

# Chapter 6

## Barriers in acquiring legal recognition

6.1 There is no data on the number of informal grandparents raising grandchildren in Australia. One research study has estimated that the ratio of informal to formal kinship carers is about three to one.<sup>1</sup> However, witnesses who gave evidence to the inquiry considered that the ratio is four to one or higher.<sup>2</sup> In either case, there are a significant number of grandparents raising their grandchildren without legal recognition.

6.2 The legal status of grandparents raising grandchildren is important for a number of reasons, including: to facilitate the return of children to their grandparents care (when removed by the birth parent(s)); the ability to exercise parental responsibilities (decision-making in relation to education, health or travel issues); and as a determinant of the grandparents' ability to access supports and services.<sup>3</sup> Wanslea Family Services Inc. (Wanslea) submitted, for example:

[The inability to sign consents] can present significant issues when attempting to access health services. It also means that the grandchildren cannot be included on their grandparents' Medicare card or private health insurance, representing a further barrier to accessing health services...[T]hese children often arrive with additional health and support needs due to their early experiences, and not being able to access health services increases their vulnerability and poor long-term outcomes.<sup>4</sup>

6.3 COTA Australia similarly submitted:

[A lack of formal status] means that grandparents are not eligible for financial assistance and children do not have the security of knowing they are in a permanent relationship. The lack of a formal order can also restrict [grandparents'] access to other support services[.]<sup>5</sup>

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1 Smyth, C. and T. Eardley (2008), *Out of Home Care for Children in Australia: A Review of Literature and Policy*, SPRC Report No. 3/08, prepared for the Department of Families, Housing, Community Services and Indigenous Affairs, Social Policy Research Centre, University of New South Wales, Sydney, p. vi.

2 For example: Dr Caroline O'Neill, Permanent Care and Adoptive Families, *Committee Hansard*, Melbourne, 10 June 2014, p. 53; Ms Meredith Kiraly, Kinship Care Researcher and Consultant, The Centre for Excellence in Child and Family Welfare Inc. (Centre for Excellence), *Committee Hansard*, Melbourne, 10 June 2014, p. 58.

3 For example: Federal Circuit Court of Australia, *Submission 91*, p. 2; North West Grandparents Raising Grandchildren Tasmania, *Submission 100*, p. [3]; Women's Legal Services NSW (WLS NSW), *Submission 138*, p. 8; National Legal Aid (NLA), *Submission 141*, p. 3; Law Council of Australia (LCA), *Submission 148*, p. 1.

4 *Submission 150*, p. 8.

5 *Submission 113*, p. 8.

6.4 For various reasons, however, many grandparents cannot, or choose not to, formalise care arrangements for their grandchildren.<sup>6</sup> For example, Dr Caroline O'Neill from Permanent Care and Adoptive Families gave the following evidence:

[A] fairly typical scenario for how people get into non-statutory care is that the police or some other organisation will ring a grandparent or other relative or neighbour or friend or whoever and say, 'We have these kids here, can you come and take them?' Of course you are going to take them. In that moment of taking them, you usually lose any possibility of statutory status. In Victoria, for instance, the [Department of Human Services (Vic)] will say the children are now safe so we do not need to go to court; we do not need to register these people formally and therefore they will not get any support at all.<sup>7</sup>

6.5 The three barriers to acquiring legal recognition examined in this chapter are:

- financial constraints, particularly where the grandparents do not receive Legal Aid;
- lack of knowledge regarding legal rights and the legal system; and
- an unwillingness to exacerbate family tensions by initiating legal proceedings.

6.6 Participants in the inquiry commented on these three themes, focussing on the Family Court of Australia, Family Court of Western Australia and the Federal Circuit Court of Australia (family law courts) jurisdiction, as well as the state and territory courts which are empowered to grant care and protection orders (Children's Courts, Youth Courts and Magistrates Courts).

### **Financial constraints**

6.7 Submitters and witnesses argued that financial constraints prevent some grandparents from formalising care arrangements for their grandchildren, particularly where the grandparents cannot access Legal Aid or afford other legal assistance and representation.

6.8 National Legal Aid (NLA) and Gosnells Community Legal Centre Inc. (Gosnells) highlighted two primary reasons why these grandparents require professional legal services:

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6 For example: Dr Marilyn McHugh, *Submission 17*, p. 2; The Salvation Army, *Submission 108*, p. 5; Tangentyere Council, *Submission 112*, p. 2; Australian Human Rights Commission (AHRC), *Submission 133*, p. 11. Other barriers which are referred to throughout this report include: distrust of formal processes and bodies; reluctance to involve child protection authorities; and intrusion into family affairs.

7 *Committee Hansard*, Melbourne, 10 June 2014, pp 53-54.

