Supplementary Submission No 32b

INQUIRY INTO REPARATIONS FOR THE STOLEN GENERATIONS IN NEW SOUTH WALES

Organisation: Legal Aid

Date received: 6/04/2016

Reparations for the Stolen Generations in New South Wales

Legal Aid NSW

Response to Questions on Notice

and

Supplementary Submission No. 2 to the

Legislative Council General Purpose Standing Committee No. 3

April 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. This question has been the subject of a Legal Aid NSW submission provided to the Committee in March 2016.

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.

The following submission addresses this second question and has been prepared Nicola Callander, Senior Solicitor, Care and Protection of the Family Law Division, Legal Aid NSW.

If there are any questions regarding this submission please contact
by email at
or by telephone on

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?*

Legal Aid NSW Supplementary Submission and Response to Question on Notice

Background

Section 13 (Chapter 2, Part 2) of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (the Act) sets out the placement principles for Aboriginal and Torres Strait Islander (ATSI) children and young persons.

In October 2014, section 10A of the Act introduced permanent placement principles. This section effectively creates a hierarchy of preferred placements for children and young persons under the Act. As an integral part of that hierarchy, Guardianship orders (section 79A) and Adoption were introduced into the permanent placement principles (section 10A(3) (c) and (e)). Adoption remains the least preferred placement for ATSI children.

To summarise, if children cannot be restored to their parents, they are placed in out of home care (OOHC). Almost all such placements involve the assessment by the Department of Family and Community Services (FACS) of family and kin (in the case of a family placement) or foster carers if no family or kin are assessed as suitable. Once assessed as suitable, these persons become 'authorised carers', and in many cases are paid an authorised carers allowance.

When placing ATSI children in OOHC, FACS are required to act in accordance with the principles set out above. FACS are also required to take into account the section 10A permanent placement principles in making recommendations to the Court about final or permanent placements.

Barriers to Aboriginal and Torres Strait Islander families

Common barriers to the placement of Aboriginal and Torres Strait Islander children with family and kin are as follows:

- Minimal effort is made to identify and find family and kin, and those efforts are often hindered by the past relationship between child welfare authorities and Community.
- Such efforts are often undermined by a lack of cultural awareness and sensitivity.
- If family or kin are identified to care for children, the assessment framework adopted by FACS may not be culturally appropriate or sensitive.
- There is a lack of services to support family placements in regional NSW.

A significant step towards improving the work done by FACS in finding and identifying ATSI extended family has been the development of the Cultural Plan, which will be integrated into the Care Plan in care and protection proceedings.

The Care Plan sets out the final recommendations of FACS, in relation the permanent placement of the children, the subject of the proceedings. The Cultural Plan will compel more rigorous engagement with a child's culture by case workers. The template is the result of almost two years of work and is due to be in circulation by July 2016.

Recent Case Study

A 10 year old aboriginal boy was removed by FACS from his mother. His mother had overdosed. He had been left with his mother a few days earlier by his aboriginal maternal grandmother, following the mother's release from custody. Prior to being placed with his mother, the boy had lived with his maternal grandmother and cousin, a 16 year old child who had been placed in the care of the maternal grandmother since birth by the child welfare department from another state.

Due to his mother's absences, the boy had lived approximately half with his maternal grandmother.

Following removal FACS placed the boy in foster care. They assessed the maternal grandmother and found her unsuitable to care for the boy because of her use of marijuana, her history with welfare in relation to her own children and domestic violence in her past, some 15 years before the proceedings involving the boy.

The grandmother sought a review of the decision to refuse her as the authorised carer for the boy. An internal review was undertaken by FACS but the maternal grandmother was not successful. The paternal grandmother also sought to be assessed and was refused but did not appeal the decision.

In the Care Plan FACS recommended the boy remain in the care of the Minister until 18 years of age. FACS also recommended that he have supervised contact with his maternal grandmother four to six times a year.

The maternal grandmother sought to be joined as a party to the Children's Court proceedings and was successful.

The expert report recommended placement with the maternal grandmother. The expert report also commented on the lack of cultural appropriateness of the assessment and assessment process.

Pending a final order in late 2015, the child had three non-aboriginal foster care placements. He was eventually placed in a 24 hour supervised residential placement. At that time he was not attending school and his behaviour had escalated to violent outbursts. The boy's maternal grandmother travelled a significant distance at her own expense to have monthly contact with him. During this placement the boy was sexually abused.

