WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

24 March 2014

Committee Secretary
Senate Standing Committees on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Email: community.affairs.sen@aph.gov.au

Dear Committee Secretary

Senate Community Affairs Reference Committee Inquiry into Grandparents who take primary responsibility for raising their grandchildren

Background

1. Women's Legal Services NSW (WLS NSW) thanks the Senate Community Affairs Reference Committee for the opportunity to comment on the inquiry into grandparents who take primary responsibility for raising their grandchildren.

2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.

3. WLS has an Aboriginal Women's Legal Program (IWLP) which delivers a culturally appropriate legal service to Aboriginal women in NSW. We provide an Aboriginal legal advice line, participate in law reform and policy work, and provide community legal education programs and conferences that are topical and relevant for Aboriginal and Torres Strait Islander women.

4. An Aboriginal Women's Consultation Network guides the IWLP. It meets every quarter over 2 days to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. This network liaises with the WLS NSW Board.

5. This submission will focus on the experiences of Aboriginal and Torres Strait Islander women. While we note this inquiry is about grandparents, the issue is often raised in

Aboriginal and Torres Strait Islander communities that kinship is extensive in Aboriginal and Torres Strait Islander communities, including parents, grandparents, great grandparents, sisters and brothers, aunts and uncles, daughters and sons, nieces and nephews. Furthermore, kinship extends beyond blood relatives within kinship groups.

6. Therefore when the term 'grandparent' is used in this submission we intend there to be a wider meaning with respect to Aboriginal and Torres Strait Islander communities.

7. Our submission focuses on the barriers that exist that prevent grandparents who are the primary carers of children (either in the short or long term) from obtaining adequate financial, legal and social support; and housing and recognition.

8. In summary, we recommend:

   8.1 The term 'grandparent' should be expanded to recognise other non-parent carers in Aboriginal and Torres Strait Islander kinship groups;

   8.2 The NSW Statutory Declaration for Informal Relative Caregivers should be accepted by all state and federal government agencies;

   8.3 A community awareness campaign about financial and non-financial support available for grandparents and how to establish grandparents are the primary caregivers of children be developed with the active participation of grandparents;

   8.4 The NSW Statutory Declaration for Informal Relative Caregivers should be valid for 12 months;

   8.5 Special processes to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities as outlined by the Family Law Council in 2004 described as Option 2;

   8.6 The agency at which the document described by the Family Law Council in Option 2 be registered be an agency other than a government agency;

   8.7 Better recognition that Aboriginal and Torres Strait Islander families are suffering the effects of trans-generational traumas and disenfranchised grief and should be provided appropriate support to address their traumas;

   8.8 Where consent is not provided by one or both parents of an Aboriginal and Torres Strait Islander child to recognise an appropriate person under Aboriginal and Torres Strait Islander customary law as having parental responsibility (Family Law Council Option 2), mediation be available for the parents and grandparents. Where one or both parents withdraw consent and a grandparent has concerns about the safety or well-being of the child, mediation should also be available;

   8.9 Additional funding for early intervention legal services and support;

   8.10 An Aboriginal and Torres Strait Islander caseworker be assigned to an Aboriginal and Torres Strait Islander family where child protection services are involved; and

   8.11 Grandparents with the primary care of children should be able to access respite without the fear of being judged and deemed no longer able to care for their grandchildren.

Recognition of grandparent carers who have primary responsibility for children

Practical challenges – informal arrangements

9. We note the need for better recognition of grandparents as primary carers of children has been an issue discussed over a number of years.

