

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

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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 Strait 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.
