

Chief Assessor Holyoak

Cultural considerations for First Nations Victims of Crime

PROJECT ORIGINS

- *Criminal Injuries Compensation Act 2003 (WA)*
- Increasing applications from First Nations applicants in remote areas
- Most requesting extensions of time as applications were made after the statutory 3 year limitation period
- Very limited legal services available and where available, often a conflict of interests
- Limited supporting information – particularly psychological as limited culturally appropriate services available

PROJECT ORIGINS CONTINUED

- Identifiable gaps in service delivery between metropolitan and regional communities – higher proportion of disadvantaged applicants in regional and remote communities are First Nations people
- Acknowledging the need for improved service delivery to regional areas, the remote access and inclusion program was developed and implemented in 2020 (ongoing)
- Delivery: face to face by the Office of Criminal Injuries Compensation for First Nations people in remote and regional communities to improve access to and education about compensation applications to individuals, communities, supportive service providers and stakeholders.


LESSONS LEARNED

- In the 4 years since commencement, gaps emerged in:-
 - Cultural understanding, knowledge and awareness
 - Eligibility criteria
 - Understanding of trauma for First Nations people including inherited experiences and intergenerational trauma
 - Culturally appropriate psychological treatment options

This project was undertaken to examine those gaps and identify recommendations for remedy



Evidence of gaps to support observations

- Our inquiries initially took us to:-
 - Department of Justice (WA) Innovate Reconciliation Action Plan Jan 2022 to Jan 2024
 - Report on the findings of the Review of the Criminal Injuries Compensation Scheme in Western Australia November 2019
 - Case law: ***Bolton v Stapleton & Ors*** [2008] WADC 45
 - Legislation in other jurisdictions and disciplines
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Department of Justice WA: INNOVATE RECONCILIATION ACTION PLAN Jan 2022 to Jan 2024 (RAP)

- Focus on Actions 11 and 14:
- (11) Implement Strategies to improve justice outcomes for Aboriginal Peoples
 - Deliverable 60: Support improved criminal compensation outcomes for Aboriginal people through the Office of Criminal Injuries Compensation Aboriginal Community Outreach Program

- (14) Improve outcomes for Aboriginal victims of crime
 - Deliverable 97: increase opportunities for Aboriginal peoples to engage with and access Victim of Crime services
 - Deliverable 98: Ensure the Department's 'Victims of Crime Strategy' acknowledges the overrepresentation of Aboriginal peoples as victims of crime, and contains recommendations for place-based, culturally informed support services
 - Deliverable 99: Improve the cultural safety and competence of support services delivered by the Department to Aboriginal peoples, by providing culturally informed trauma support training to employees



Emerging patterns: 2 key areas

1. **ELIGIBILITY:** Consideration of the family structure and relationality by examining Kinship systems (deliverable 60 and 97)
2. **INJURY AND HEALING:** understanding cultural expressions/manifestations of psychological injury and exploring culturally appropriate healing opportunities (deliverable 98)

ELIGIBILITY

- Definition of close relative in the *Criminal Injuries Compensation Act 2003*
- Section 4: a person who immediately before the offence was committed is a parent, grandparent, stepparent, spouse or de facto partner, child, grandchild or stepchild of the person who suffered injury

ELIGIBILITY CONT...

- ***Bolton v Stapleton & Ors*** [2008] WADC 45
- Goetze DCJ concluded “(t)he *Criminal Injuries Compensation Act 2003* neither provides for a person “who has the position or role of a parent”, nor “one who exercises the functions of a parent; a protector, guardian” [40]. He went on to note the Act did not provide for the position of “parent” according to Aboriginal law and custom.

ELIGIBILITY CONT...

- CULTURAL GAP:
 - *Report on the findings of the Review of the Criminal Injuries Compensation Scheme in Western Australia*
 - definition of *close relative* as “culturally exclusive to families outside of an Anglo-Western context” and inconsistent with Aboriginal and Torres Strait Islander kinship relationships.
 - inconsistent with recommendation 67 of the *Western Australian Law Reform Commission’s Project 94* which recommended “the Western Australian Government actively promote, at the national level, the cause of functional recognition of non-biological parents who have parental responsibility or primary care for a child, whether of Aboriginal or non-Aboriginal descent”

ELIGIBILITY CONT...

- KINSHIP

- Body of academic study which states:-

- Kinship is a concept of 'relationality' between place, land, animal, plant, spirit and each other in culturally defined gendered roles
 - Kinship embodies reciprocity between each element and the importance and effect of those relationships
 - Physical and emotional connection is created by kinship systems and the social responsibilities of individuals who are part of the system
 - Kinship is responsible for cultural continuity and family responsibility instilling strong bonds of belonging and respect

ELIGIBILITY CONT...

