Reparations for the Stolen Generations in New South Wales

Legal Aid NSW

Response to Questions on Notice

and

Supplementary Submission to the

Legislative Council General Purpose Standing Committee No. 3

March 2016

Table of Contents

Introduction

In October 2015, Legal Aid NSW provided a submission to the Legislative Council General Purpose Standing Committee No.3 in response to the terms of reference of the Inquiry into Reparations for the Stolen Generations in New South Wales. A number of Legal Aid NSW practitioners contributed to the submission.

On 10 February 2016 the primary authors of the submission, Anthony Levin and Melissa O'Donnell of the Civil Law Division, Legal Aid NSW appeared before the Committee and gave evidence, together with Dixie Link-Gordon, Senior Community Access Officer, Women's Legal Service NSW.

There were two outstanding Questions on Notice following the hearing. The first question, from the Hon. Sarah Mitchell MLC concerns the use of Koori Courts in NSW. The second question from the Hon. Natasha Maclaran-Jones BN MHSN MLC concerns placement principles in foster care or guardianship for Aboriginal and Torres Straight Islanders. The second question was addressed to Ms Link-Gordon but following discussions with the Principal Council Officer to the Committee after the hearing, Legal Aid NSW offered to provide a response.

For completeness, the second question is included in this submission but will be addressed in a further separate submission by Legal Aid NSW. This is currently being prepared by the Senior Solicitor, Care and Protection of the Legal Aid NSW Family Law Division and is due to be submitted by 31 March 2016.

Question on Notice: Koori Courts

The Hon. SARAH MITCHELL: *Yesterday one of the ladies who gave evidence believed until she was almost 30 that her family had given her up for adoption. She was so angry and did not want to know that she did not learn until she was in her late twenties that she was actually a member of the stolen generations. So it is an incredibly complex situation and it is hard to quantify the number of people involved or impacted. My question is: if we were to look at other models—and you mentioned Koori courts, which I would be really interested to hear your views on—would that potentially include the capacity where people might not have to say, "Yes, I have been affected by this or my family has been impacted" but perhaps through that process consideration could be given to their family history? Do you have a view on if that would be a more effective way in terms of keeping Aboriginal people out of the criminal justice system?*

Youth Koori Court

The Youth Koori Court (YKC) is a dedicated pilot program for Aboriginal young people which commenced in February 2015 and operates from Parramatta Children's Court. Part of the broader aim of the YKC is to provide greater Aboriginal involvement in the court process by ensuring that it is culturally relevant while reducing the risk factors that might impact on a young person's offending behaviour.

Legal Aid NSW is currently engaged with the YKC through its Children's Civil Law Service (CCLS). A CCLS solicitor attends the YKC on a weekly basis and works in partnership with the Aboriginal Legal Service NSW/ACT to provide a comprehensive wrap-around legal service for the young person. A 'Legal Health Check' is conducted with the young person to help identify relevant civil law issues.

The YKC involves a holistic approach that includes the participation of services to help support young people with their identified issues. The involvement of Aboriginal Elders provides this important cultural connection for the young person, as well as providing appropriate cultural advice to the court.

The YKC process openly takes into account the impact of generational disconnection from culture and family as a result of the Stolen Generations. Part of the screening assessment conducted by the YKC includes asking the young person about their family and there is a focus on establishing positive connections with the young person's family, culture and community. This is in recognition of how important culture and community is to a young person's sense of identity and their development.

The YKC also allows for the direct participation of family members throughout the process which has provided the opportunity for family members to describe their experiences, including that of being part of the stolen generations. The ability to do this through the YKC process has been powerful for the young person and their family and pivotal in responding effectively and appropriately to each young person.

The YKC has been operating for a year now and the outcomes for the young people who have graduated from the program have been positive. The additional support of services and the increased connection to family and culture have proved effective in reducing the interactions of Aboriginal young people with the criminal justice system.

