ALS field officers.

Legal Aid NSW has a strong commitment to ensuring genuine partnerships with Aboriginal and Torres Strait Islander¹ (TSI) peoples, communities and organisations to improve access to legal services, reduce the overrepresentation of Aboriginal people in the justice system, meet the current and changing criminal, civil and family law needs of Aboriginal people and communities, and ensure our services are culturally sensitive.

The following services and initiatives are at the core of this commitment:

- **Aboriginal Services Unit** – an overarching service that provides a source of knowledge and expertise in developing and delivering criminal, family and civil law services to Aboriginal people.
- **Legal Aid NSW and Aboriginal Legal Service Statement of Commitment** – a joint commitment to providing high quality legal services to Aboriginal people and communities across the state.
- **Civil Law Service for Aboriginal Communities (CLSAC)** – a team specifically dedicated to delivering advice, casework and education services to specific Aboriginal communities across NSW. The service aims to increase advice and casework services to Aboriginal people and to increase the capacity of Aboriginal communities and community workers to deal with civil law problems as they arise.
- **Family Law Early Intervention Unit** – although not exclusively targeted at assisting Aboriginal clients, this unit services a high percentage of Aboriginal clients through tailored programs in an effort to obtain early intervention and resolution of family law disputes and avoid costly and stressful litigation.
- **Legal Aid NSW Reconciliation Action Plan 2013-15** – building on two previous Aboriginal Services, Employment and Partnerships Plans, our Reconciliation Action Plan is evidence of Legal Aid NSW's commitment to ensuring targeted strategies and genuine partnerships. It requires annual reporting to Reconciliation Australia.
- **Partnership with the Aboriginal Legal Service NSW/ACT (ALS)** – by placing additional staff within the ALS we ensure broader and more culturally appropriate access to justice for Aboriginal communities.
- **Judge Bob Bellear Legal Career Pathways program** – provides opportunities for Aboriginal students to explore and pursue legal careers and targeted employment opportunities for Aboriginal people throughout Legal Aid NSW.

¹ Any reference in the submission to Aboriginal people and communities is inclusive of Torres Strait Islander people and communities. For brevity and ease of reading we have shortened this reference.

Consistent with our commitment, in June 2015, 4.6% of Legal Aid NSW staff identified as Aboriginal or TSI and between 2014-2015, 9.37% of our clients identified as Aboriginal or TSI.

Legal Aid NSW recognises the Traditional Owners of the lands where we work and our offices are located. We acknowledge Elders both past and present and recognise the contribution that Aboriginal and Torres Strait Islander people make to our work and workplace.

4. Introduction

This submission is a reflection of Legal Aid NSW's experience in advising, assisting and representing a wide range of clients whose lives have been affected by the issues arising from the Stolen Generations. The views stated are those of Legal Aid NSW and its staff based on that experience.

All case studies are used to reinforce the views of Legal Aid NSW about the fundamental importance of an appropriate system of reparations to address systemic and recurrent disadvantage suffered by Aboriginal communities as a direct and indirect result of the policies that led to the forcible removal of thousands of Aboriginal children.

Our submission does not attempt to state the views of Aboriginal communities themselves. Widespread community consultations have already been undertaken by others² which have, for the purposes of determining the need for reparations, adequately presented the views of the broader Aboriginal community.

Legal Aid NSW emphasises the need for Aboriginal led decision-making when implementing any reparations scheme. As such, we encourage the NSW Government to ensure that any system is established with sufficient community consultation and a mechanism for ongoing input from Aboriginal communities.

We welcome the NSW Parliament's willingness to consider reparations for its role in the wrongs perpetrated. However, we continue to endorse the need for a national response which entitles all Aboriginal persons to reparation for the past policies of Governments throughout Australia. Legal Aid NSW submits that a national response would address the flow on effects of interstate removals and accord with the *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law* (the "Basic Principles").³

² We refer particularly to the consultations that were part of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' *Bringing Them Home* report and the Public Interest Advocacy Centre's national consultation project, *Moving Forward: Achieving Reparations*.

³ GA Res 60/147, 3rd Comm, 60th Sess, 64th Mtg, Agenda Item 71(a), A/RES/60/147, (16 December 2005). On 'Reparation for harm suffered', see article IX(16).

5. The limitations of existing remedies and schemes

Over the years, numerous attempts have been made to achieve some form of compensation for members of the Stolen Generations, whether through litigation in the courts, victims' compensation tribunals, applications for ex gratia payments or schemes for the return of "stolen wages". A review of these avenues reveals not only the failure to provide a consistent remedy both within NSW and interstate, but also the multiple impediments posed by the legal system itself.

Legal Aid NSW is of the view that the reasons underlying these failures underscore the need for an alternative system specifically adapted to the systemic vulnerabilities of Stolen Generation survivors and their descendants. These legal antecedents offer salutary lessons which ought to be addressed in the development of a reparations scheme in NSW.

5.1 Civil litigation

There have been a numerous cases litigated through civil courts seeking to compensate members of the Stolen Generations. These cases have sought to establish a right to compensation and remedy on a wide range of grounds, including gross violation of international human rights law,⁴ unconstitutionality, breaches of fiduciary duty, misfeasance in public office, and breaches of common law duties and principles, including negligence, deprivation of liberty, deprivation of parental rights, abuses of power and breach of guardianship duties.

However, Legal Aid NSW submits that litigation is inadequate as a method to compensate the Stolen Generations for the harm suffered. Legal Aid NSW has advised more than fifty clients about compensation for their experience of forcible removal in the last five years alone, with those numbers increasing steadily in recent years. In every case, we have advised against a realistic possibility of compensation.

At the core of this advice is the stark reality that, with one exception,⁵ every litigated case for compensation for the Stolen Generations has been unsuccessful. As the limitations on litigation for the Stolen Generations have been well traversed elsewhere,⁶ our analysis will be confined to the most salient points.

⁴ For a comprehensive review of the principles relating to reparations under human rights law, see article by Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations', *Australian Indigenous Law Review*, 14(2), 2010.

⁵ *South Australia v Lampard-Trevorrow* [2010] SASC 56, the Full Court of the Supreme Court of South Australia unanimously dismissed an appeal against the decision of Gray J in *Trevorrow v South Australia* [2007] SASC 285 which ordered substantial damages in favour of an Aboriginal man who had been wrongfully and forcefully removed from his family and put into foster care.

⁶ Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004); Chiara Lawry, 'Moving Beyond the Apology: Achieving Full and Effective Reparations for the Stolen Generations' (2010) 14(2) *Australian Indigenous Law Review* 83; Honni van Rijswijk and Thalia Anthony, 'Can the Common Law Adjudicate Historical Suffering?' (2012) 36 *Melbourne University Law Review* 618; Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32 *Melbourne University Law Review* 382.

Legal Aid NSW notes that the Courts themselves have acknowledged the need for a socio-political response rather than a legal solution. O’Loughlin J in *Cubillo* (1999)⁷ stated:

“While the removal and detention of part Aboriginal children has created racial, social and political problems of great complexity, it nevertheless remains the duty of the Court, in the determination of the issues that are presently before the Court, to limit its observations to the legal issues that have been identified during the course of argument... [I]t must be left to the political leaders of the day to determine what, if any, action might be taken to arrive at a social or political solution to these problems. It would not be proper for this Court to go beyond the boundaries of the legal issues that are to be determined.”

The legal hurdles faced by Stolen Generations litigation can be generally summarised into five categories.

5.1.1 Lack of Access to Legal Services

Access to legal services remains an ongoing concern for members of Aboriginal communities. Randall Kune argues that removal of Aboriginal children from their families may have inhibited peoples’ ability or willingness to litigate. This is especially so given Aboriginal people are disadvantaged across all the major social and economic indicators including health, education, housing, criminal justice and employment.⁸ In 2009, the Commonwealth Attorney-General’s *Access to Justice Taskforce* noted:

“Indigenous Australians were the group most likely to take no action in response to legal events, doing so for 50.9 per cent of legal events, compared with 32 per cent for non-Indigenous people.”⁹

There is now considerable evidence of unmet legal need in family and civil law. For example, in a study of civil and family law needs of indigenous people conducted by Cunneen and Schwartz in 2009, it was observed:

“...there were a number of legal areas where there may not have been a high recognised legal need, but where there was yet a substantial unrecognised need. The lack of identification of need spoke more of the absence of community legal education in the area rather than an absence of need. Three legal areas that we have identified as falling into this category are victims’ compensation, stolen wages and wills.”¹⁰

Historically, and for multiple, complex reasons set out by Cunneen and Schwartz, Aboriginal people have not taken action in relation to harm caused by policies of forced removal. Even where clients have approached Legal Aid NSW or other services for initial legal advice, Kune notes “[t]he shame and humiliation victims feel can be a powerful emotional disincentive to litigate”.¹¹

⁷ *Cubillo v Commonwealth of Australia* [1999] FCA 518 at [5].