- for advice regarding whether a care and protection order or a Parenting Order/Parenting Plan<sup>8</sup> is in the best interests of their grandchildren (especially where the children have complex needs); and
- for general information, advice and representation.<sup>9</sup>

6.9 Further, the Federal Circuit Court of Australia (Federal Circuit Court), which deals with the vast majority of family law parenting disputes, noted that grandparents raising grandchildren might:

...have difficulty in securing an order in the Court, [particularly] if they have to make an application without assistance or legal representation.<sup>10</sup>

### ***Legal Aid***

6.10 Participants stated that grandparents raising grandchildren cannot access the professional services provided by state and territory Legal Aid Commissions (LACs) due to prohibitive eligibility criteria and the prioritisation of birth parents' grant applications.<sup>11</sup>

### ***Eligibility criteria***

6.11 LACs provide legal assistance to disadvantaged people but, to qualify for legal representation, an applicant must first satisfy a means and merits test, as well as meet the relevant commission's guidelines.<sup>12</sup>

6.12 Submitters and witnesses maintained that grandparents often fail the means test 'because of the assets that they have, for example a family home against which they could borrow'.<sup>13</sup> NLA noted that, in such circumstances, the grandparents can still access the LAC's free services (such as the Family Law Duty Lawyer Scheme,

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8 A 'Parenting Order' is an order, by consent or judicially determined, that may specify the person(s) with whom a child is to live and allocate 'parental responsibility' for that child: sections 61B and 64B of the *Family Law Act 1975* (Cth) (Act). A 'Parenting Plan' is a written agreement made by the birth parents and dealing with certain matters, such as where a child is to live and who is to exercise 'parental responsibility' for the child: section 63C of the Act.

9 NLA, *Submission 141*, p. 4; Gosnells Community Legal Centre Inc. (Gosnells), *Submission 37*, p. 3.

10 *Submission 91*, p. 2.

11 North Australian Aboriginal Justice Agency (NAAJA) noted also that the ability of Aboriginal and Torres Strait Islander grandparents raising grandchildren to apply for Legal Aid is compromised by geographic and language considerations: Mr Matthew Strong, *Committee Hansard*, Darwin, 5 August 2014, pp 4-5.

12 Attorney-General's Department, *Legal Aid*, available at: <http://www.ag.gov.au/LegalSystem/Legalaidprogrammes/Pages/Legalaid.aspx> (accessed 18 September 2014).

13 NLA, *Submission 141*, p. 2. Also see, for example: Relationships Australia, *Submission 58*, p. [4]; Mrs Nicole Patton, The Mirabel Foundation, *Committee Hansard*, Melbourne, 10 June 2014, p. 4.

and advice or minor assistance from an LAC office or outreach service).<sup>14</sup> The Department for Child Protection and Family Support (WA) advised that it also exercises a role in supporting grandparents who have not obtained a grant of Legal Aid:

[T]he department's role at times is to support grandparents and other carers to access and apply for parenting orders through the Family Court. We would step in quite formally there, write to the Family Court, confirm our support of that arrangement or not and we would stay involved in a case management sense, facilitate access to some practical and emotional support [for] those carers. But we are not funded—and we are not a legal provider—to facilitate access to legal representation.<sup>15</sup>

6.13 Grandparents For Grandchildren SA Inc. described the means test as 'harsh', submitting that grandparents raising grandchildren must sometimes liquidate assets to finance legal proceedings. Further:

The period for finalisation of a custody case can take as long as [two] years or more and may result in destitution for the grandparents, with no funds remaining to purchase [the] necessities of life.<sup>16</sup>

6.14 The Mirabel Foundation similarly commented on how a LAC's decision not to make a grant of Legal Aid adversely affects grandparents who raise their grandchildren:

[It] means re-mortgaging their home. It means downsizing. It means going back to work. It means sometimes hundreds of thousands of dollars in legal representation costs, which is something that of course [the carers] have not planned for but which obviously impacts their ability to then parent their grandchildren.<sup>17</sup>

6.15 The Aboriginal and Torres Strait Islander Legal Service (Qld) Ltd (ATSILS Qld) opposed compelling grandparents to use their income or savings on legal services:

Assistance should be available to grandparents across the board—or at the very least (for those above the means test) with minimal financial contribution required.<sup>18</sup>

6.16 Community Legal Centres NSW and The Aged-care Rights Service Inc. (TARS) indicated that contributions toward the cost of legal proceedings could still render those proceedings unaffordable for some grandparents raising grandchildren

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14 *Submission 141*, p. 2 and Attachments C-D. Ms Julie Jackson, Legal Aid Western Australia Representative, Family Law Working Group, noted 'one could not expect that one would be able to manage the whole of their Family Court proceedings with the assistance of the duty lawyer scheme': *Committee Hansard*, Canberra, 20 June 2014, p. 15.

15 Ms Emma White, *Committee Hansard*, Perth, 6 August 2014, p. 13.

16 *Submission 55*, p. 3.

17 Mrs Nicole Patton, *Committee Hansard*, Melbourne, 10 June 2014, p. 4.

18 *Submission 134*, p. [6].

(particularly when Legal Aid grants are exhausted).<sup>19</sup> A representative from TARS added:

We have had desperate calls from people whose funding grant has run out, and so [has] the solicitor, because they cannot afford to pay for the rest of it. And that is usually [at] the most critical time.<sup>20</sup>

6.17 Participants called for state and territory governments to review the eligibility criteria for Legal Aid,<sup>21</sup> with the Commonwealth assisting where possible,<sup>22</sup> to enable grandparents to access professional legal services when seeking to formalise care arrangements for their grandchildren.