10. We refer to a question on notice at the 2012-13 Additional Estimate Hearings about Government support for grandparent carers. The question asked for an update on the outcomes and recommendations made following agreement in 2006 at the Community and Disability Services Ministers' Conference 'that all jurisdictions would work towards the provision of government support for grandparent carers raising children outside the foster care system.'[1]

11. The response states:

> *In 2007, an update was provided to the Community and Disability Services Ministers' Conference on this action. It was found that a significant barrier for many grandparents caring for a child in an informal arrangement is having a consistent and recognised method to prove their care-giving status in order to access relevant government and other services.*
>
> *To address this issue, Ministers agreed in principle to support the Informal Relative Caregiver's Statutory Declaration at a national level, agreeing to individual jurisdictions considering their particular legislative and policy requirements for implementing a version of the Declaration.*
>
> *The Declaration was implemented in South Australia on 9 May 2007, and similar statutory declarations have since been implemented in the Australian Capital Territory, New South Wales, and Victoria.*
>
> *Within the Commonwealth, a Statutory Declaration may be accepted by Centrelink and Medicare as one piece of evidence of an informal carer's (including grandparent carers') care-giving status.*
>
> *The Australian Government supports formal and informal grandparent carers by ensuring they are eligible for the full range of government family payments including Family Tax Benefit, Parenting Payment and Child Care Benefit, on the same basis as other families.*
>
> *The Government has also established specialist Grandparent Advisers to help grandparent carers access Centrelink payments and services and provide referrals to other community service providers. Grandparent Advisers can be accessed in selected Centrelink Customer Service Offices across Australia or via telephone.*[2]

12. In our experience, few grandparents are aware of the NSW Statutory Declaration for Informal Relative Caregivers document ('NSW Informal Caregivers Statutory Declaration'). This document can be used as evidence of a non-parent's care-giving status. The Informal Caregivers Statutory Declaration is made under the *Oaths Act 1900* – NSW state legislation.

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[1] Answers to Estimates Questions on Notice, Families, Housing, Community Services and Indigenous Affairs Portfolio, Question 100, 2012-13 Additional Estimates Hearing accessed on 21 march 2014 at: http://www.aph.gov.au/~/media/Estimates/Live/clac_ctte/estimates/add_1213/FaHCSIA/Answers/100.ashx

[2] Ibid.

13. We further note there is a lack of certainty that the NSW Informal Caregivers Statutory Declaration can be used or would be accepted by all state and federal government agencies. It states on the NSW Informal Caregivers Statutory Declaration that 'some government agencies may not accept the Declaration or may require additional proof and/or information to support the Declarant's claim that they have day–to–day responsibility for the child.'

14. We submit that certainty of acceptance of the NSW Informal Caregivers Statutory Declaration by all state and federal government agencies may increase its use.

15. Further, of itself, the NSW Informal Caregivers Statutory Declaration appears to be insufficient for the purposes of taking the child to the doctor or dentist[3] or enrolling the child in school as these would involve parental responsibility and the Informal Caregivers Statutory Declaration does not change parental responsibility.

16. In our experience a child may be in the primary care of his/her grandparents for some years without a document to recognise this and it is not until, for example, a medical emergency involving the child arises or the child is about to start school that the need for a document providing evidence of primary care is required.

17. While we agree evidence to support a claim of primary care of children is required, we recommend a community awareness campaign be developed with the active participation of carers so there is greater understanding within the community about the kind of evidence required and when it is best to collect such evidence.

18. The community awareness campaign should also include information about the financial and non-financial supports and services to which carers are eligible. For example, in our experience very few people know of the grandparent advisers referred to in the answer to the question on notice above.

19. The NSW Informal Caregivers Statutory Declaration is valid for 6 months. We refer to the Statutory Declaration for Informal Relative Caregivers in Victoria and note it is valid for 12 months. Given the Informal Caregivers Statutory Declaration (NSW) is invalid from the 'point in time the child stops living with the Declarant' we submit having to complete an Informal Caregivers Statutory Declaration every 6 months is unnecessarily onerous for the relative carer. We therefore recommend the NSW Informal Caregivers Statutory Declaration be valid for 12 months unless the child stops living with the Declarant before this time.

Recommendations

The NSW Statutory Declaration for Informal Relative Caregivers should be accepted by all state and federal government agencies.

A community awareness campaign about financial and non-financial support available for grandparents and how to establish grandparents are the primary caregivers of children be developed with the active participation of grandparents.

The NSW Statutory Declaration for Informal Relative Caregivers should be valid for 12 months.