For more information about the Youth Koori Court, please contact:

Magistrate Sue Duncombe, Presiding Magistrate, Youth Koori Court: sduncombe@courts.nsw.gov.au

Nadine Miles, Chief Legal Officer, Aboriginal Legal Service NSW/ACT: nadine.miles@alsnswact.org.au

Both her Honour Magistrate Duncombe and Ms Miles have indicated a willingness to assist the Committee with any questions about the YKC. Procedural information about the Youth Koori Court process may be found in the NSW Children's Court practice note.

Creation of an Adult 'Koori Court'

There is no current Koori Court in existence for adults in New South Wales. Legal Aid NSW is very supportive of the creation of a specialist Koori Court for adult offenders.

We understand that a proposal to establish a Koori Court as a Division of the District Court of New South Wales is currently before the Attorney-General for consideration. This proposal is championed by her Honour Judge Dina Yehia SC of the NSW District Court.

If adopted, the proposal would ensure that some Aboriginal offenders are diverted into a specialised Koori Court. In common with the YKC, an adult Koori Court would be designed to enhance the level of court support provided to Indigenous offenders and victims.

The objectives of the proposed NSW District Koori Court include increasing the level of compliance by Indigenous offenders with community-based orders, reducing the frequency and seriousness of offending by Indigenous offenders, reducing the amount of time spent by Indigenous offenders in custody, increasing the awareness of Indigenous offenders of the consequences of their offences on victims and the communities to which they belong, and enhancing the confidence of Indigenous communities in the courts and the administration of justice.

An adult Koori Court would be better resourced to consider issues of social deprivation and the impact of the Stolen Generations on individual cases that come before the court. Like the Drug Court, it is proposed that the NSW District Koori Court would work on a ballot system, where selected offenders are diverted into a process that includes Aboriginal Elders and relevant Aboriginal communities in the sentencing process.

Legal Aid NSW submits that Stolen Generations issues impact upon an offender's upbringing, family and social deprivation. To have a specialist court capable of tailoring appropriate sentencing outcomes is a very real and practical form of reparation.

Funding for *Gladue* style reports

Another mechanism for assisting the criminal justice system to consider the Stolen Generations and consequent issues relevant to social deprivation is to increase funding and investment in 'Gladue reports'. A 'Gladue report', taken from the Canadian case of *Gladue v R* [1999] 1 S.C.R. 688 (Supreme Court of Canada) is a report written for a Sentencing Court by an expert, generally from the relevant indigenous culture, that specifically addresses the social deprivation of particular offenders.

If an offender is significantly affected by the impact of the Stolen Generations, dispossession, significant social deprivation and hardship follow in many cases. It can be difficult to gather evidence of this to put before a sentencing court. An investment in such reports appropriately provides real evidence of these facts for the sentencing court to consider when applying the principles enunciated in *Bugmy* and *Fernando*.

Existing Circle Sentencing Intervention program

Legal Aid NSW submits that the Committee could also consider the ability of the existing Circle Sentencing Intervention Program (CSIP) to play a role in reparation in appropriate cases, by ensuring that the harm caused to the Stolen Generations is recognised as part of the sentencing process.

Circle Sentencing has been available in NSW in a limited number of NSW Local Courts since 2002 and is codified in Part 6 of the *Criminal Procedure Regulation 2010* (NSW).

The CSIP is limited to Aboriginal offenders and includes Aboriginal Elders and the communities in the sentencing process.

A suitable offender is referred by a Magistrate to the CSIP. The local Aboriginal Community Justice Group assesses whether the candidate is suitable to participate in the program and the court decides whether or not a participation order should be made.

If the offender agrees to participate, the project officer convenes a Circle Sentencing Group (CSG), presided over by the Magistrate and attended by the prosecutor, project officer and at least three Aboriginal Elders from the offender's community. The offender must attend the CSG at which the offending behaviour is discussed and an intervention plan put in place. The CSG also recommends an appropriate sentence and, in many cases, full time gaol, which would otherwise be the most likely outcome, is avoided.