⁸ Randall Kune, “The Stolen Generations in Court: Explaining the Lack of Widespread Successful Litigation by Members of the Stolen Generations”, *University of Tasmania Law Review*, Vol 30(1), 2011, at 47.

⁹ Access to Justice Taskforce, Attorney-General’s Department (Cth), *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Commonwealth Government, Canberra, September 2009), 20.

¹⁰ Cunneen and Schwartz ‘Civil and Family Law needs of Indigenous People in NSW: The Priority Areas’ 2009.

¹¹ Kune, *op. cit.*, at 48.

While Legal Aid NSW funds a Civil Law Service for Aboriginal Communities, which now operates outreach advice services in regional areas across NSW, the creation of this service has only served to spotlight the intergenerational legacy of the Stolen Generations, and the degree of exclusion faced by Aboriginal people yet to tell their stories.

5.1.2 “Standards of the Time”

The Courts have shown clear deference to the “standards of the time”, resulting in a consistent position which recognises the various legislative frameworks as having generally served a welfare and protective purpose. As such, the laws in and of themselves have not been found to constitute a violation of constitutional rights, but rather as a policy decision of Parliament. Nor has any action taken in compliance with the framework been found to rise to a breach of duty. In this respect, the High Court in *Kruger* (1997)¹² set an early precedent that severely limited the scope of litigation, with Dawson J noting:

*“The measures contemplated by the legislation of which the plaintiffs complain would appear to have been ill-advised or mistaken, particularly by contemporary standards. However, a shift in view upon the justice or morality of those measures taken under an Ordinance which was repealed over 40 years ago does not itself point to the constitutional invalidity of that legislation.”*¹³

With its categorical dismissal of the constitutional arguments on all grounds, the Court held, *inter alia*, that the power conferred to remove and detain Aboriginal children was not an exclusive exercise of judicial power, given the welfare objectives as defined by the standards of that time which purported to underpin the Northern Territory *Aboriginal Ordinance*.

Since then *Cubillo* (2000)¹⁴, *Williams* (1999)¹⁵ and *Trevorrow* (2007)¹⁶ have consistently applied the standards of the day argument, which has largely limited the degree to which the Commonwealth or Government agency can be held to account. Where a removal was plainly made within the scope of the discretion conferred by the legislation, it has been held to be unimpeachable by the Courts. With respect to the treatment once in care, although a duty of care has been found to exist, the Courts have held it must be assessed with respect to the standards of the time and what might have been reasonably foreseeable harm in those days.¹⁷

In *Cubillo* it was ultimately found that it was the acts of removal and detention themselves that caused the harm to the plaintiffs and those acts occurred as a result of a policy decision of Parliament; it was not the manner of removal and manner of detention, actions which could be reviewed by the Court.¹⁸

¹² *Kruger v Commonwealth of Australia* (1997) 190 CLR 1.

¹³ *Kruger v Commonwealth of Australia* (1997) 190 CLR 1, 52-53.

¹⁴ *Cubillo v Commonwealth of Australia* (2000) 103 FCR 1. The Full Federal Court rejected the appeal and special leave to appeal to the High Court was denied.

¹⁵ *Williams v Minister, Aboriginal Land Rights Act 1983 (No 2)* (1999) 25 Fam LR 86.

¹⁶ *Trevorrow v South Australia* [2007] SASC 285.

¹⁷ *Cubillo v Commonwealth of Australia* (2000) 103 FCR 1.

¹⁸ *Cubillo v Commonwealth of Australia* (2000) 103 FCR 1, 483.

Even *Trevorrow* (2007), in which the plaintiff was awarded \$525,000 in damages plus interest for his unlawful removal and detention, and for misfeasance in public office, applied the standards of the day test. However, in that case extensive medical, psychiatric and documentary evidence was led by the plaintiff to prove an ongoing breach of duty while in care on the basis of medical knowledge at that time, and the removal itself was shown to be unlawful and outside the scope of what the legislation had permitted.

With the Courts unable and unwilling to go behind the policies of the day, litigation is rarely going to be successful for the broad category of persons who have suffered as a result of the Stolen Generations and who are unable to show exceptional wrongdoing in their case.

5.1.3 Evidential Hurdles

The evidential hurdles faced by litigants from the Stolen Generations are difficult to overstate. With the overall legislative framework found not to be unconstitutional, the evidential onus falls to the plaintiffs to establish that their removal or detention, or other statutory power exercised against them amounted to a misuse of power. The cases litigated to date have generally failed to attain the requisite level of proof on three broad grounds.

First, Courts have found there has been a lack of adequate documentary evidence to establish a claim.¹⁹ The reasons for this may be numerous – these events occurred a long time ago and documents have often been lost or destroyed as was the case in *Cubillo* (2000) and *Williams* (1999). In many cases the documentary evidence never existed in the first place because Government departments kept inadequate records about Aboriginal children in their care.

Where abuse took place, it was highly unlikely children would report that abuse because they were institutionalised, isolated or deeply ashamed. Therefore, no records exist to substantiate their story. In the case of *Williams* (1999), the plaintiff was forced to withdraw her allegations of sexual abuse because the Court did not find her a credible witness due to apparent inconsistencies in her testimony.

Critically, Aboriginal culture relies on a rich tradition of oral communication, not on writing and record keeping as a means of communication or chronicling events. As a result, Aboriginal claimants rarely have independent documentary evidence recognised by courts of law. The formal justice system places great weight on written evidence, without which members of the Stolen Generations cannot meet the evidentiary threshold required to establish their case.

Second, this dearth of documentary evidence is compounded by the fact that where documents do exist, the Courts have tended to take those documents at face value, whether or not witnesses are available to give evidence on the integrity of the documentation. For example, in *Cubillo* (2000)²⁰, the Federal Court found that a thumbprint of the second plaintiff's mother signified, on the balance of probabilities, her express and informed consent to her son's removal. The Court was not willing to challenge the apparent consent without other countervailing evidence. His mother had passed away and there was no way of identifying the specific officer of the Native Affairs Branch.

¹⁹ *Cubillo v Commonwealth of Australia* [1999] FCA 518 and *Williams* (1999).

²⁰ *Cubillo v Commonwealth of Australia* (2000) 103 FCR 1, 245.

Accordingly, in *Cubillo* (2000), O'Loughlin J gave the benefit of the doubt to the government officers, with the documentary evidence prevailing over the context in which Aboriginal parents were made to give their consent:

*But it is not beyond the realms of imagination to find that it was possible for a dedicated, well-meaning patrol officer to explain to a tribal Aboriginal such as [Mr Gunner's mother] the meaning and effect of the document. I have no mandate to assume that [Mr Gunner's mother] did not apply her thumb or that she, having applied her thumb, did not understand the meaning and effect of the document.*²¹

In *Williams* (1999)²², in commenting on a notation indicating that the plaintiff's mother had sought permission to visit her daughter, the Court questioned whether she had forgotten that she had consented to her child being removed or whether she believed any visit must be sanctioned.

Legal Aid NSW submits that the reparations tribunal model should include a rebuttable presumption in favour of an applicant that removal as a child is presumed to be forced, as an evidential threshold.²³ A robust test should be applied in assessing evidence of rebuttal, including evidence of context over and above mere circumstances, such as whether the parents were asserted to have been alcoholics and unable to care for the child.

Third, in the absence of written evidence, Aboriginal clients rely on their oral testimony to establish their case. However, in these matters, Courts have regularly given less weight to the oral evidence of witnesses, usually on the basis that with the long passage of time, memories are unreliable and inaccurate.²⁴ In some cases, applicants have been unable to rely on oral evidence at all because witnesses are no longer alive.

Legal Aid NSW has concerns with the current approach to oral evidence for two reasons.