[3] See Justice and Attorney General, *NSW Statutory Declaration for Informal Relative Caregivers: Frequently asked questions* (accessed on 21 March 2014)

Family Law Council recommendation

20. In 2004 the Family Law Council acknowledged the need to develop special processes to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities:

> *Council sees merit in considering easier ways of recognising the parental responsibilities of non-biological parents in Aboriginal and Torres Strait Islander communities. The aim would be to devise processes which do not in most cases require a full scale court application with its attendant costs and difficulties*.[4]

21. The Family Law Council outlined 3 possible options which are extracted in full below:

> *Option 1*
>
> *Create a special procedure by legislation departing from the normal procedures under the Family Law Act for recognition of non-biological parents as having parental responsibility. This legislation would allow an appropriate person under Aboriginal and Torres Strait Islander customary law to be recognised as having parental responsibility for the purposes of Federal law where both biological parents indicate their consent without having to go through a complex and court-based process. Simple registration with a Government agency familiar to Aboriginal and Torres Strait Islander people such as Centrelink would be all that is required.*
>
> *That parental responsibility could last for as long as neither biological parent withdraws his or her consent. An application to a court or to the Administrative Appeals Tribunal might be required in a situation where the primary caregiver consents (e.g. the mother) but the father either does not consent, or cannot be located for the purposes of seeking consent.*
>
> *Option 2*
>
> *Same as option 1, but the recognition of parental responsibility would be for all purposes, state and federal. This would then cover medical treatment and schooling for example. This could only be done after appropriate consultation with the States and Territories.*
>
> *Option 3*
>
> *Amend specific legislation on child support, family tax benefit or whatever, to create a process whereby non-parent persons can be recognised as exercising primary parental responsibility for the purposes of that Act e.g. receiving child support payments or family tax benefits.*
>
> *Council believes that this is not an issue that can be resolved by the Commonwealth alone given the range of benefits and services provided by State and Territory governments. We also believe that requiring that this matter be determined on a legislation by legislation basis is a complex solution and one that is unlikely to be welcomed by Aboriginal and Torres Strait Islander people. On this basis Council believes that Option 2 above offers the best practical approach to dealing with this issue.*[5]

22. We support Option 2 in principle, as the recognition of parental responsibility would apply to

[4] Cited in Family Law Council, *Improving the Family Law System for Aboriginal and Torres Strait Island Clients*, February 2012, Part 5.10.2 at 83.
[5] Family Law Council, Note 4 at 84.

both state and federal jurisdictions and would, for example, include medical treatment and schooling.

23. We note due to past government policies which have resulted in dispossession of land, the forced removal of children and the loss of connection to land and cultural identify, Aboriginal and Torres Strait Islander people may be reluctant to register a document regarding the care of Aboriginal and Torres Strait Islander children with a government agency. Consideration should therefore be given to registering the document with an agency other than a government agency.

Role of mediation

24. There needs to be better recognition that Aboriginal and Torres Strait Islander families are suffering the effects of trans-generational traumas and disenfranchised grief. Family violence may present in multiple forms including: parents to children; parents to grandparents where grandparents have intervened due to safety concerns about their grandchildren; grandchildren to grandparents where the grandchildren may have been raised in a situation of violence but miss their parents. It is vital that appropriate support be available to help people address their traumas.

25. In our experience, many grandparents want the opportunity to meet with the parents of the grandchildren to try and heal the broken relationships and help the parents resume their role as primary carers of their children when they are ready to do so.

26. We therefore recommend where consent is not provided by one or both parents that mediation be available for the parents and grandparents. Where one or both parents withdraw consent and a grandparent has concerns about the safety or well-being of the child, mediation should also be available.

27. We have had Aboriginal and Torres Strait Islander grandparent clients who have indicated that the option of culturally appropriate and responsive mediation should be more widely utilised in Aboriginal and Torres Strait Islander grandparent carer cases to ensure the people making decisions about the children's long-term care and welfare are the children's family – not state or commonwealth agencies or Courts.

28. This is particularly important given as at the 30 June 2011 there were 6060 Aboriginal children and young people in out-of-home-care.[6] Many in Aboriginal and Torres Strait Islander communities refer to these children and young people as 'the next generation of the stolen generation.'