#### *Prioritisation of birth parents' grant applications*

6.18 In addition to eligibility criteria, participants indicated that grandparents raising grandchildren are prevented from accessing Legal Aid by the prioritisation of birth parents' grant applications. UnitingCare Tasmania reported that some grandparents:

...noted the unfairness of a system that provides Legal Aid to parents with addictions or mental illness to regain custody or access while the [grandparent], who in their own opinion, is 'saving' the grandchild/ren from harm, is deemed ineligible for Legal Aid.<sup>23</sup>

6.19 A few organisations—The Centre for Excellence in Child and Family Welfare Inc. and Mission Australia—remarked on the behaviour of birth parents who receive Legal Aid and who intentionally prolong the legal process at great expense to the grandparents.<sup>24</sup>

6.20 NLA acknowledged that 'decisions about whether or not to make a grant of aid are...made in the context of competing priorities for limited funds'.<sup>25</sup> Acknowledging this situation, the Shoalcoast Community Legal Centre Inc. (Shoalcoast CLC) noted that there are no easy solutions to address the demand for, or allocation of, limited Legal Aid funding.<sup>26</sup>

6.21 However, a NLA representative indicated that the merit of ongoing funding will be reviewed at all stages in the proceedings: 'so, although it may well be the case

19 *Submission 139*, p. 10 and *Submission 64*, p. 7, respectively. Also see: Mr Roy Cox, *Committee Hansard*, Albany, 7 August 2014, p. 25.

20 Mrs Margaret Small, Solicitor, Older Persons Legal Service, *Committee Hansard*, Sydney, 13 June 2014, p. 44.

21 For example: AHRC, *Submission 133*, p. 11.

22 COTA Australia (COTA), *Submission 113*, p. 8.

23 *Submission 65*, p. 12.

24 *Submission 169.1*, pp 11-12; Mr Brett Fahey, Mission Australia, *Committee Hansard*, Sydney, 13 June 2014, p. 45.

25 *Submission 141*, p. 2.

26 *Submission 87*, p. 4.

that a parent is funded at the outset, over time Legal Aid will continue to consider the appropriateness of that funding'.<sup>27</sup>

6.22 In relation to Aboriginal and Torres Strait Islander families, ATSILS Qld advised that it too is sometimes constrained in the provision of legal services by a conflict of interests. However, similar to the North Australian Aboriginal Justice Agency (NAAJA) in the Northern Territory,<sup>28</sup> there are few alternate providers. ATSILS Qld highlighted the effects of a lack of access to legal services, including: birth parents not agreeing to consent orders, or agreeing without fully understanding the implications of the orders; and the need for grandparents raising grandchildren to pursue contested Parenting Orders.<sup>29</sup>

### ***Legal assistance and representation***

6.23 Submitters and witnesses argued that the affordability of legal assistance and representation is a key barrier preventing some grandparents from formalising care arrangements. Without a grant of Legal Aid, these costs can be significant and/or prohibitive.<sup>30</sup> Mr John Ward, grandparent, described legal costs ranging from \$3,000 to \$165,000 and the example of one grandparent who could not afford to take on the care of a grandchild for such reasons:

One gentleman rang me one night from up on the north-west coast in tears. He had another grandchild who wanted to come and live with him, but he said he could not afford the court costs. I said, 'Just fill out your paperwork, and you'll get the large sum of \$28 per week', which was the same as the rest of [the] grandparents were received at that particular time.<sup>31</sup>

6.24 Wanslea submitted:

Even though [the grandparents] might own some key assets, such as their home, they do not necessarily have ready access to cash. Further, caring for their grandchildren has already placed a significant burden on their finances. The result is that legal services are unaffordable and inaccessible to grandparent carers in attempting to secure the long-term safety and care of their grandchildren.<sup>32</sup>

6.25 In one submission, a grandchild observed that some grandparents raising grandchildren pursue legal proceedings despite the immense cost:

[G]randparents have had to go into large amounts of debt, who were in a good position going into retirement, but have then had to go into debt, sell

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27 Ms Julie Jackson, *Committee Hansard*, Canberra, 20 June 2014, p. 12.

28 Mr Matthew Strong, *Committee Hansard*, Darwin, 5 August 2014, pp 2-3.

29 *Submission 134*, pp [5-6].

30 For example: Tweed Valley Kin Care Support Group Inc., *Submission 56*, p. 5; COTA, *Submission 113*, p. 8; LCA, *Submission 148*, p. 1.

31 *Committee Hansard*, Hobart, 19 September 2014, p. 2.