Firstly, it is unrealistic for witnesses to meet the detailed evidentiary burdens of the formal justice system in terms of reliability and availability of evidence. Details of possible oral testimony of children removed from their families can be lost as a by-product of the trauma caused by their removal, which can result in a loss of clarity about critical events of childhood. More generally, children rely on trusted adults to narrate their upbringing, and where these relationships have been broken as a result of Government policies, both child and adult witnesses cannot provide extensive and accurate detail. These factors, coupled with the long passage of time, has meant that in some cases witness evidence is unreliable or not available.

Secondly, such an approach fails to recognise the cultural differences arising from the rich oral traditions of Aboriginal communities and in memory recall. Familial and kinship bonds are of fundamental importance in Aboriginal culture and play a significant role in the retelling of experiences and the recall of particular memories, often at odds with more western parameters of recall which are guided by reference to chronology and time. As such, in many cases, the memory of an Aboriginal witness may not be unreliable but merely different.

Significantly, the success in *Trevorrow* (2007)²⁵ has been attributed in large part to the volume of evidence the plaintiff was able to present to substantiate his case, and was considered rather exceptional for Stolen Generations litigants.

²¹ *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97, 344

²² *Williams v Minister, Aboriginal Land Rights Act 1983 (No 2)* (1999) 25 Fam LR 86

²³ See Recommendation 13

²⁴ *Williams v Minister, Aboriginal Land Rights Act 1983 (No 2)* (1999) 25 Fam LR 86

²⁵ *Trevorrow v South Australia* [2007] SASC 285.

5.1.4 Statutory Limitation Periods

The fourth significant legal hurdle faced by litigants are the statutory limitation periods. While Courts have varied in their decisions, the willingness to extend limitation periods has largely been dependent on the availability of witnesses and documentary evidence militating against prejudice to the State as defendant. In the cases of *Cubillo* (2000) and *Williams* (1999) the Court deferred making a final decision on the question of limitations until after consideration of the substantive issues but in both cases, the Court found there would be 'overwhelming prejudice' to the Government if time limits were extended.

5.1.5 Socio-cultural limitations of litigation

In addition to the legal hurdles, there are the socio-cultural limitations of litigation which hinder claimants and diminish the utility of court proceedings, further substantiating the need for an alternate form of reparations scheme. These include:

- the adversarial nature of court proceedings, particularly the pressure of cross-examination, could be harmful to persons already traumatised by their experiences of removal, and
- failure address the underlying issues of most significance to the complainant, and the broader Aboriginal community, namely, that the widespread removal of Aboriginal children was underpinned by a prejudiced 'worldview' which had devastating effects of those removals on Aboriginal communities and individuals.²⁶ Instead, legal claims focus on narrow issues in dispute, such as the technicality of consent to the removal.

Recommendations

Legal Aid NSW recommends:

- 1. Evidentiary thresholds for proving removal and individual harm should be made considerably lower than those required by the civil jurisdiction. When reflecting on the strength of evidence, consideration should be given to the historical and moral context for policies of removal, and the traumatic impact of such policies on oral traditions and cultural memory in Aboriginal communities.**
- 2. The space and opportunity must be provided to Aboriginal people to share their version of what they experienced and its impact on them, where individuals wish to tell their story.**

5.2 Victims' Compensation

Statutory victims' compensation schemes have proven more successful than litigation because of their lower evidentiary burden and the strict liability imposed for sexual assault matters. However, the statutory scheme has excluded many members of the Stolen Generations from making claims because of the general requirement to show a causal link between the act of violence and the injury suffered.

Additionally, recent legislative changes to the scheme in NSW have severely curbed the amount of compensation available such that it would prove inadequate in most cases.

²⁶ Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004).

5.3 Stolen Wages – the Aboriginal Trust Fund Repayment Scheme

The Aboriginal Trust Fund Repayment Scheme (ATFRS) was a NSW Government initiative, established in 2004, to repay money to Aboriginal people and their descendants, which had been paid into Trust Funds by the Aborigines Protection Board and later the Aborigines Welfare Board. It was not a compensation scheme.

Legal Aid NSW assisted over 1100 people to register claims with the ATFRS. While ultimately a relatively successful scheme, our experience exposed a number of concerns that should be considered in the establishment of a statutory reparations scheme.

- There needs to be a targeted communication strategy so that the community knows about the scheme. The ATFRS scheme was poorly publicised. As a result, the deadline for lodging claims was deferred to allow more claimants to lodge claims.
- Careful consideration should be given to the name of a reparations scheme. The “Aboriginal Trust Fund Repayment Scheme (“ATFRS”)” did not resonate with Aboriginal people. The Waitangi Tribunal in New Zealand is a good example of appropriate branding, although we recognise that the diversity of Aboriginal nations and languages presents an added challenge.
- The system was evidence based and required proof that money was paid into a “Trust Account” on behalf of a person which has never been repaid. This was problematic because in many cases proper records were not kept or had been lost or destroyed over time. On the face of the documents, it was also difficult to prove that monies had not been repaid.
- The scheme itself was responsible for finding records on behalf of claimants. While this lessened the evidential burden on claimants, two factors should be considered in any future system.
 - The uncontrolled release of documents often caused unnecessary hurt and re-traumatisation for claimants, especially those from the Stolen Generations, as they frequently contained insensitive information and comments about claimants and their relatives. Any future system ought to consider the sensitivity of information in documents and provide culturally appropriate counselling and support for those who will be exposed to their content if they are released.
 - Some claimants were initially unsuccessful because their records could not be found. Legal Aid NSW assisted some of these claimants to apply for their records through NSW Aboriginal Affairs but often they were received after the ATFRS claim was finalised.
- Any scheme must be culturally accessible and respectful. The mistrust of Government departments by Aboriginal communities should not be underestimated. The ATFRS office was near the Redfern Police station. The fact that claimants had to walk past the police station to make a claim deterred many people who were entitled to make a claim from doing so.

- Many claimants that had money paid into trust accounts had passed away by the time the scheme was established. While descendant claims were available under the scheme, there were numerous problems with them.
 - Some had difficulty proving the descendants claim because of lack of identification documentation of their forebear - no birth certificate or births were not properly recorded in the first place – and because of a lack of documentation of their relationship with the person. In order to recognise descendant claims, the term ‘descendants’ should be interpreted flexibly to account for the complexity and cultural specificity of familial and kinship relations which may include close personal relationships that do not conform to Western notions of biological family.²⁷
 - A secondary issue was how the money was to be divided up between descendant claimants.
- Generally claimants who were legally represented had better outcomes than unrepresented claimants, despite the fact that the system was designed to not require the involvement of lawyers.

Legal Aid NSW submits that a reparations scheme should provide funding to ensure parties have access to legal representation to allow the highest possibility of a successful claim.

Recommendations

Legal Aid NSW recommends that:

3. **The duration of the reparations scheme must be long enough to enable Aboriginal people sufficient time to make their claims. The period should be not less than 6 years.**
4. **A detailed, targeted and culturally appropriate communications strategy must form an integral part of the scheme to ensure that communities are aware and informed of the relevant processes.**
5. **Adequate social and psychosocial supports, including counselling, must be provided to achieve full participation and minimise the re-traumatisation of claimants to the greatest extent possible.**

²⁷ Legal Aid NSW notes that existing laws in NSW already permit flexible consideration of indigenous traditions, customs and practices upon death; see for example, section 133 of the *Succession Act 2006* (NSW).

6. Addressing the lasting impacts of the harm

The harm and lasting intergenerational impact of the Stolen Generations is now beyond dispute. This part of the submission sets out how that harm brings many members of the Stolen Generations and their descendants into conflict with the legal system, and therefore in need of our services.

6.1 Systemic disadvantage

Legal Aid NSW lawyers observe that the levels of disadvantage faced by Aboriginal people in NSW are high, multifaceted and complex. Key indicators of disadvantage include lack of literacy and numeracy skills, insufficient levels of income to support household needs, high levels of unemployment, homelessness or lack of suitable and stable housing, overcrowded households, significant levels of family breakdown, inadequate access to essential services including healthcare, criminal victimisation and high incarceration rates.

It is not appropriate or accurate for these factors to be directly attributed to family separations and the removal of children. However, as noted by the *Bringing Them Home Report*, “childhood removal is a very significant cause [of mental health issues] both in its distinctive horror and in its capacity to break down resilience and render its victims perpetually vulnerable.”²⁸.

Aboriginal people have sought advice and assistance from Legal Aid NSW in relation to the trauma associated with being removed from their families and institutionalised or adopted. People from the Stolen Generations seeking assistance are experiencing extreme anger, grief and loss at the denial of their Aboriginal heritage, deep distrust of governments and government departments, and trauma as a result of abuse within institutions and adoptive families.