29. Given many current family dispute resolution models are set up on the basis of having two primary caregivers only: that is, a mother and father, it is important that the mediation process be inclusive of all relevant parties: that is, parents and grandparents. We submit such mediation would more likely be effective if adequate time and resources were invested, particularly in pre-mediation processes. Time must be allowed for parents and grandparents to understand, reflect upon and have their say about the options. Further, the service delivery of these mediation services must be culturally responsive. We submit this would include having Aboriginal and Torres Strait Islander mediators.

30. We acknowledge that mediation may not be appropriate in all circumstances, for example if there is family violence. However, we also acknowledge that mediation is possible in some circumstances of family violence, provided there is an appropriate risk assessment, safeguards

[6] Cited in NSW Government, *Child Protection Legislative Reform Discussion Paper*, November 2012 at 33.

are in place and the victim of violence is adequately supported.

Recommendations

Special processes to provide adequate functional recognition of the particular child rearing and kinship practices within Aboriginal and Torres Strait Islander communities as outlined by the Family Law Council in 2004 described as Option 2.

The agency at which the document described by the Family Law Council in Option 2 be registered be an agency other than a government agency.

Better recognition that Aboriginal and Torres Strait Islander families are suffering the effects of trans-generational traumas and disenfranchised grief and should be provided appropriate support to address their traumas.

Where consent is not provided by one or both parents of an Aboriginal and Torres Strait Islander child to recognise an appropriate person under Aboriginal and Torres Strait Islander customary law as having parental responsibility, mediation be available for the parents and grandparents. Where one or both parents withdraw consent and a grandparent has concerns about the safety or well-being of the child, mediation should also be available.

Practical challenges – formal arrangements

31. As noted by the Family Law Council above there are practical barriers to using the family law system such as costs and other difficulties.

32. To enshrine particular living arrangements for children into a legally binding document, grandparents would either need the consent of the parents to enter into Consent Orders or would need to initiate/participate in Court proceedings seeking orders by the Court about children. This presents many complex problems for grandparents.

33. Grandparents are formally recognised under the *Family Law Act 1975 (Cth)* as being persons who are permitted to seeking orders in the federal Family Law Courts about children and as being persons of particular importance to children.[7]

34. In our experience, the practical barriers that often prevent grandparent carers from using the family law system include:

    - dealing with possible conflict/resistance and/or family violence from their own child, the parent of the grandchild;

    - health related issues due to age as well as a result of stress from Court proceedings potentially impacting on their capacity to care for their grandchildren;

[7] For example, section 65C(ba) *Family Law Act 1975 (Cth)* provides a grandparent can apply for a parenting order.

- the model of family dispute resolution has been set up on the basis of only having two primary caregivers, namely a mother and father and does not adequately recognise kinship groups;

- difficulties in securing legal aid: in some of our clients' experiences they have observed when comparing their grandparent caring stories that the more articulate the client the better their chances of getting a grant of aid; and

- an inability to fund contested litigation about the living arrangements of the children where legal aid is not available.

35. However, in some circumstances it is important for grandparents to pursue family law proceedings before a child is removed by the state. The benefit in these circumstances is there is an increased likelihood that the child will stay with family members instead of going into 'care.'

36. Our IWLP program adopts such an early intervention approach. In many cases this has resulted in reduced acrimony within the family, safer arrangements for children, reduced trauma (noting the trauma associated with a child's removal) and we submit is a better use of state and federal resources as opposed to the costs of removing a child from his/her family and assuming him/her into care.

37. We submit that more funding is required for such meaningful early intervention legal services and support.

38. We would anticipate such investment would have significant social benefits, including protecting children from harm while simultaneously allowing them to remain with people they know. It would also allow Aboriginal and Torres Strait Islander children continued opportunities to foster their cultural identity.

39. It is important in such circumstances that grandparents have access to financial support for taking on this caring role, just as foster carers would have access to financial support.

Recommendation

Additional funding for early intervention legal services and support.

Financial & non-financial support – parity with foster carers

40. There are legislative provisions that enable grandparents who are the primary carers of their grandchildren – and have the consent of the parents to be the primary carers – to be eligible to receive child support payments from the parents. However, if a parent does not explicitly give their consent, then the grandparents do not then have the requisite proof required by Child Support to make them eligible payees.