32 *Submission 150*, pp 7-8. Also see: Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission 140*, p. 5.

businesses, mortgage houses to be able to pay for the legal fees... Yeah my Nana's had to do that.<sup>33</sup>

6.26 An officer from the Department for Child Protection and Family Services (WA) noted that there is a wide continuum of experiences where some grandparents raising grandchildren incur greater legal costs than other grandparents who provide care to their grandchildren:

[W]e have a combination of experiences. There are some that are quite smooth, they are quite quick and they are not contested. We have other scenarios where, with what starts as a clear direction around a parenting order, as the family become more involved in that process, our department or other services become more involved in the family and other factors come into play and, in fact, the parenting order might not be the right strategy. It might be that care and protection orders may need to be considered and therefore the Family Court would cease and we would come into the Children's Court around a care and protection matter. There are a range of reasons that that process for a parenting order can be delayed and take considerable time.<sup>34</sup>

### **Lack of knowledge regarding legal rights and the legal system**

6.27 Participants in the inquiry argued that grandparents are also prevented from formalising care arrangements by a lack of knowledge regarding their legal rights and the legal system. Submitters and witness indicated that grandparents require access to information and advice to successfully navigate the system(s),<sup>35</sup> especially where grandparents self-represent in proceedings,<sup>36</sup> proceedings involve child protection authorities or proceedings involve more than one jurisdiction.

#### ***Self-representation***

6.28 The inability to afford professional services can result in grandparents raising grandchildren acting as self-represented litigants in legal proceedings. Self-representation involves many challenges which, the committee heard, can disadvantage the grandparents and, ultimately, the children for whom they care. Gosnells considered that self-representation by grandparents raising grandchildren is unjust:

These clients are often stressed from the responsibility of raising young children and dealing with ongoing conflict in their family. They are

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33 Centre for Excellence, *Submission 169.1*, pp 11-12 (quoting a grandchild). Also see: The Aged-care Rights Service Inc., *Submission 64*, p. 7, which noted the adverse effect of legal costs on grandparents raising grandchildren's financial security at a time when income and assets are finite.

34 Ms Emma White, *Committee Hansard*, Perth, 6 August 2014, p. 13.

35 For example: Mrs Gabrielle Heuft, Blue Care Multicultural Services, *Committee Hansard*, Sydney, 13 June 2014, p. 37; Ms Meredith McLaine, Shoalcoast Community Legal Centre Inc. (Shoalcoast CLC), *Committee Hansard*, Sydney, 13 June 2014, p. 41.

36 Ms Elizabeth McCrea, The Mirabel Foundation, *Committee Hansard*, Melbourne, 10 June 2014, p. 4.

physically exhausted from caring for children while often dealing with their own health problems associated with advancing age. It is unjust that they should also have to initiate [family law court] proceedings without legal assistance and representation.<sup>37</sup>

6.29 NLA highlighted that self-represented litigants must 'prepare, file, and negotiate complex and/or daunting legal proceedings either on their own or with very limited legal assistance'.<sup>38</sup>

6.30 Mr Patrick Mungar from Gosnells considered that community legal centres provide the most cost effective way to support grandparents raising grandchildren who commence proceedings in the family law courts:

In most cases the application will not be opposed. We are not talking about something which will result in a full-blown trial, but it would require some expert knowledge to draw the documentation in a way which would be acceptable to the court.<sup>39</sup>

6.31 A legal practitioner representing Shoalcoast CLC gave evidence regarding the assistance she currently provides to grandparents, to draw documentation in the care and protection jurisdiction:

I am particularly focusing on the care and protection [jurisdiction] at the moment, so that is advising family members who are not parents how to fill in an application for leave to be a party to the case and how to do an affidavit to go along with that and so forth. It is not ideal; representation is better. But it is something. There is not necessarily a lot of free legal advice services out there that would even be particularly familiar enough with the Children's Court to be able to give that advice.<sup>40</sup>

6.32 The Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS Vic) suggested that self-represented grandparents raising grandchildren might not be presenting the best evidence to the courts:

It is difficult for the Family Court of Australia to discharge its duty to make decisions in the best interests of the child (particularly Aboriginal children) when it is limited to the evidence raised by unrepresented parties. The court's role is also hampered where it is unable to avail itself of the evidence and input from grandparents who have key cultural knowledge because grandparents are unaware of their right to participate in proceedings, or are forced to appear without legal representation due to legal aid funding limitations.<sup>41</sup>

6.33 Both Tangentyere Council and the AFVPLS Vic advocated the need for courts to better recognise Aboriginal and Torres Strait Islander grandparents raising

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37 *Submission 37*, p. 4.

38 *Submission 141*, p. 4.

39 *Committee Hansard*, Perth, 6 August 2014, p. 60.

40 Ms Meredith McLaine, Shoalcoast CLC, *Committee Hansard*, Sydney, 13 June 2014, p. 49.

41 *Submission 140*, p. 5.

grandchildren, with the latter suggesting the implementation of culturally appropriate court procedures: 'there is no Aboriginal specific list in the Children's Court of Victoria (Family Division) or the Family Court of Australia'.<sup>42</sup>

***Proceedings involving child protection authorities***

6.34 Participants described specific barriers to acquiring legal recognition, which arise from proceedings involving child protection authorities, such as obtaining standing as a third party. The Mirabel Foundation explained that grandparents raising grandchildren become involved in the care and protection jurisdiction:

...when the department has a perspective, the parents have a perspective and the grandparents feel that the magistrate is not hearing the whole story...So they become a party to proceedings, if they are aware of the fact that they can do that.<sup>43</sup>