6.2 Loss of identity

Over the years, numerous clients have come to Legal Aid NSW for advice or representation for issues arising directly or indirectly from their struggles with identity. Some clients merely seek to be linked in with their family from whom they have been disconnected for decades. Others have sought advice on the recognition of their status and rights within their adoptive ‘white’ families, often upon the death of an adoptive parent which gives rise to disputes over the estate.

One client faced difficulties obtaining employment after he lawfully changed his name from his ‘stolen’ name to his original name. Where job applications required details of other names by which he had been known, he refused to provide his ‘stolen’ name, although he could provide evidence of it because he did not wish to validate his past life as a member of the Stolen Generations.

Others, like Kathy whose case study is set out below, have struggled to prove their Aboriginality to enable them access to Aboriginal specific supports and programs, which are often crucial to validating their sense of belonging.

²⁸ <https://www.humanrights.gov.au/publications/bringing-them-home-chapter-11>

Case Study: Kathy, aged 65

Kathy identifies as a member of the Stolen Generations because her grandmother and siblings were stolen. Her grandmother would not speak about being Aboriginal because she feared her children and grandchildren being removed. Kathy searched the Aboriginal national archives in Canberra and found that her grandmother had been stolen and put into service which is why she would not speak of her identity.

Legal Aid NSW assisted Kathy with Housing NSW as they had failed to activate her on Aboriginal Housing lists. Kathy provided medical reports of her medical conditions including endometrial cancer, kidney disease, chronic fatigue, anxiety and depression. Kathy is also a carer for her husband who is visually impaired and confined to a wheelchair. Kathy and her husband were both employed until they encountered ill health.

Kathy says that although she has always known she is Aboriginal and she has always been “treated as an Aboriginal”, it was only for the last 25 years that she has known details about her grandmother’s life and the records linking them to their traditional Country. Since that time, Kathy has involved herself in the Aboriginal communities she has lived in and engaged in paid employment within the community. While Kathy has been on the journey of learning more about her culture and ancestry she has faced conflict from Aboriginal communities about why she didn’t “identify” earlier in life.

Kathy’s medical reports acknowledge her identification with the Stolen Generations and Kathy attributes her physical diseases as symptoms of the grief and stress associated with her disconnection to family and Country. Kathy has described being affected by the Stolen Generations as follows:

“Growing up we lived with a fear and we didn’t know why. I always knew there was something being hidden but I didn’t know what or why.”

“When I went to school I got called an Abo and I was angry and confused because I didn’t know what my identity was as an Aboriginal person at that stage.”

“I was always treated differently at school. I had a teacher who would never let me go to the toilet when I put my hand up.”

“Within my family I would ask why I looked differently... I was always just told to say that I am anything else except Aboriginal.”

“It feels like I have a hole inside me that keeps me searching.”

“Sometimes I just feel so overwhelmed with grief I just sit down by myself and cry. The grief is the hardest thing to deal with.”

“I look Aboriginal, but for me it is a spiritual and cultural thing, once you accept this yourself others come to accept you as you see yourself, and after that you can start to feel some healing.”

“It is too expensive to pay for ongoing psychologists and my counsellor with AMS may not be able to keep her job because of the possible AMS closure. I don’t know who I will have to talk to then. If I was near family at least we could support each other.”

Kathy’s treating physicians support the need for her to be close to family to assist her healing. She sought Legal Aid NSW’s assistance to confirm her priority transfer to an AHO property close to her family. Kathy has been waiting for a transfer for 9 months. It took 2 months with legal assistance to list Kathy on AHO property lists, despite her already having provided Aboriginality identification material. Such bureaucratic processes are impossible to navigate when dealing with the myriad of other issues that Aboriginal Australians regularly face. AHO providers have given varied responses about estimated priority transfer times, with 2 to 5 years at most.

Other clients have found themselves in severe financial hardship for a multitude of reasons stemming in large part from their experience as a member of the Stolen Generation. One client found herself in acute financial trouble as a result of having signed a number of mortgages at the request of her husband. This client instructed Legal Aid NSW that she had been institutionalised as a child, sexually abused in foster care and denied a proper education. Her husband was the first loving relationship she had experienced and as a result she trusted him to an extent defies reason but is directly related to her experience as a member of the Stolen Generation.

Case study: Grace, aged 54

Grace was born in a regional hospital on in 1961. She thinks that after she was born she was sent away initially to a children's home or orphanage in Southern NSW and then to a similar institution in Queensland. She doesn't know exactly happened at this time. Grace can only remember her childhood from when she was about 4. She thinks at about that time she was taken in by her mother's sister and her husband who lived in a remote NSW town. Grace said that her aunt wasn't so keen to have her but her uncle had the "final word." They had 2 other children who were older than Grace. Grace said that her uncle was kinder to her than her aunt.

Contact with birth parents

When Grace was 14, she found out who her real parents were as they came to see her. Grace then found out that she was taken at birth because her birth mother was a single Aboriginal woman. She worked as a nurse at the hospital. Grace's father wasn't Aboriginal. Sometime after Grace's birth her birth parents wanted to get married, but her father's family "kicked up a fuss" as Grace's mother was Aboriginal and he returned to his family.

Grace's uncle died when she was 15. After that, her relationship with her aunt deteriorated and Grace left when she was 16 to live in Sydney with her birth mother. When she was 17, Grace was raped while living in Sydney. She became pregnant and had an abortion. Grace then moved back to her place of birth when she was 18.

When Grace was 40 she was contacted by her brother and sister who she had not known about. They are younger than Grace and were also taken away after their birth. Grace's sister was taken to a Salvation Army home and her brother was given to a gypsy family. Grace also discovered that her mother had a relationship with a man after she was with her birth father. They had 2 children. One of these children died at the age of 8 when Grace was 12. Grace said that her birth mother "never got over that."

Grace later found out that there are 2 different dates of birth listed for her and a different surname. Grace feels certain that she was born in 1961 but the record says 1962 with the surname of her birth mother's partner.

Effect of separation

Grace felt robbed of her childhood. She lost any orientation with family. She was shocked when at the age of 40 she discovered that she had a lost brother and sister. It took her almost 30 years to build a relationship with her birth parents. In 1995, Grace was diagnosed with cancer and had a major operation. At this time her birth parents supported her. Grace said that during this time she forgave them for what happened to her. Grace's mother won't speak about what happened.

Grace went on to get married and has 3 adult children – 2 boys and a girl. Her husband died a few years ago. She now has a good relationship with her birth mother who is in aged care and she is the carer for her mother and a friend. Grace works full-time in a local Aboriginal Service and assists Aboriginal people.

6.3 Overrepresentation in the criminal justice system

Legal Aid NSW is highly concerned about the over-representation of Aboriginal people in the criminal justice system. In NSW, in 2013-14, Aboriginal people were incarcerated at a rate of 1699.7 prisoners per 100,000 in the adult Aboriginal population compared to the considerably lower rate of 150.7 prisoners per 100,000 non-Aboriginal persons.²⁹

Numerous studies including the *Royal Commission into Aboriginal Deaths In Custody* and the *Bringing Them Home* report have attributed this in large part to issues of dispossession, state violence and the effects of the Stolen Generations. Academic studies have shown that the loss of identity by members of the Stolen Generations, which often manifests in feelings of alienation with 'white' culture and the lack of identity with Aboriginal culture, underlies the high incidence of criminal offending among members of the Stolen Generations.

While because of their age many persons directly removed by Government policies are no longer personally interacting the justice system, the intergenerational effects of that loss of identity, dispossession and kinship continue to impact the children and grandchildren of the Stolen Generations.

Legal Aid NSW acknowledges that the criminal justice system has instituted a number of mechanisms by which it endeavours to address the above phenomenon.

On sentencing, the social disadvantage caused by a person's experience of the Stolen Generations can and should be weighed as a mitigating factor.³⁰ The full implications of the decision in *Fernando* have since been settled and arguably narrowed by the High Court in the recent decision of *Bugmy v The Queen*,³¹ where the Court rejected the argument that Aboriginality in and of itself could be a mitigating factor. The High Court ruled that the Court could not take judicial notice of the systemic background of deprivation of Aboriginal offenders as a factor in sentencing because that would be antithetical to our system of individualised justice. However *Bugmy* did hold that the relevance of social deprivation to mitigation is not diminished with time or a lengthy criminal record.