The matter was heard over five day in the Children's Court. The Court placed the child with the maternal grandmother on a final basis.

FACS refused to pay the grandmother an authorised carers allowance for the care of the boy on the basis that it disagreed with the decision of the Court.

Recent Legislative changes creating additional barriers

ATSI family and kin now face additional legislative barriers on two fronts.

Removal of the power to review the decision to authorise or not authorise a person as an authorised carer

Section 245 of the Act was amended by the *Child Protection Legislation Amendment Bill 2015* to remove the power to review a decision to authorise or not authorise a person as an authorised carer.

Until 2015, section 245(1)(a) read:

> *Each of the following decisions made under or for the purposes of the Act or the regulations is an administratively reviewable decision for the purposes of section 28(1)(a) of the Community Services (Complaints, Reviews and Monitoring) Act 1993:*
>
> *(a) a decision of the relevant decision maker to authorise or not to authorise a person as an authorised carer, to impose a condition on an authorisation, or to cancel or suspend a person's authorisation as an authorised carer,*

Subsection (a) now reads:

> *(a) a decision of a relevant decision maker to suspend a person's authorisation as an authorised carer or to impose a condition on a person's authorisation,*

The effect of the amendment is that if an ATSI family member or kin, or any member of a child's extended family or a person significant to a child, is assessed to care for children and is found by FACS to be unsuitable to be authorised as a carer, there is now no avenue for review.

Changes to Child Protection (Working with Children) Act 2012 (CPWC)

Changes to the Child Protection (Working with Children) Act 2012 (CPWC) mean that all authorised carers are required to undergo a Working with Children's Check (WWCC) to obtain clearance to engage in child related work.

In addition to the authorised carer being required to undergo the check, the legislation extends to any person residing on the same property. This means that the spouse or any relative or friend living on the same property has to undergo a WWCC.

The WWCC is undertaken by the Office of the Children's Guardian (OCG), which conducts a criminal record and database check.

The WWCC involves one of three processes that in turn lead to one of two outcomes:

(a) No relevant info discovered: no further inquiry, no discretion to be exercised – the person is cleared.

- Outcome is clearance, which lasts for 5 years.

(b) Relevant information from Schedule 1 discovered. A risk assessment is conducted. The applicant may not be told about this assessment. If the OCG proposes to refuse a clearance, the applicant must be told and the OCG must consider any submissions put by the applicant in response.

- If the OCG is satisfied that person poses a risk, the outcome is a bar, which lasts for 5 years (there is a ban on further applications for 5 years unless certain circumstances change in the interim), or,

- OCG is not satisfied that person poses risk the outcome is clearance.

(c) Relevant info from Schedule 2 discovered. In these circumstances there is no further inquiry, no discretion, no notice of proposed refusal, and the person is 'disqualified'.

- Outcome is a bar.

Interim bar

The OCG may, at any time after receiving an application for a check, determine that the applicant be subject to an interim bar. It may do so if of the opinion that it is likely there is a risk to the safety of children if the person engages in child related work pending the determination.

Appeals go to Administrative Division of the NSW Civil and Administrative Tribunal (NCAT). A person who has been barred by the OCG may apply to NCAT for an Enabling Order. A person can also apply for an Enabling Order allowing a further application within 5 years after a bar.

If an authorised carer fails a WWCC and the children they care for are under the parental responsibility of the Minister, there is a statutory obligation to remove the children or remove the authorised carer, or their spouse or anyone else living on the property who has failed a WWCC, within 48 hours.

If the authorised carer is caring for children who are not under the parental responsibility of the Minister, as a general rule, FACS will file a section 90 application, which is an application to vary or rescind a final care order, relying on the failed WWCC as the relevant change in circumstances.

Clearly this legislation can have a deleterious impact on children, creating a whole new set of risks associated with sudden and often unexplained loss of security and stability, loved ones, home and school.

Often children will have been with authorised carers for a considerable amount of time. More often than not, these are indigenous children. Almost all children who are caught up in this regime are likely to have already suffered significant trauma, insecurity and instability in their young lives and have been the subject of care and protection proceedings.