- Other legislation – recognition of Aboriginal Cultural Relationships
- Clause 5(2) of the *Criminal Law (Unlawful Consorting) Bill 2020* (WA) includes in the definition of ‘family member’ as “(2) Without limiting subsection (1), a person is a family member of another person who is an Aboriginal person or Torres Strait Islander (an Indigenous Person) if, under the customary law and culture of the Indigenous person’s community, the person is regarded as a member of the extended family or kinship group of the Indigenous person.”
- Section 3 of the *Children and Community Services Act 2004* (WA) defines *family of a child* as “A person regarded under the customary law or tradition of the child’s community as the equivalent of a person mentioned in paragraph (a).” Paragraph (a) defines family as including parent, grandparent, other ancestor, step-parent, sibling, uncle, aunt, cousin, spouse or de facto partner.

ELIGIBILITY CONT...

- Under Section 281(2)(b) of the *Mental Health Act 2014 (WA)* *close family member* includes, if a person is of Aboriginal or Torres Strait Islander descent, any person regarded under the customary law, tradition or kinship of that person's community as the equivalent of any person listed in section 281(2)(a) which lists a close family member as spouse, de facto partner, child, stepchild, parent, stepparent, foster parent, sibling, grandparent, aunt, uncle, niece, nephew or cousin.

RECOMMENDATIONS

- In the OCIC review it was recommended the definition of “close relative” in the Act should be amended to include: -
 1. a person who was in a parent-like relationship with the victim for a substantial period of time (foster carer, relative carer or guardian of a child);
 2. any person to whom the victim stood in *loco parentis* for a substantial period of time (foster carer, ward, younger relative); and
 3. any other person who satisfies the Assessor that, in respect of the victim, they stood in the place of a person referred to, in paragraphs (a) or (c) of the definition of close relative for a substantial period of time.

Acknowledgment of Kinship and the role of Kinship relationships within First Nation’s communities has been considered and legislated elsewhere and requires further consideration in this space to meet deliverables 60 and 97

INJURY AND HEALING

- *Criminal Injuries Compensation Act 2003* - section 35: Mental and Nervous Shock
- *DR v CD*: must be of an enduring character so as to amount to an injury in the legal sense and common parlance as opposed to a mere emotional reaction” with a focus “on the enduring nature of the emotion consequent upon impact” rather than descriptors such as disgust, distress, fright or humiliation.
- Unlike under other civil liability legislation, a diagnosis of a recognised psychiatric injury is not required.

EXPRESSIONS OF PSYCHOLOGICAL INJURY

- Body of academic work talks about psychological injury expressed as 'shame' which is:-
 - Individuating but relational to community
 - Multi-generational and in some cases an inherited experience
 - Physically embodied: loss of fitting the place/out of placeness
 - Ought not to be pathologized (fits the mental and nervous shock criteria)

▶ EVIDENCE OF CULTURAL EXPRESSIONS OF PSYCHOLOGICAL INJURY

- The challenge lies in identifying and articulating the cultural expressions of psychological injury, its manifestation within the self and as an individual placed within a community
- Communicated through words and actions, facial expressions and what is not said

RECOMMENDATIONS


- Properly informed an Assessor may be able to take into account the unverbaliised manifestations
- Cultural Awareness training/evidence from appropriately trained professionals (deliverable 99)
- Well-structured, culturally communicative victim impact statements (VIS)
- Meeting face to face: informal hearings (Deliverable 60)

HEALING

- Section 6: Compensation for certain losses
 - traditionally been approved for treatment recommended by mainstream health professionals who adopt a biomedical approach focussed on categorising, diagnosing and treating on an individualistic basis
- Body of academic work advocating for a changed approach to treatment from the universal individualisation of human behaviour towards holistic connection to contemporary support networks linking people, culture and place.



OBSERVATIONS

- Importance of community in maintaining social and emotional obligations through kinship networks
 - The role of kinship in the process of healing as a culturally appropriate approach to First Nation people's mental health and wellbeing
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RECOMMENDATIONS TO MEET DELIVERABLE 98

- The importance of self-determination through a process of social, cultural, and economic choice: understanding manifestations of injury including inherited experience
- Culturally safe workforce: practitioner and patient coming from the same racial background to be culturally empathetic
- The role of community/kinships in individual healing – helping address the out of placeness.
- Culturally safe accessibility to services: access to services on Country

CONCLUSION


Legislative reform, culturally appropriate education, training and service delivery and a shift in the approach to these experiences will improve outcomes for Aboriginal victims of crime in Western Australia.

Balance the needs of the community with the need to maintain economic viability of the scheme.

Meet the deliverables set out in the RAP

WHAT CAN BE DONE NOW?

1. Practical and informative cultural awareness training
2. Properly constructed, descriptive statements in the applicant's own language
3. Improved/alternative service delivery: new model for the outreach program

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4. If obtaining or providing medical/medico-legal reports:-
 - a. Be aware of different ways emotion can be expressed and communicate the applicant's expression of these to the report writer;
 - b. Reframe 'treatment' as 'healing' and explore culturally safe alternatives to conventional forms of treatment.
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