In 2002, NSW introduced Circle Sentencing for adult Aboriginal offenders who had committed a summary offence or an indictable offence dealt with summarily, with a few exceptions for particular offences.³² The objective of the system is to better engage Aboriginal communities in the sentencing process with a view to reducing the barriers that currently exist between the Courts and Aboriginal people, providing more meaningful sentencing options, and promoting healing, reconciliation and a reduction in recidivism.³³ However, Circle Sentencing is only available in particular courts, and its success has proven to be dependent on the strength of the Aboriginal community participating in the process.

²⁹ Australian Bureau of Statistics.

³⁰ The Supreme Court in *R v Fernando*³⁰ held that while the same sentencing principles should be applied irrespective of the identify of a particular offender or his membership of a particular ethnic group, it does not mean that the sentencing court should ignore those facts which exist only by reason of the offender's membership of such a group.

³¹ (2013) 249 CLR 571

³² *Criminal Procedure Act 1986* (NSW), Part 4.

³³ Judicial Commission of NSW and NSW Aboriginal Justice Advisory Council, *Circle Sentencing in New South Wales: A Review and Evaluation* (2003).

In 2000, the NSW Government opened the first Aboriginal specific correctional centre, Yetta Dhinnakkal. It is a minimum security prison located south of Brewarrina which is designed to provide culturally appropriate and targeted interventions for Aboriginal male offenders. This was followed in 2008, by the establishment of Balund-a, (Tabulam), an innovative residential diversionary program for male and female, predominately Aboriginal offenders on the North Coast. Both were established in response to the recommendations by the Royal Commission into Aboriginal Deaths in Custody and studies have shown that recidivism rates for those incarcerated at Yetta Dhinnakkal Centre have dropped significantly below the state average.

However, Legal Aid NSW submits that overall the NSW criminal justice system is poorly placed to adequately and efficiently address the impact of the Stolen Generations on Aboriginal communities. There is a need for more culturally appropriate mechanisms for disposition of Aboriginal Offenders, including Koori Courts, and for greater funding for drug and alcohol rehabilitation, anger management and behaviour change programs.

Recommendation:

- 6. Funding should be provided for more culturally appropriate mechanisms for disposition of Aboriginal Offenders, including Koori Courts, and funding should be increased for Circle Sentencing, Aboriginal correctional programs, and other diversionary programs including drug and alcohol treatment, behavioural change and anger management programs which have an Aboriginal focus.**

6.4 Care and Protection – ongoing removals of Aboriginal and Torres Strait Islander children

The Aboriginal and Torres Strait Islander Placement Principle is the preferred order of placement for an Aboriginal child who has been removed from their birth family. The preferred order is for the child to be placed with:

1. The child's extended family (kin)
2. The child's Indigenous community (kith)
3. Other Indigenous people.

States and territories may be unable to place children in accordance with the preferred placement types because of a shortage of Indigenous carers.³⁴

Two of the main factors are:

- trauma and disadvantage associated with the Stolen Generations that affects many Aboriginal and Torres Strait Islander adults today, to the extent that they are not able to care for children, and
- some Aboriginal people do not want to be associated with the "welfare" system because of past government practices, including forced removal.

Even when children are placed in accordance to the principle they may become disconnected from their culture. This may occur when children are placed with the "white" side of the family, an Aboriginal carer who is not from the child's own cultural group or kin who may have been disconnected from their traditional culture.³⁵

³⁴ *Foster Families* by Osborn, Panozzo, Richardson & Bromfield, 2007.

³⁵ Child Family Community Australia – Resource Sheet September 2015

The Human Rights and Equal Opportunities Commission (1997) report, *Bringing Them Home*, concluded that some of the underlying causes for the poor outcomes experienced by Aboriginal peoples and for the over-representation of Aboriginal children in child protection and out-of-home care were:

- the legacy of past policies of forced removal and cultural assimilation
- intergenerational effects of forced removals, and
- cultural differences in child rearing practices.

Historical and ongoing dispossession, marginalisation and racism experienced by Aboriginal people have led to high levels of unresolved trauma and grief.³⁶ Internalised trauma may be expressed by individuals in various ways including psychological distress and destructive behaviours.³⁷ Concerns have been voiced that some Indigenous communities are experiencing intergenerational cycles of adversity and trauma, leading to entrenched social problems including poverty, high levels of violence, child abuse and neglect, and individual, family and community dysfunction.³⁸

The following are two case studies which illustrate these broad areas of concern:

Case Study: Wanda, aged 54

My name is Wanda and I was born in 1960. When I was 6 years old I was committed to the care of the Aboriginal Welfare Board as a neglected child. I was then admitted to state control when I was 9 under the Aborigines Act.

I was adopted out to a foster family and went to a boarding school during my primary school years. During primary school I found out that I was actually a year older than I thought I was. I had previously thought I was born in 1961. This meant I had to go straight from 5th to 7th grade. This had really negative effects on my schooling and my ability to make friends.

I was fond of my foster parents but did not get to create a strong bond with them as most of my time was spent at boarding school. I also never got to develop a strong bond with my biological parents. They were practically strangers to me. It was hard to organise visits or contact with them.

My mother made constant attempts to have me restored to her care after she and my father separated. However, despite the fact that she was in a stable relationship and seemed capable of supporting me it was decided that returning me to my mother would not be in my best interests. I remember requesting a visit with her over the school holidays, and even that was refused.

When I was 16 I left my foster home and moved in with my biological mother. After I had done this the State finally decided I could be restored to the care of my mother, although still under supervision.

As a teenager I had problems at school and ended up leaving and being expelled and sent to a convent by the state to learn how to be an office assistant. During this time I was not able to frequently visit my home or family.

³⁶ HREOC, 1997.

³⁷ Atkinson, 2002.

³⁸ Atkinson, 2002; Robertson, 2000; Silburn et al., 2006; Stanley et al., 2003.

Removal of my own children

I had my first child when I was 23. I have 11 children. I have had to deal with each of them being taken away from me. This brings up memories of my own separation from my family as a child and has left me unable to form strong family bonds with my own children. All of my children are adults now - my oldest is 32 and my youngest is 18. I want to repair my relationships with each of my children. I want to try to get them the help they need. None of my children have been able to receive a proper education, most of them have drug and alcohol abuse problems, some are in jail and some have severe mental health issues.

The removal of children has been such a big part of my history. I was removed as a child and was never able to form a proper bond with my mother. Now the same thing is happening with my kids. A section of my life has been ruined and now theirs. I don't want this passed on down to my grandchildren. My family needs to heal. I want to gain compensation so I can stop the cycle of removal within my family.

Loss of cultural connection and identity

Being removed from my family, and having my children removed from me has meant that we all have weaker connections with our culture and identity as Aboriginal people. We have also not been able to bond in traditional indigenous ways. There are a lot of cultural experiences that we have lost out on. I would really like to be able to teach my kids what I do know of indigenous ways.

I was always an outcast and have never really been able to fit in in either culture. I just want to be able to have something that is mine and to have a connection to a culture that it mine.

Compensation would allow me to bring my family back together. My son, daughter and grandchildren live in Queensland and I want to move back to them.

Case Study: Elizabeth, 57

I had five siblings, but three brothers passed away. I have vivid memories of my early childhood, living with my parents, walking for miles, hunting for food and sleeping under the stars in country.

I can remember when I was about seven being at a mission in South Australia. It was started by a couple from the Church for black fellas. I thought it was alright because the mission was actually on the reserve. It was easy for us kids to walk home to the community. I trusted that Christian family. But then Welfare started to take kids away from the mission.

I remember being on a train with mum and dad. I can picture a tin of apricots. We went to this courtroom: I was looking at mum and she was crying, and I seen dad crying too. I remember thinking "What's going on?" That was the last time I seen dad.

I ended up in a Children's Home in North Adelaide. I think there were 5 or 6 kids there. I tried to run away a couple of times – I even jumped out the window on the first level while everyone was sleeping. We all went to school. Every morning, we had to walk to school on our own which took about 15 to 20 minutes. I remember we used to go together because we'd always have a race to the traffic light to press the button. I'd see a happy family, and I'd think "That's lovely".