6.35 However, Shoalcoast CLC noted that becoming a party to proceedings generally requires the leave of the court, an application for which might or might not be covered by a grant of Legal Aid. Consequently:

Many grandparents...remain non-parties or unrepresented in these proceedings, despite having a genuine concern for the welfare of the child, and are hence essentially reliant on the hope the [Department of Family and Community Services (NSW)] will support and recommend them to be the child's carer.<sup>44</sup>

6.36 The Law Council of Australia noted that the involvement of child protection authorities generally renders grandparents 'eligible for legal assistance funded by the relevant state welfare authority when in court', so:

Financially disadvantaged grandparents may have no choice but to wait for departmental intervention before they can seek appropriate orders to effectively care for their grandchildren.<sup>45</sup>

6.37 However, participants stated that grandparents in informal care arrangements are often influenced by child protection authorities to formalise the arrangements in the family law courts.<sup>46</sup> Gosnells explained that this occurs when the authorities decide not to continue with proceedings in the care and protection jurisdiction:

We have seen a number of situations where [the Department for Child Protection and Family Support (CPFS) has] been involved with the family and where child protection orders have been in place for some time.

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42 *Submission 140*, p. 6. Also see: Tangentyere Council, *Submission 112*, p. 2.

43 Ms Elizabeth McCrea, *Committee Hansard*, Melbourne, 10 June 2014, p. 4.

44 *Submission 87*, p. [4]. Also see: Mr Matthew Strong, NAAJA, *Committee Hansard*, Darwin, 5 August 2014, pp 3 and 5-6.

45 *Submission 148*, p. 2. The LCA acknowledged that this alternative to self-representation 'may have a negative and significantly detrimental effect on the child or young person': Attachment A (contributed by the Queensland Law Society).

46 For example: NLA, *Submission 141*, p. 3.

The grandparents are told by the CPFS that they no longer consider the children to be in need of protection. The grandparents are then referred for legal advice and assistance to apply for Parenting Orders in the Family Court of WA. Sometimes there is pressure on the grandparents to commence proceedings in the Family Court as CPFS wish to withdraw from the Children's Court matter but insist that Parenting Orders be obtained so that the status quo continues. Grandparents can find [the] transition from one jurisdiction to another...quite confusing. They are often not aware that there are two separate pieces of legislation and two courts which can make decisions about children.<sup>47</sup>

6.38 Gosnells highlighted that the formalisation of care arrangements can affect grandparents' entitlement to financial supports and services:

In some instances where child protection orders are in place, grandparents do receive financial support from the state government. But when CPFS forms the view that the children are no longer in need of protection and propose to withdraw from the legal proceedings by not pursuing further protection orders, there is a negative impact for the grandparents because the financial support is withdrawn upon the grandparents assuming full parental responsibility for the children.<sup>48</sup>

6.39 More broadly, Mrs Shirley Fitzthum made the same point:

My child came to me through [CPFS] and I had him for six months under their ruling. I also had his sister at the time. The [CPFS] then came to me and said, 'Look, things are going really good. I think you should apply to the Family Court and get a parenting order, and we will support you to do that.' I did—I got the order—and then the [CPFS] said, 'You're nothing to do with us anymore.' None of their support was available after that; we were off their books.<sup>49</sup>

6.40 Ms Kiraly highlighted that regardless of the supports and services available to formal grandparents raising grandchildren, some grandparents prefer to remain in informal care arrangements:

The vast majority that are outside the statutory system have the same characteristics—parents with substance dependency, mental health issues and so on. Whether all would want to be inside the statutory system is another question. I have heard one or two say, 'Life would have been a lot easier with a proper allowance,' when they are living in poverty. On the other hand, they also say, 'From what I hear about going in and out of the courts and fighting through the courts, I am glad I did not have to deal with that.'<sup>50</sup>

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47 *Submission 37*, p. 3. Also see: Australian Association of Social Workers, *Submission 132*, p. 10.

48 *Submission 37*, p. 2. Also see: Ms Kaye Bendle, Grandparents Rearing Grandchildren WA (Inc.) (GRG WA), *Committee Hansard*, Perth, 6 August, 2014, pp 29-30.

49 *Committee Hansard*, Perth, 6 August 2014, p. 33.

50 *Committee Hansard*, Melbourne, 10 June 2014, p. 58.

6.41 In addition to these matters, Mr Matthew Strong from the NAAJA indicated that child protection authorities might not be amenable to resolving care arrangements independent of the legal process:

**Senator MOORE:**...[T]here is no process in the Northern Territory where that can be worked out in a face-to-face discussion? I just want to see whether we could cut through the legal aspects, whether, on an issue such as this, there is any ability for a conciliation as opposed to an arbitration.