Question on Notice: Placement Principles

The Hon. NATASHA MACLAREN-JONES: *My question is to Ms Link-Gordon, and I am happy for you to take this on notice as well. In your submission you talk about placement principles. In that you talk about the priority for Aboriginal and Torres Strait Islanders to be placed with family and kinship groups. I am interested to know a bit more about the current numbers of people registered to be foster carers or guardians. What are the barriers and what changes might need to be made to ensure that those options are available?*

As stated in the introduction, this Question on Notice is included for completeness only and will be answered in a supplemental submission which is due by 31 March 2016.

Supplementary Submission on suitability of an Independent Assessor model for Reparations to the Stolen Generations

This following submission supplements and elaborates on evidence given by Legal Aid NSW to the hearing of the Inquiry held on 10 February 2016 at 9.30am.

We refer specifically to questions posed by the General Purpose Standing Committee[1] in relation to the comparability of the 'Tribunal model' and the South Australian Independent Assessor model, noting that Legal Aid NSW had previously endorsed the Tribunal model in part 8 of our first written submission of October 2015.

We provide the following additional comments about Independent Assessor models.

[1] See questions put by The Hon. Shaoquett Moselmane on pages 3 and 4 of the transcript of hearing respectively.

Independent Assessor Models

At the time of writing, and as indicated at hearing, the full eligibility criteria for the South Australian Stolen Generations Scheme (the SA scheme) are not publicly available. It is therefore difficult to provide extensive remarks about whether that scheme addresses the needs and concerns of those forcibly removed within South Australia, or the applicability of such a model to New South Wales.

What is known is that the SA scheme is a non-statutory model which requires Ministerial approval before any payments may be made. In so far as the Assessor's decisions are recommendations only, Legal Aid NSW submits there is a risk that the model will be perceived as not truly independent. We are concerned that the scheme may be susceptible to criticism because it fails to completely separate executive discretion from a quasi-judicial process.

We submit that a reparations scheme has the potential to be the masthead of a broader project for restorative justice for Aboriginal communities in New South Wales. If that premise is accepted, then a tribunal model, which includes inquisitorial functions and powers, and suspends the rules of evidence, would help to maintain public confidence in the integrity of the process and maximise a communal sense of participation and ownership.

On its face, the SA scheme also bears some resemblance to the Stolen Generations Assessor scheme enacted in Tasmania in November 2006.[2] The Tasmanian scheme was a $5 million fund established pursuant to the *Stolen Generations of Aboriginal Children Act 2006* (Tas).

As the Committee may be aware, the scheme:

- included three categories of eligibility for applicants
- remained open for six (6) months
- appointed an Assessor whose primary role was to decide whether an applicant was eligible for an ex-gratia payment
- gave the Assessor power to do all things necessary or convenient to enable him to carry out his functions, including the power to obtain information from State Government agencies and to seek further information from an applicant
- was non-adversarial and informal and the rules of evidence did not apply
- gave applicants the opportunity to be heard
- made decisions accompanied by written reasons
- could award ex-gratia payments of $5,000 to living biological children of deceased persons who would have been eligible under the scheme, and
- made decisions which were final and not subject to review, judicial or otherwise.

[2] The Office of the Stolen Generations Assessor became operational in Tasmania on 15 January 2007.

To the extent that a scheme in New South Wales may mirror the provisions of the Tasmanian scheme or the SA scheme (even if not created under statute), as a minimum standard we would recommend the following aspects:

- the Assessor should have broad inquisitorial powers including the power to compel the release of information from public or State government agencies
- the forum should be non-adversarial and informal while allowing applicants the right to representation
- the scheme should permit applications by individuals (including descendants) and community organisations or groups[3]
- decisions should be accompanied by written reasons
- applicants should be able to tell their stories openly and frankly without the application of the rules of evidence, and
- the Assessor's decisions should be binding and independent of government oversight.

The Tribunal Model

Legal Aid NSW reiterates the submissions already made in support of the Tribunal Model, based on the *Stolen Generations Reparations Tribunal Bill 2010* (Cth) (the Bill). We draw particular attention to the following provisions of the Bill.