One day I was walking to school with another little girl. As we rounded the corner, this bloke came along, and he had this hat on, and asked us where the zoo was. I knew, so I told him where to go. He asked, "Can you take me there?", so we took him. Eventually, we went past the zoo... We came to a ledge and you could see the caravan park up top. Somehow, he took the little girl behind the bush. When he came out, she was crying and her face was red, and after that, I can't remember nothing. I can't remember how I got back to the children's home. My mind had a block after I saw the little girl screaming. And yet I remember every other detail of that day right down to how the light played on the leaves in the trees. I believe I was sexually assaulted and blocked out the memory of exactly what happened as a way of coping with that trauma.

Ever since then, I've had feelings of paranoia, anxiety and claustrophobia. I think that's how I got my stutter. I've been thinking maybe there was no other girl...it might have been me. But I'm only trying to work things out. I think it all boils down to that day. How did I come to be there? Because I was taken away from my biological parents.

I was at the Children's Home for a couple of years before I was moved to other foster homes. At one point, my brother and I were moved to the same foster home. It was one of those places with bad memories. The woman was always shouting at the man. I remember her trying to smash the front window of his truck. Then one time in the kitchen I remember she picked up a knife during an argument and chucked it at her daughter. The man also used to hit my brother with his belt buckle.

Later I moved to a foster home where things were better. That was the only house with security and love. My foster parents became mum and dad to me. They put me through ballet. I was stuttering a lot at that time, so I didn't say much but I let my body do the talking. I stayed with them until 1975, when at 17 I moved to NSW. I got pregnant and so I took my daughter home to mum and dad's because I couldn't mentally look after her. I didn't realise why until now, but everything from that time in Adelaide - that fucked it up for me with my daughter.

All I know is that when I was with my biological mum and dad, I felt safe, happy, secure. There was love there, and there was connection to the country and to the culture because I could speak the language then. At the time I didn't know what was going on but as I've got older, I'm thinking 'What happened?' I want someone to tell me: *Why were we taken away? What happened in the courts? Why was my father crying?* I just want to know so I can pass it down to my family. I just want answers. That would make me happy.

7. Types of reparation

The right to remedy and reparation is firmly grounded in international law, and forms an essential part of the international human rights framework of treaties which Australia has ratified.³⁹

The *Bringing Them Home* report concluded that the policies of the Stolen Generations were contrary to prohibitions on racial discrimination and genocide. The impacts of the policies of the Stolen Generations have been as varied as they are widespread and systemic.

Legal Aid NSW submits that the often individualised nature of the impacts of the policies of the Stolen Generations must be taken into account in any approach that is adopted for a reparations scheme.

It is equally important that any reparations scheme is able to recognise that 'harm' may take forms which are not ordinarily recognised by western conceptions of 'harm'. While many people have provable forms of trauma, conditions and illness, many more are struggling with the cultural and spiritual effects of the policies of the Stolen Generations and the collective harm that comes from broken kinship relations, disconnection to country, removal from sacred sites and systemic and structural inequalities in health and education.

³⁹ Art 8 of the *Universal Declaration of Human Rights*, Art 2 of the *International Covenant on Civil and Political Rights*, Art 6 of the *International Covenant on the Elimination of All Forms of Discrimination* and Art 39 of the *Convention on the Rights of the Child*.

Therefore, Legal Aid NSW submits that, consistent with principle of redress for the harm caused by the wrongdoing,⁴⁰ the scope of reparations must be sufficiently adaptable to meet the needs of individual harm. To that end, we endorse the scope of powers to award reparations as outlined in section 28(1) of the *Stolen Generations Reparations Tribunal Bill 2010* (Cth).

7.1 Monetary Compensation

Legal Aid NSW strongly supports for the need for monetary compensation for members of the Stolen Generations and their descendants. Numerous Aboriginal clients have approached us seeking advice about obtaining compensation in recognition of the wrongs done to them.

Some clients are able to point to the specific trauma they have suffered but many others simply want and need compensation for the wrongdoing itself. Luke's case study below is a poignant example of the desire for compensation as a form of respect and recognition that he was wronged by the Government in being removing him from his family,

Luke aged 67

My name is Luke. I was born in Lismore. I lived with Mum, Dad, brothers and sisters.

When my Dad died, I went with my Mum and my brothers and sisters to live with our cousin. Soon after, when I was about 9, the welfare came and took me and my brothers and sisters away. My brother Tim was about 8. He and I were separated from the other kids. We were put on a train and taken to a home on the central coast. I didn't know what happened to our sisters (aged between about 15 and 5 years) and my other brother (aged 6 years) until much later, when I found out they had been placed with foster families.

At the home Tim and I slept with other boys in a big room with beds in rows. We had to do what we were told. We had to get up at 6 o'clock to peel potatoes. We were dressed in blue shirts and grey shorts, socks and shoes. We went to the classroom every day and the teacher wrote on the board. We used to copy what the teacher was writing into our books. I don't remember what they taught us at school but I know we had to do maths and English. I remember when we got in trouble we would have to stand in a row and a big guy would hit us on the palm of our hands with a cane.

Some of our family came to visit Tim and me once. I remember crying then.

When I was at school, I think by then high school, I ran away from school with 3 other boys. I ran away 'cause I couldn't deal with being in the home. We ran to the riverbank – but when it started to get dark we all went to the Police Station and handed ourselves in. The police locked us in the station cells for the night. Me and one boy were in one cell. [The other two] were in another cell. The next day we had to go to a court room – and the big fella (the boss from the home) asked us questions.

The big fella grabbed me and the other boy and took us straight to the train station. I remember crying as I was being taken away. I didn't get to see or say bye to Tim, or my friend, or anyone else from home. I had no idea where I was going.

⁴⁰ *Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of Human Rights and Serious Violations of International Humanitarian Law*, GA Res 60/147, 3rd Comm, 60th Sess, 64th Mtg, Agenda Item 71(a), A/RES/60/147, (16 December 2005)

I was put on a train, this time to a school for Aboriginal and white boys. It was like an army camp. Me and the other boys in my house wore a blue jumper and trousers. The bedroom was similar to before - a big room set up with beds in rows. For meals we'd all have to get in a line and they'd call your name out (it was like that before too). There were tables and chairs in a big room.

They locked the dorms once we got back from school. A security guard used to sit in the dorm office and check on us when we were sleeping.

On Saturday and Sunday we played sports. We didn't go to church.

They always had a notebook with them where they wrote notes about us. They wrote down if we mucked up or not. We all had numbers – 6,5,4,3, or 1. They punished the boys who mucked up and rewarded the boys who behaved by letting them go home. The 6's slept in the same area, the 5's all together etc. I started off in bed number 6, then I went up to number 5. The bosses kept score in their book. When you got to number 1, you had to be good for about 2 weeks – and then you got to go home. I remember the white kids got treated better than the Aboriginal kids. The bosses were a mix, some were good, some bad. I didn't listen to them, I minded my own business.

When you mucked up, they would lock you in a room and just give one meal a day. A small room like the doctor's room. It was called "Boo" (sent to the Boo) I was locked in there once. The boss was saying something bad about black fellas, so I knocked him. I was locked up for a week. The room was like a cage, like a cell. There were small windows along the top, a bed, toilet and shower. It was cold at night. They only gave us one blanket.

A boy threw a blanket over his head and jumped out the window and took off. Years later he told me that they caught him and he got locked up. I couldn't run because it was too far to get back.

I left that school when I was about 14. I was glad to get out of there. They gave me \$800 and I got the train back to Lismore. I asked around after my family. I learned where Mum was living. I got a taxi, which cost \$15. A neighbour of my Mum asked me who I was looking for and I told him my mum and he told me, "hat's her house there". I remember Mum came outside and she was crying. Someone told her that I was coming before I got there. I felt the same thing – I was crying too. Mum took me to the doctor and I went on the pension because of my speech impediment that I was born with. I had my own money then. I used to sing out in my sleep and wake up at night. I had nightmares about being at the homes. Mum would come to me.

My brothers and sisters were split up all over the place. Tim got out before me and he was living in Sydney. Tim picked me up from Mum's and took me to see our sister in Ballina and our sister in Lismore. After that, I stayed with Tim and his wife. Mum and all of my brothers and sisters are dead now, except one brother and my step-sister (the youngest).

The worst thing was being taken away from my family. It's real hard to talk about and to think about – too many bad memories. I think the Government should pay money, out of respect. I've still waited a long time. Should the Government apologise? I don't know what to say. I suppose they should say sorry.

Legal Aid NSW submits that compensation must not only recognise the wrong of the act itself, but it must also seek to repair the damage that flows from that act. There are many Aboriginal persons who suffered additional abuse and other wrongs that flowed from but were in addition to their wrongful removal.