The current statutory requirement to remove children appears to presume that the mere lack of a WWCC clearance or a refusal of such a clearance, places children at risk.

Legal Aid NSW understands there is no such mandate to remove children who are not in the parental responsibility of the Minister. In relation to those children, FACS files an application in the Children's Court and asks the Court to determine risk. This suggests inconsistency as to why the same circumstances create a level of risk requiring removal for one category of children and not the other.

Recommendation

Legal Aid NSW recommends that there be no statutory requirement that children be removed unless it is otherwise considered (that is other than the failed WWCC), that the children are at serious risk of harm in their placement.

Financial Hardship

Payments to authorised carers are suspended pending the determination of a clearance. The same applies to any consequent proceedings in NCAT either to review the Guardian's decision to refuse a clearance or in relation to an order overcoming a Schedule 2 disqualification. This can create extreme financial hardship for carers responsible for children who are otherwise without the means to properly fund their care.

This additional financial hardship is created at a time of significant stress for a family.

While payments will be back-paid if carers obtain a clearance, the delay in processes makes this unsustainable for most families and negatively impacts on the children the legislation was drafted to protect.

Recommendation

Legal Aid NSW recommends that a solution would be to maintain payments for any period of time in which children remain in the care of authorised carers, regardless of their working with children's check status at that time.

Indigenous Carers

The legislation has a very significant impact on many kinship placements within indigenous families. Members of indigenous communities are more likely to have a criminal record and so more likely to fail a working with children's check. The tragic and unacceptable consequences for these families of having children removed from their care needs no explanation or emphasis.

The Application of Schedules 1 and 2 CPWC

Many refused clearances are based on conduct falling short of a criminal conviction of an offence of sexual misconduct or violence against a child.

Many offences leading to a failed WWCC took place in the distant past and have little if any relevance to a carer's capacity to care for children or the extent to which they pose a risk to children.

Because of the age of many offences, carers often find themselves trying to defend themselves against offences they cannot remember or accurately recall, or to which they have over time given limited attention due to not having been convicted.

The sheer scope of the Schedule 1 and 2 offences means that potentially hundreds of authorised carers will be caught in the net. Legal Aid NSW is seeing a steady increase in the number of clients who have been notified of a failed WWCC. This is increasing delays, exacerbating the consequences for families and children.

Recommendation

Legal Aid NSW recommends that Schedules 1 and 2 CPWC be carefully reviewed to strike a more appropriate balance to address unforeseen consequences of the legislation and perceived injustices and to explore if the number of offences and types of proceedings specified can be limited.

Proceedings

Delay

The assessment process undertaken by the OCG can take a considerable amount of time, during which families can be in a state of high anxiety resulting from the uncertainty about their futures and financial hardship because their payments are suspended.

Transparency

During the assessment process, the OCG seeks information from various sources including the carer. Usually the carer does not have the benefit of legal advice at the preliminary stages of the process and so does not respond adequately, if at all.

It is also often the case that at the early stages of communication from the OCG, the carer does not understand the potential consequences of the process.

It is the experience of Legal Aid NSW that the carer is not provided with sufficient support and help in the preliminary stages of their involvement which not only creates stress and upheaval for families but also prolongs and complicates matters.

Legal Aid NSW suggests that more resources should be made available at the early stages to assist disadvantaged and vulnerable ATSI carers. This would not only speed up the process but reduce the associated emotional and financial stress.

Recommendations (in relation to these proceedings)

Consideration be given to allocating more resources at the early stage of the process to assist vulnerable ATSI carers. This should include legal advice services.

Further Complications

Interim Bars cannot be appealed for 6 months and can take up to 12 months to determine. This can have disastrous consequences including the removal of children, a loss of employment, loss of income and denial of future employment.

NCAT has the power to stay the operation of a decision of the OCG. However, it is the experience of Legal Aid NSW that to stay a decision requires as much preparation and work as to run a final hearing.

Recommendation

Legal Aid NSW recommends consideration be given to an improved legislative regime in relation to stays. It should be possible for carers to stay interim bars in certain circumstances and should not be an overly onerous process to commence that action.

Contacts for further enquiries

For more information with respect to culturally appropriate assessment of carers, please contact:

Information regarding the number of indigenous foster carers and guardians can be obtained through the Program and Service Design, Innovation, Safety and Permanency, Division of FACS which may be contacted on