**Mr Strong:** There is some room for that in the Act, but it has not been enacted, I understand. That would be preferable. We do try and have meetings with the [Department of Children and Families (NT)] and the family, but ultimately the say as to whether that goes ahead is the department's. With its strict guidelines it is difficult, sometimes, to get around that.<sup>51</sup>

### *Proceedings involving more than one jurisdiction*

6.42 In evidence, legal representatives indicated that one challenge for grandparents formalising care arrangements is navigating the complexities of the legal system. Ms Meredith McLaine from the Shoalcoast CLC explained that a key cause of this complexity is the 'interplay between...the federal family law and the state care and protection jurisdictions'.<sup>52</sup>

6.43 In its submission, NLA illustrated how inter-related legal proceedings can take place in both federal and state/territory jurisdictions, as well as multiple courts:

[I]n the family law court for "live with" orders; in the state/territory local court for personal protection orders; in the state/territory care and protection jurisdiction court; and in a state/territory court with criminal jurisdiction if charges have been brought as a result of an alleged incident relevant to the issue of whom the child should live with.<sup>53</sup>

6.44 Shoalcoast CLC noted:

There are no easy solutions to this complexity, which arises partly from the nature of our existing federal system (which separates the relevant laws for children between the Commonwealth family law and State child protection regimes), and partly from the inherent reality that each family and each case is distinct.<sup>54</sup>

6.45 In addition, the NAAJA highlighted that there is a degree of complexity incurred in cross-state matters, where two or more sets of child protection laws apply:

**Senator MOORE:**...[Case] law is exacerbated by being between two states, so you have got the added complexity of Western Australian and Northern Territory jurisdictions.

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51 *Committee Hansard*, Darwin, 5 August 2014, p. 4.

52 *Committee Hansard*, Sydney, 13 June 2014, p. 41.

53 *Submission 141*, p. 3.

54 Shoalcoast CLC, *Submission 87*, pp [3-4].

**Mr Strong:** Yes, that is correct.

**Senator MOORE:** Do you have many of those in your service because of the nature of your geography?

**Mr Strong:** We have matters with issues like that with family law being a federal service with relocation. So, with the Northern Territory being quite remote, people like to relocate fairly regularly which causes issues with children. We have some cross-border child protection matters with Western Australia where people are coming from, say, Broome to Darwin.

**Senator MOORE:** Do you have issues with Queensland with that area down on the border: Tennant Creek across the border in Queensland?

**Mr Strong:** I have only had the one matter that has had an issue with Queensland.<sup>55</sup>

6.46 In recent years, there have been a number of research projects and inquiries directed toward enhancing the family law and related systems' responses to various issues (such as: child abuse, family violence and family breakdown). NLA noted that identified issues are the subject of ongoing collaborative work between the Commonwealth, states and territories.<sup>56</sup>

6.47 In particular, in August 2009 the Standing Committee of Attorneys-General (now the Standing Council on Law and Justice) agreed to explore options to improve co-operation between the federal family courts and the state/territory child protection authorities.<sup>57</sup> NLA submitted:

The current collaboration between the federal family law system and the state and territory based child protection/child welfare authorities about sharing information such as experts reports, and streamlining processes across the systems, can be expected to ultimately benefit the children caught up in the family law and child protection systems and those who are endeavouring to provide care for them including grandparents.<sup>58</sup>

### ***Proposed solutions to remove financial and knowledge barriers***

6.48 Submitters proposed a range of solutions to remove the financial and knowledge barriers which inhibit or prevent grandparents from formalising care arrangements, such as: amending the Legal Aid eligibility criteria;<sup>59</sup> and funding a dedicated seniors' lawyer in each LAC.<sup>60</sup> Other participants focussed on alternate

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55 Mr Matthew Strong, *Committee Hansard*, Darwin, 5 August 2014, p. 2. Also see: Ms Julie Jackson, NLA, *Committee Hansard*, Canberra, 20 June 2014, p. 16.

56 *Submission 141*, p. 4.

57 Communiqué, 6-7 August 2009, p. 6, available at: [http://www.lccsc.gov.au/sclj/archive/former\\_sclj/communiques/2009\\_communiques.html](http://www.lccsc.gov.au/sclj/archive/former_sclj/communiques/2009_communiques.html) (accessed 20 October 2014).

58 *Submission 141*, p. 4.

59 For example: GRG WA, *Submission 50*, p. [3]; Country Women's Association of NSW, *Submission 19*, p. 2 (aligning the means test with the aged pension).

60 For example: Wanslea Family Services Inc., *Submission 150*, p. 9.

solutions: a greater role for community legal centres and enhanced assistance in navigating current systems.

### *Community legal centres*

6.49 Community legal centres and Aboriginal and Torres Strait Islander legal services described their current programs, which enable, or are targeted toward, the provision of legal assistance to grandparents raising grandchildren. At the same time, the committee heard that these programs do not have long-term financial security.<sup>61</sup>

6.50 NAAJA, whose practice comprises approximately 40 per cent civil law (including family and child protection law), gave the following evidence:

Our entire family law practice is reliant on additional funding [beyond core operation funding]. At this stage the additional funding ceases on 30 June 2015. That will mean that we will need to cease our family law service entirely...[W]e will have to make drastic changes to the delivery of our legal services to Aboriginal people. This will be disastrous in terms of the ability of Aboriginal people in the Top End to access justice. There is nobody else who can fill the gap. NAAJA is the only general civil law service that is available to people living in remote communities.<sup>62</sup>