Case Study: Nathan, age unspecified

The nuns they were very vicious. They could be very violent because you were put in line and they didn't care if they hit you around the head with something or gave you a backhand. I got a few backhanders, I can't tell you how many and slaps across the face. If you did anything wrong you got the ironing cord. If you did anything wrong you get the switch or the cane. They'd hit you with anything. Hit you with a book, rulers, and the cane. If you looked like you were enjoying it on the hands your pants would be down and around the ass. I used to watch other kids get hidings too.

I don't know about the girl's side but what I experienced was very regimental. You lined up to go in, you lined up to go out and if you got out of line you just coped the worst after it. They could be loving at times but you just had to get out of hand with them and it didn't take much to get out of hand because we were kids. We were kids. Kids play up. It doesn't constitute getting a beating and that bloody ironing cord it was always a threat because when they whacked you they didn't just whack you once they whacked you about 10 or 20 times. You could hardly walk after it. You couldn't even sit down. When you went to have dinner you'd be standing up because you'd be too scared to sit down.

Where you got beaten for nothing. You get touched up by the bloody workers who were there. You get beaten up by the priest. That priest was the toughest dude I ever came across and he didn't muck with you. I remember next to the priest's quarters they had a little garden and we used to go in there and eat the things off it. And if you ever got caught you got beaten. Any little thing they beat you. They had a punishment for everything and anything. The punishment they gave you didn't deserve the crime. It could have just been waving the finger at you and telling you "that's not the right thing to do." It was so trivial and they would still beat you for it. They just liked beating you.

I can't speak the language. I go back up Nambucca and people are talking in the lingo and that and I felt left out. I feel cheated. They all know how to speak the lingo and here I am "what did you say? Speak English" because I don't know. I don't know they might be talking about me. I don't know. It's a terrible thing. In NSW there isn't too many places where you get the indigenous language but they have got it there [back home]. They've got the language and their teaching the young kids. But I never got that.

The government of the day, their policies, ruined my life and ruined my childhood. I've never had a mother and father, my mother is still distanced to me, the government took it away. It seems everything's been taken and I've got nothing. I've been given nothing back. It all comes down to why did they put me there in the first place? What did I do? There were other families around, but they were never sent to homes. Why did they pick on my mother? She was a pretty good mother and I had a great life before they took me to Cowper.

I was an altar boy while I was at Cowper orphanage and that was the first time I ever tasted wine and got beat up, got a black eye out of it. I was punched by the priest. He was a new young priest and he punched me in the face because I was drinking the altar wine. He was a vicious man, I mean he'd be no more than 27-28 and he was tough. He called a spade a spade and I don't think he liked koori's because he used to always have a go at different koori's. He was just a mean bastard. He was a real mean bastard. I don't know if any of the white children got beat up, but I know a lot of koori's who did get beat up by him.

There was another worker there, he was a mongrel of a bloke. People from outside, they used the think the sun shined out of his bum. Little did they know what he used to bloody do. The boiler room was where he waited for all the young boys to come down. I don't know what happened to the other young fellas, but you weren't allowed in there while one young fella was stocking the wood up. You were only allowed one boy in there at a time. That man had a lot of time for the girls too, you know. He and that bloody boiler room. There was never to be two boys in the room with him. He touched me up a bit but I don't know for sure if he did with the other fellas.

Case Study: Jake

Early life

Jake was born in 1949 in a remote Northern NSW town. His father served in WW2 in the army and was imprisoned by the Nazis. Jake said that his father suffered from schizophrenia when he returned after the war. When Jake was 2 he was forcibly removed with his 2 brothers (one was a year older, one a year younger) to an Aboriginal foster mother in South-West NSW. Jake said that he and his brothers were physically and mentally abused by the mother's male partner.

Jake left school after completing 6th class – he said that he repeated 6th class 4 times. He worked in a variety of labourer type jobs after leaving school including for the Council, on the railways and farm work.

Later contact with parents

Jake met his father in 1996 for a week. After his father died, he left all of his estate to a not for profit. Jake seemed quite upset about that. Jake doesn't remember ever seeing his mother after he was taken. The organisation "Link Up" found her grave. He went to visit her grave recently and all that was written on there was her subsequent surname. He knows that she had married a man with that surname.

Effect of the separation

Jake said his childhood experiences have affected him a lot. He suffers from depression. He didn't have any encouragement to stay at school, which limited his future job opportunities. It has affected his relationships and he never got to know half of his family. Jake has 3 sons of his own. Jake said that is why he was caring for his 2 grandsons – he wanted them to be with family.

Jake has chronic health problems – he is a diabetic and recently had a triple heart bypass. Jake said that he can't understand technology and can't do anything with a computer. He said he doesn't even know how to charge his mobile phone.

7.2 Alternatives to direct Monetary Compensation

In addition to pure monetary compensation, there is a real need for other financial and non-financial alternatives which go to addressing the four other categories of reparations identified in the terms of reference, namely acknowledgment, non-repetition, restitution and rehabilitation.

As should always be the case, the appropriateness of these alternatives ought to meet the circumstances of the individuals and communities who should benefit from these reparations. Legal Aid NSW supports a flexible system in which individuals and community groups can receive reparations based on their particular cases or apply for funding to support their own projects aimed at addressing the harm experienced in their community. This proposition was recommended in the *Bringing Them Home* Report and supported by the proposal put forward in the *Stolen Generations Reparations Tribunal Bill 2010* (Cth).

Legal Aid NSW sets out below a number of examples of policy initiatives and reparations derived from our experience with Aboriginal clients and communities.

One of the biggest issues facing many Aboriginal communities is housing. Few Aboriginal people are able to own their own homes and many find themselves excluded from the private rental market because they are unable to afford it or because of discrimination. Consequently, many are dependent on the social housing provided by Housing NSW and the Aboriginal Housing Office. Housing is often in a poor state of repair.

Legal Aid NSW submits that some Aboriginal clients would benefit from the following forms of reparations:

- schemes to help members of Stolen Generations (and descendants) get out of the social housing market
- priority housing options for Stolen Generations clients to reconnect them with family and Country. This may mean increased rental assistance to allow prompt transfer into private market until Aboriginal Housing Office (AHO) housing becomes available
- equal priority for Aboriginal people who have married into a non-Aboriginal family, and
- changes to Native Title legislation to recognise the rights of land for Aboriginal people removed from their families.

The general and systemic disadvantage experienced by Aboriginal communities points to the need for support, policies and resources to increase the economic participation of members of the Stolen Generations and their descendants, as well as more schemes to allow Aboriginal people to develop and deliver community-based initiatives. Establishing community centres to support members of the Stolen Generations and their families would also greatly encourage community participation. Community participation would also be enhanced by funding mental health assistance specifically directed to meet the needs of Aboriginal people.

The prevalence of loss of identity among members of the Stolen Generations and their descendants could, in part, be repaired by more investment in projects aimed at rejuvenation and preservation of languages and culture. In addition, establishing permanent memorials, and developing historical information and education curriculums on the policies that led to the Stolen Generations, and their devastating impact, would go some way to providing an acknowledgement as well as developing the awareness needed to ensure these or like policies are never repeated.

In the criminal justice system there is a need for more culturally appropriate disposition of Aboriginal Offenders, including Koori Courts, and for greater funding for drug and alcohol rehabilitation, anger management and behaviour change programs. Additionally, there is a need for greater funding of culturally appropriate mentor and role model programs for young people. Aboriginal specific support is crucial to ensuring those programs resonate with Aboriginal participants.

Legal Aid NSW recommends that:

- 7. Reparations should be available to meet both individual and collective needs and sufficiently adaptable to address the specific circumstances of each individual case or application. Community organisations should be given standing to make applications on behalf of groups of individuals where appropriate.**
- 8. Individual claimants must be empowered to seek the reparations most suitable to their circumstances and there must be information and guidance available to enable this to happen.**
- 9. The reparations scheme should have the capacity to make recommendations as to the need for review of legislation and Government policies, where particular cases demonstrate the need for systemic change. In turn, these law reform recommendations should be given upmost priority by the Government.**

8. The system of reparation

Legal Aid NSW supports the model proposed by the Public Interest Advocacy Centre (PIAC) and tabled as part of the *Stolen Generations Reparations Tribunal Bill 2010* (Cth) as the preferred model for reparations. We note that it was the result of wide community consultation, contains appropriate measures for a comprehensive reparations scheme, and accords with the principles set out in the Basic Principles.