- Section 26 of the Bill states that "the hearing of a claim before the Tribunal must be in public." We submit that the public nature of proceedings, whatever their form, will be a critical feature of their acceptance by Aboriginal communities and the community at large (subject to the consent and wishes of applicants).[4] Legal Aid recommends that any New South Wales scheme should adopt a similar approach.
- Section 28 of the Bill sets out the forms of reparation which could be paid, acknowledging that monetary compensation is a form of reparation which may be appropriate for applicants who can prove particular types of harm such as sexual or physical assault (s28(4)). By linking specific types of reparations to the suffering of wrongfully inflicted harm, the Bill conceptualises reparation as an adaptive form of redress which seeks to valorise individual experience rather than universalise it.

[3] This is supported by the Healing Foundation report which found that 77% of Stolen Generations survivors who participated in collective healing projects reported an increased sense of belonging and connection to their culture. Under the Stolen Generations Initiative, grants of between $25,000 and $90,000 totalling $1,487,700 were made available to Aboriginal and Torres Strait Islander organisations across the country in 2013 and 2014 to deliver healing responses for local Stolen Generations communities. See *Healing for Our Stolen Generations: Sharing Our Stories*, Healing Foundation, 11 February2016:http://healingfoundation.org.au/wordpress/wp-content/files_mf/1454631315HealingforOurStolenGenerationsSharingOurStoriesExecutiveSummary.pdf .

[4] Section 26(3) of the Bill makes provision for private hearings where "it is desirable to do so by reason of the confidential nature of any evidence, document or matter or for any other reason…".

By contrast, the Tasmanian scheme made ex-gratia payments of $58,333.33 to eighty-four eligible members of the Stolen Generations. While this represents a significant outcome, it did not distinguish the relative types of harm suffered by each applicant.

Legal Aid NSW does not support any notion of competitive victimhood, but we submit that a scheme which enables the particularity of human experience to be heard and recognised is one which is likely to reveal the true breadth and depth of the effects of policies of assimilation and forced removal.

The extensive provisions for reparations set out in the Bill mark out the Tribunal model as an instrument which offers a moral response to survivors' concerns, while also carrying some judicial force. That is borne out by the inclusion of juridical review rights under section 32 of the Bill. While such a provision may be inappropriate to include as part of an Assessor scheme, Legal aid NSW submits that the creation of some method of appeal or review, internal or otherwise, would further bolster its integrity.

At the time of writing, a special leave application on the issue of legal costs in the recent Stolen Generations case of *Collard v State of Western Australia* is yet to be decided by the High Court of Australia.[5] That case, in which the plaintiffs were unsuccessful in establishing that the state had breached fiduciary duties to them, serves as yet another cautionary tale to potential Stolen Generations litigants in bringing their actions through the court system. We understand that the decision is imminent and may be of assistance to this Inquiry. Legal Aid NSW submits that any model which the government may adopt should minimise the costs borne by applicants and designed to ensure access to an informal, efficient and just no-costs scheme.

Recommendations

Consistent with recommendation 10 of our submission of October 2015, Legal Aid NSW endorses a Tribunal Model as the preferred model for a reparations scheme in New South Wales. However, to the extent that the NSW government may implement a scheme akin to an Independent Assessor model, Legal Aid NSW makes the following recommendations:

1. An Assessor should have broad inquisitorial powers including the power to compel the release of information from public or State government agencies.
2. The forum should be informal, cheap and non-adversarial, and the rules of evidence should not apply. Applicants should have the right to representation.
3. The decisions of an Assessor should be independent of government oversight and accompanied by written reasons.
4. Applicants should have the right to seek review of an Assessor's decision within a specified time period.
5. The scheme should permit applications by individuals including descendants, and community organisations or groups.

[5] See the Western Australian Court of Appeal decision on costs: *Western Australia v Collard* [2015] WASCA 86.