6.51 Ms Priscilla Collins, Chief Executive Officer, noted that, in 2013-2014, NAAJA delivered family law and child protection legal services to over 620 Aboriginal and Torres Strait Islander people (including grandparents raising grandchildren), adding:

The impact of [the] cuts also needs to be understood in light of increasing demand for our services. The volume of work required of NAAJA to meet the legal needs of Aboriginal people in the Top End continues to grow, in part by virtue of demographics, but also because of changes to law and policy that impact particularly on Aboriginal people.<sup>63</sup>

6.52 Ms McLaine from the Shoalcoast CLC stated that its special program funding, for the provision of family law services to Aboriginal and Torres Strait Islander communities, is not certain beyond 2015:

[W]ithout me and another solicitor also in a part-time role focused on this, and without the new Aboriginal family law support worker position we created...and if the funding goes on top of all the generalist legal work the service does for the whole South Coast, it will be extremely hard to maintain that level of help and special knowledge.<sup>64</sup>

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61 For example: Ms Shannon Williams, Senior Community Access Officer, Indigenous Women's Legal Program, WLS NSW, *Committee Hansard*, Canberra, 20 June 2014, p. 3.

62 Mr Matthew Strong, *Committee Hansard*, Darwin, 5 August 2014, p. 1. In 2015-16, NAAJA's operational budget will be reduced to \$6.036 million: see NAAJA, answers to questions on notice, received 27 August 2014, pp 1-2.

63 Answers to questions on notice, received 27 August 2014, p. 3.

64 *Committee Hansard*, Sydney, 13 June 2014, p. 48.

6.53 In Perth, Gosnells told the committee that it has already lost the federal funding which it used to assist its grandparents raising grandchildren clients:

All we are able to do at present is give legal advice to them. Previously, we often provided more time than was funded as we knew the clients could not get legal aid, so we assisted them with preparing consent orders or applications to the Family Court. We are not aware of how many other community legal centres are able to assist with these matters, but we understand that it would only be minor assistance and not include court representation.<sup>65</sup>

6.54 NLA commented:

It is very often the initial paperwork that is the huge challenge for grandparents. If there were some way for there to be exploration of the potential, for example, for warm referrals into legal aid commissions and other agencies like community legal centres for the purpose of at least that initial preparation, I feel confident that would make a beneficial difference to grandparents.<sup>66</sup>

6.55 Mrs Sue Brooks concurred that the assistance provided to her by a local community legal centre was 'marvellous':

I got legal support because we were not sure what to do. I wanted to make it so that my grandson was safe so that his mother could not go to school, drugged out of her brain or whatever, and say, 'That's my son and I'm taking him,' because I would not know where he is. So I went and saw [the community legal centre] and I simply told the man the situation. I asked, 'What do I do? Where do we go? How do we do it?' He gave me all the information I needed. It was marvellous. He wrote all that was required.<sup>67</sup>

#### *Enhanced assistance in navigating current systems*

6.56 Shoalcoast CLC submitted that formalising care arrangements in New South Wales is not practicable for grandparents however, the relevant systems and authorities—schools, medical providers, Centrelink and other government agencies—have adapted their policies to recognise informal care arrangements. In its view, attention should focus on assisting informal grandparents raising grandchildren to navigate these systems:

The necessary official policies and supports do exist, but the process of finding these can be problematic. Therefore there may be a need for better streamlining of inter-agency services for grandparents and other informal carers, and perhaps a central contact point or service which can coordinate the necessary affairs on a carer's behalf.<sup>68</sup>

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65 Ms Lorraine Taylor, *Committee Hansard*, Perth, 6 August 2014, p. 59.

66 Ms Julie Jackson, *Committee Hansard*, Canberra, 20 June 2014, p. 13.

67 Grandparent, *Committee Hansard*, Albany, 7 August 2014, p. 13.

68 *Submission 87*, pp [2-3].

6.57 A member of the Aboriginal Advisory Group of Community Legal Centres NSW stated that informal care arrangements are often functional, and questioned why there should be any need for grandparents to alter their legal status.<sup>69</sup> Other members of the group denounced the need to exchange informal care status for government financial assistance, arguing that the current system discriminates against Aboriginal and Torres Strait Islander grandparents raising grandchildren:

Most 'grandparent raising grandchildren' arrangements, in Aboriginal communities, are informal...For many families, formalizing care arrangements is simply not worth the complications.<sup>70</sup>

### **Unwillingness to exacerbate family tensions by initiating legal proceedings**

6.58 As previously discussed, commencing or even joining legal proceedings against the birth parent(s) can generate family conflict.<sup>71</sup> The removal of a grandchild from his/her parent(s) by the grandparents and the prospective loss of entitlement to government financial assistance, for example, can also create, or exacerbate, this tension.

6.59 Some participants suggested ways in which this aspect of intra-family relations could be better managed, to assist grandparents to formalise care arrangements, primarily through a more active role for child protection authorities.