8.1 A tribunal model

A reparations tribunal or other legal mechanism of the sort proposed by PIAC is founded on the following considerations:

- claimants comply with a certain threshold rather than having to fit cultural ideas into narrow legal concepts
- Tribunal members and staff include people with links to Aboriginal communities, to ensure processes and decisions are more appropriate and relevant to those they are intended to benefit
- The investigative forum is inquisitorial and culturally appropriate, minimises the need to revisit the trauma, and allows the individual to determine the degree of direct disclosure
- the need for not only monetary compensation is recognised, but reparations can also be shaped to meet the needs of specific claimants with reference to historical and sociological factors, community need and available resources
- a wide range of people having standing to apply for reparations in recognition that individuals *and* broader communities were affected by these policies
- a lengthy but time-limited period of 10 years for acceptance of claims following the establishment of the tribunal or mechanism (Legal Aid NSW recommends a period of 6 years), and
- the need for reparations for gross human rights violations, particularly where the Government is confronting contemporary harm incurred as a consequence of policies implemented by previous governments.

The implementation of a model is advantageous to claimants for a number of reasons:

- it allows for the expeditious determination of claims
- it provides a forum in which claimants can share their experiences without the limitations of formal procedures and evidential limitations
- it avoids substantial costs being incurred by claimants, and
- it ensures that records held by Government and other bodies are easily accessible.

These factors all stand in stark contrast to litigation experiences of members of the Stolen Generation.

8.2 Aboriginal Community Engagement Officers

Legal Aid NSW strongly advocates the need for a communications and community engagement strategy which ensures widespread knowledge of and access to any reparations scheme which is established. According to Cunneen and Schwartz,⁴¹ 92.9% of participants in their study reported they had not received advice in relation to the ATFRS. The authors note:

“Some comments from focus group participants highlighted the lack of information and perceived lack of support in lodging claims in some communities...

While the cut-off date for lodging a claim was extended to 31 May 2009, this is unlikely to have changed the situation in the absence of extensive provision of community information.” [pp 734-5]

The experience of Legal Aid NSW with the Stolen Wages scheme underscores the fundamental importance of state wide, community based engagement in order to ensure the success of the scheme.

Legal Aid NSW would supports a model which employs a team of Aboriginal Field Officers to engage and educate communities and assist with the lodgement of claims.

However, Legal Aid NSW is prepared to assist the scheme in any way possible to ensure it is efficient and cost-effective. We draw the Standing Committee’s attention to our particular expertise and experience which mean we are uniquely placed to:

- promote the scheme across NSW through existing Outreach Services delivered by the Civil Law Service for Aboriginal Communities, which already reaches communities in Dareton, Lake Cargelligo, Murrin Bridge, Condobolin, Baryulgil, Malabugilmah, Yamba, Maclean, Coraki, Tabulam, Cabbage Tree Island, Tweed Heads, Bourke, Brewarrina and Mt Druitt, and is set to expand to more regional Aboriginal communities in 2016
- sensitively engage potential claimants through Legal Aid NSW Aboriginal Field Officers
- work closely with scheme staff in order to facilitate and reduce the time taken to process claims, drawing on our previous experience with ATFRS, and
- assist in reducing the likely duration for which the scheme will need to remain open, thereby reducing operational costs.

Given the potential that claimants who participate in the process may re-traumatized, the scheme should also provide culturally appropriate psychosocial support throughout the application process.

8.3 Legal Representation

Consideration must be given to the funding of legal representation before a tribunal or similar mechanism. As the Stolen Wages scheme and other international reparations tribunals have shown, people who are represented tend to have a better chance of achieving a successful outcome because they have assistance in gathering necessary evidence and articulating their claim appropriately.

⁴¹ Chris Cunneen and Melanie Schwartz, ‘Civil and Family Law Needs of Indigenous People in New South Wales: The Priority Areas’, *UNSW Law Journal*, Vol 32(3). 2009. See also *University of New South Wales Faculty of Law Research Series 2011*, Paper 8.

8.4 Reparations and ex gratia payments

Legal Aid NSW supports the power of the reparations tribunal to make both a wide range of orders for reparation and ex gratia payments. However, Legal Aid NSW is concerned by the use of the term 'ex gratia', as this term is used by the NSW government to refer to an "exercise of the prerogative power of Government" to make a payment "if a person has suffered a financial loss or other detriment directly as a result of the workings of Government" and where the detriment is "of a nature which cannot be remedied or compensated through recourse to legal proceedings."⁴² That is, 'ex gratia' payments are made where there is no legal liability and this would appear to be contrary to the spirit of making reparations to the Stolen Generations. In the alternative, Legal Aid NSW prefers the term 'recognition payment', both for its symbolic value to the Aboriginal community in redressing historical injustice and in more accurately describing one of the legal remedies made available.

Legal Aid NSW also notes that section 30(2) of the Bill provides that the tribunal would not have power to award reparation if it determines that removal of the child from his or her family was in the child's best interests. We recommends that legislation included a rebuttable presumption in favour of the applicant being forcibly removed and provide that, where the presumption is not rebutted, any award made is compensatory in nature, and not in the form of an 'ex gratia' payment.

Additionally, Legal Aid NSW notes that the Bill provides only for lump sum compensation to be awarded, with time spent removed from family and community as the only variable factor. In accordance the well documented harm that has flowed from the policies of the Stolen Generation, we supports the need for legislation to specifically provides for compensation where applicants can show they were affected by additional harm under the heads set out in Recommendation 14 of the *Bringing Them Home* report, namely:

- racial discrimination
- arbitrary deprivation of liberty
- pain and suffering
- abuse, including physical, sexual and emotional abuse
- disruption of family life
- loss of cultural rights and fulfilment
- loss of native title rights
- labour exploitation, and
- economic loss.

To some extent, these will be addressed by the award of other forms of reparation as outlined in section 28 of the Bill. However, Legal Aid would endorse a model that provides for more specific recognition of the individual harms suffered and not merely the broader community impacts as recognised by a recognition or 'ex gratia' payment.

⁴² http://www.lawlink.nsw.gov.au/Lawlink/Isb/II_Isb.nsf/vwPrint1/Isb_exgratiapayments

8.5 Descendants of the Stolen Generations

The Bill recognises the right of a living descendant of a deceased member of the Stolen Generations (s. 30(3)(b)) as well as a relative, family member or descendant of a member of the Stolen Generations who was harmed as a consequence of that person's removal (s. 30(4)(b)) to submit a claim for reparations.

Legal Aid NSW supports the flexible interpretation of the term "descendant" to account for the complexity and cultural specificity of familial and kinship relations. We refers to the findings of ALRC Report 96, *Essentially Yours: The Protection of Human Genetic Information in Australia*, para 36.34 which deals with the meaning of Aboriginal kinship;

"The Inquiry was told in some consultations that the three-part definition works well enough in most circumstances. However, a number of concerns were expressed about the test. In some cases, the courts have interpreted 'descent' in terms of biological descent when interpreting the meaning of an Aboriginal person. This tends to undermine the role of social descent within Aboriginal communities whose traditional laws and customs might provide for adoption or other social forms of inclusion into a family or community. The emphasis on biological descent has led to some anxiety that genetic testing might increasingly be used (or even required) as a means of proving a person's kinship relationship with another Aboriginal person."

Recommendations:

- 10. The model proposed by PIAC, which formed the basis of *the Commonwealth Stolen Generations Reparation Tribunal Bill 2010 (Cth)* is the preferred model.**
- 11. A team of field workers, including Aboriginal Liaison officers, should be established to ensure community engagement with the process, and adequate, culturally appropriate support.**
- 12. Consideration must be given to funding for legal representation.**
- 13. The threshold requirement for establishing a claim should be based on a rebuttable presumption in favour of the applicant having been removed forcibly, where removal is established.**
- 14. Lump sum compensation in the form of a recognition payment should be available to all those who can establish removal under the *Aborigines Protection Act 1909 (NSW)*, rather than an 'ex gratia' payment.**
- 15. Applicants who can establish additional and individualised harms under particular heads of damage, as outlined in Recommendation 14 of the *Bringing Them Home* report, should be able to obtain monetary compensation and/or other appropriate forms of reparation to redress that particular harm.**
- 16. Descendant claims for reparations should be treated differently to those under the ATFRS by acknowledging that the direct harm suffered by some descendants as a result of their parent's removal should give rise to an independant claim.**