41. In our experience some grandparents are not aware they have rights to financial support from the parents under the child support legislation or do not wish to pursue such financial support for fear of the parents removing the children should they have to start paying for the

grandparents to care for their children. The risk to the child's safety is the prohibiting factor of grandparents pursuing child support from parents in these situations.

42. We have heard from some grandparents that they risk losing the care of the children if the grandparent carers apply for financial support such that the parents have their government payments cut off. In these circumstances, parents are likely to take the children back into their household. This is a scenario that is not limited to Aboriginal and Torres Strait Islander families.

43. The grandparents are thus faced with a choice: protection of the child versus obtaining appropriate government financial support.

44. Furthermore, some relative/kinship carers speak of the desire to have 'parity with foster carers in terms of the supports available to them' and the importance of resources available 'to assist them to assist the children to flourish.'[8] They also speak of the challenges when DoCS, as they were then called, and Centrelink are unable to provide accurate responses to questions about entitlements and support services.[9] They also raise the issue of the need for training, but have been advised they are not eligible for such training or it was on at times that they were unable to attend.[10]

Housing

45. Issues with housing are a common theme raised amongst grandparent carers. We are aware of grandparents who have been charged more rent due to taking on the care of their grandchildren despite the fact they receive little or no additional financial assistance for taking on the primary care of their grandchildren.

46. In other circumstances, grandparents have been threatened with eviction due to allegations of overcrowding.

47. It is concerning that grandparents are at risk of being evicted or being charged more rent in circumstances where they take on the primary care of children and receive little or no additional financial support for doing so.

Access to legal and other support services

Role of Aboriginal and Torres Strait Islander caseworkers

48. To ensure a culturally responsive approach to matters involving the care of Aboriginal and Torres Strait Islander children there needs to be an Aboriginal and Torres Strait Islander caseworker assigned to Aboriginal and Torres Strait Islander families where child protection services are involved.

49. We hear anecdotally that in mainstream services rather than allocating an Aboriginal and Torres Strait Islander caseworker to work directly with Aboriginal and Torres Strait Islander families, there tend to be Aboriginal and Torres Strait Islander staff appointed to advise the service more generally about culturally appropriate practices.

[8] Ainslie Yardley, Jan Mason, Elizabeth Watson, *Kinship Care in NSW – finding a way forward*, University of Western Sydney, November 2009 at 39.
[9] Ibid at 40.
[10] Ibid at 41.

Financial support for other family members to provide respite

50. All carers, parents and grandparents alike, need a break from care duties from time to time. We submit there needs to be an acknowledgement that seeking a brief break from full-time care duties is acceptable and recommended to ensure the longevity of the care arrangements.

51. Grandparent carers are typically part of the ageing population and may be more likely to suffer some health issues that may have an impact on the full-time care of their grandchildren.

52. We note the life expectancy at birth for Aboriginal and Torres Strait Islander males is estimated to be 67.2 years, and 72.9 years for females. There is a gap of 11.5 years for males and 9.7 years for females between Aboriginal and Torres Strait Islander life expectancy and non-Aboriginal and Torres Strait Islander.[11]

53. To increase the sustainability of the care arrangements, it is therefore important that grandparents are supported and have the opportunity to have a break without the fear that they may be deemed no longer able to care for their grandchildren.

54. There is an intergenerational fear amongst Aboriginal and Torres Strait Islander communities of having kids taken.

55. We understand that some grandparents are reluctant to disclose health issues for fear their children will be assumed into care.

56. Support can come in a variety of forms, including other family members or members of the kinship group taking on this caring role for a short period. Financial support should be available for this.

Recommendations

An Aboriginal and Torres Strait Islander caseworker be assigned to an Aboriginal and Torres Strait Islander family where child protection services are involved.

Grandparents with the primary care of children should be able to access respite without the fear of being judged and deemed no longer able to care for their grandchildren.

Yours faithfully,
Women's Legal Services NSW

Janet Loughman
Principal Solicitor

[11] ABS, 4704.0 - The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples, Oct 2010