Supplementary
Submission
No 32a

INQUIRY INTO REPARATIONS FOR THE STOLEN GENERATIONS IN NEW SOUTH WALES

Organisation: Legal Aid

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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.

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[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.

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