6.60 The Federal Circuit Court referred<sup>72</sup> to a report published jointly by the Australian Law Reform Commission and New South Wales Law Reform Commission, which acknowledged 'the powerful case for child protection services having more involvement in family court proceedings where they investigate allegations of child abuse and refer grandparents to family courts for orders'.<sup>73</sup> Consistent with this view, the commissions recommended:

**Recommendation 19–3** Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

- (a) provide written information to a family court about the reasons for the referral;
- (b) provide reports and other evidence; or
- (c) intervene in the proceedings.<sup>74</sup>

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69 *Submission 139*, p. 9.

70 *Submission 139*, p. 11.

71 For example: Gosnells, *Submission 37*, p. 3; Centre for Excellence, *Submission 169.1*, p. 6.

72 *Submission 91*, p. 2.

73 *Family Violence—A National Legal Response* (ALRC Report 114, NSWLRC Report 128), October 2010, p. 926.

74 *Family Violence—A National Legal Response* (ALRC Report 114, NSWLRC Report 128), October 2010, p. 928.

6.61 NLA submitted that, where child protection authorities are involved, it would be beneficial to the grandparents 'to be able to say that [the] child protection authority is responsible for the decision-making and the action being taken'.<sup>75</sup> Further, where the child protection authority concludes that someone other than the birth parents should have the primary care of children, the child protection authority should pursue Parenting Orders in favour of that person:

Such a response would:

- i. Overcome the need for grandparents to initiate proceedings against their own child in the federal family law courts jurisdiction/s.
- ii. Obviate the need for representation of the grandparent in the child protection proceedings;
- iii. Remove or reduce the potential for further damage to the grandparent/parent/child relationship because of any perception that the grandparent was responsible for the removal of the child from the parent and associated proceedings.<sup>76</sup>

6.62 Both NLA and the Women's Legal Service Tasmania added that, if this approach were adopted, child protection authorities would need to be funded for their additional role.<sup>77</sup> Alternatively, as is the practice in New Zealand, child protection authorities could fund the legal representation of informal grandparents raising grandchildren who seek Parenting Orders.<sup>78</sup>

6.63 Ms Meredith Kiraly commented on the need for courts to adopt a more inquisitorial approach 'where grandparents and parents are not pitted against each other in the process'.<sup>79</sup>

### ***Committee view***

6.64 The legal status of grandparents raising grandchildren carers is important, particularly for the recognition of grandparents' parental rights in relation to grandchildren in care. For grandparents who seek formal recognition, access to the family law and care and protection jurisdictions should be guaranteed. However, the ability to access the courts can be hampered by financial considerations.

6.65 The committee accepts that the provision of Legal Aid is necessarily limited and subject to strict criteria but, as highlighted throughout the inquiry, grandparents raising grandchildren are significantly disadvantaged. The committee believes that the grandparents should receive legal assistance to manage the care arrangements for their grandchildren (including information, advice and representation in proceedings to formalise the arrangement). Such assistance would have many benefits to the

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75 *Submission 141*, p. 4.

76 *Submission 141*, p. 5.

77 *Submission 141*, p. 5 and *Submission 66*, p. [5], respectively.

78 NLA, *Submission 141*, p. 5; Women's Legal Service Tasmania, *Submission 66*, p. [5].

79 Australian Psychological Society, *Committee Hansard*, Melbourne, 10 June 2014, p. 12.

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grandparents, such as helping to preserve their limited income and assets for the raising of their grandchildren. Accordingly, there is merit in governments exploring options for the provision of legal assistance to informal grandparents raising grandchildren.

6.66 Evidence presented to the committee highlighted that some community legal centres and Aboriginal and Torres Strait Islander Legal Services (ATSILS) are currently providing assistance to grandparents (in the form of information, advice and document preparation). NLA acknowledged the value of this assistance. The committee suggests that governments collaboratively consider dedicated funding for community legal centres and ATSILS, to enable the better provision of legal assistance to grandparents who have taken on the primary care of their grandchildren.

6.67 Submitters and witnesses informed the committee that grandparents raising grandchildren have difficulty navigating the legal system. This is partially due to a lack of knowledge and also the complexity of the system. It appears that this complexity particularly increases when matters involve cross-jurisdictional issues. As noted by Shoalcoast CLC, this is an inherent aspect of Australia's federal system with no easy solution. The committee notes the current collaboration between Commonwealth, state and territory governments to improve the interface between family law and child protection systems. As part of this initiative, the committee suggests that consideration should be given to reviewing, and developing if necessary, information materials which identify and explain potential pathways for grandparents who wish to formalise care arrangements for their grandchildren.

6.68 In recognition of the role, responsibilities and expertise of child protection authorities, the committee considers that there is potential for these authorities to exercise a greater role in the formalisation of care arrangements for children who are being raised by their grandparents. It would be useful for governments to investigate means by which grandparents could be better supported in the family law jurisdiction, as well as in the care and protection jurisdiction, including potentially an enhanced role for mediation.

6.69 In this regard, the committee notes also Recommendation 19-3 of the Australian Law Reform Commission and New South Wales Law Reform Commission, which endorses intervention by child protection authorities as a means of eliminating, or reducing, one source of intra-family conflict. The committee suggests that governments re-consider this recommendation.

