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Louise Smith

16 September 2014

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

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Dear Committee Secretary,

**Re: Community Affairs References Committee Inquiry
Grandparents who take on primary responsibility for raising their grandchildren
Questions on Notice from public hearing 20 June 2014 NLA**

Introduction

Please find following NLA's answers to questions on notice at the hearing of the Inquiry into Grandparents who take on primary responsibility for raising their grandchildren, held on 20 June 2014. We apologise for the delay in providing these answers to you.

Q1. What is the average cost of going through a family court process?...perhaps just the information that was provided to the Institute of Family Studies previously, just to give us an indicative sense of what quantum of funds we are looking at."

The Australian Institute of Family Studies reported that in the 2009-2012 financial years, "legal aid commissions in Australia allocated \$263 million (exclusive of GST) towards family law grants of legal assistance" of which \$65 million related to ICL grants. "...the average funding per family law grant Australia-wide - \$1,700 (GST exclusive) - was lower than the average funding for ICL grants (\$5,371)¹".

The figures referred to in the AIFS report include matters that settled early and therefore did not have to go the full way through a family court process.

¹ P.23 Independent Children's Lawyers Study, Final Report, May 2013, Australian Institute of Family Studies, noting "Queensland data was excluded from the analysis reported in the figure, as data covering the number of family law grants during this period were not available."

Work pursuant to a grant of legal assistance is undertaken by either a legal aid commission in-house family lawyer, or a lawyer in private practice who is prepared to take on legal aid matters, and accept the grant as payment for the work. Legally aided work is considered by some in the private profession to be of a pro-bono nature as a result of the disparity between what legal aid pays and the fees that can be charged in the private market.

Legal aid commissions have looked at the cost of legal aid grants where an extension on the grant of aid was made for a family law court hearing in the 2013-2014 financial year. These matters may include some which have settled without the need for full hearing, for example because they settled part-heard. Grants of legal aid are made in stages, and parties will be required to attend dispute resolution where appropriate, and encouraged to settle throughout the life of the matter. There are also local factors which affect the average cost in the individual states and territories, eg workload and procedures in individual registries and differences in fee rates, the structure and functioning of the profession, and the cost of reports prepared by social scientists in relation to the families. We think however that the average cost of the totality of a legal aid grant to one party to the proceeding² to go through a family law court process to trial is in the order of \$10,400³. We suggest that a privately paying client could expect to pay at least 3 times this amount, again with some variations between the jurisdictions.

Q2. "...the whole family law duty lawyer scheme. ..I was interested in section 3 on prioritisation, which listed a whole lot of dot points about how people make the prioritisation around whether the duty legal solicitor can get involved at the time. I am wanting to know how the priorities work, because it lists statements as opposed to whether this was something that helped you get in or something that help you get out of getting the help. It goes down into whether to provide assistance in the matter and the level of assistance, whether the person is seeking assistance for a matter for which legal aid is available. Even on notice, if I could actually just get some information on those dot point about whether the statement there means they are more likely to get support or not."

"Do not go and do all of that extra work it is too much. But dot point 2, whether the unrepresented party cannot afford the cost of representation but falls outside the Legal Aid Commission's means test – does that mean if they fall outside the Legal Aid Commission's means test that they are unlikely to get help?"

The Family Law Duty Lawyer Scheme National Protocol sets out the guidelines for the provision of duty lawyer services by legal aid commissions in family law matters before the Family Court of Australia, the Family Court of Western Australia and the Federal Circuit Court. The parties to the protocol are the Commonwealth Attorney General's Department, National Legal Aid (representing the Directors of the eight states and territory Legal aid Commissions), the Family Court of Australia, the Family

² (Excluding independent children's lawyers)

³ This is an estimate of national average, based on estimations of individual averages.

Court of Western Australia and the Federal Magistrates Court (now the Federal Circuit Court of Australia).

Each legal aid commission provides a duty lawyer service in the family courts in their jurisdiction which meets the guidelines set out in the protocol, however the structure, processes, personnel and hours of service of each duty lawyer service may vary in accordance with local jurisdictional requirements.

The priority clients of the legal aid duty lawyer service are unrepresented parties to parenting order matters that are listed in court on the day or need to be in court urgently in relation to matters that meet legal aid guidelines for a grant of legal aid such as recovery orders for the return of children to their primary carer or injunctions preventing the relocation of children or their removal from the jurisdiction. Duty lawyer assistance is likely to be given to people who fall within the above description of priorities and who do not meet the legal aid means test but appear not to be able to afford the cost of legal representation, or are in very urgent circumstances, but these people are informed of the limited nature of the duty lawyer assistance.

The duty lawyer services are integral to the effective and efficient operation of the family courts and the services are in high demand.

Q3. “....You mention here that you have a relationship with jurisdictions across Australia in terms of gathering reports from each State and Territory” [legal aid commission]. How is the Northern Territory? I know that there have been significant cuts across Children’s and Families Services. Have you received much information from them over the past 18 months to two years?” [To refer to the NT Legal aid commission to provide specific information at this point in time].

It is understood that mandatory reporting laws in respect of both child abuse and family violence, have resulted in increased substantiations in child protection, and that about \$8 million or 7.2% has been cut from the funding of the Department of Children and Families (DCF) this financial year.

It is difficult for the Northern Territory Legal Aid Commission (NTLAC) to assess the impacts of the reduction in funding to DCF. Tight Territory funding has however resulted in the cessation of the duty lawyer service provided by the NT Legal Aid Commission in the child protection jurisdiction. A reduction in Commonwealth funding provided to the NTLAC has also resulted in the cessation of the NTLAC’s minor assistance civil service. This service provided minor assistance in civil law matters beyond initial advice which would have provided assistance to grandparents with civil law issues associated with their carer role, eg employment, Centrelink, housing etc. Further, it is understood that the North Australian Aboriginal Justice Agency (NAAJA) which provides family, child protection, civil and criminal law advice and representation services to a significant proportion of aboriginal parents and extended family members in the NT, particularly in remote regions have also

sustained cuts to funding. This combined reduction in the availability of legal assistance services can be expected to impact adversely on people needing family law, child protection, family violence, and associated legal assistance, including grandparents and other carers.

A further barrier to accessing legal services and the family law system for some people living in the Northern Territory, including extended family members and other suitable carers, is remoteness. The closure of the Alice Springs Registry of the family law courts has exacerbated this situation as it is no longer possible to access face-to-face services of the Court, the closest registry being 1500km away in Darwin.

Aboriginal children are over-represented in the child protection system. DCF cites a preference to place Aboriginal children with family if possible in accordance with the aboriginal placement principle under the Care and Protection of Children Act 2007. It is understood that a recently enhanced out-of-home care team, has been developing better processes for the identification of kinship carers. It is hoped that this will help expedite child protection proceedings which can be protracted because of difficulties identifying and confirming suitable carers. This might also reduce associated costs.

Whilst historically, placement of children in need of care with extended family/kin was done by DCF without court orders, a fact highlighted by the Board of Inquiry⁴ and known as '*family way placements*' as a way of keeping children in their communities, this meant care givers were not provided with any financial support nor were they able to secure parental responsibility for children unless they engaged with the family law process. Since the Board of Inquiry recommendations, there has been a trend to secure kinship placements for children under the imprimatur of child protection orders which sometimes involves joining kinship carers as parties to the child protection proceedings. However, where it has been deemed that intervention would not be warranted because of the existence of a 'parent' able and willing to care for a child, DCF has been known to refer parties to the family law jurisdiction. Whilst many people experience the prospect of engaging with the legal system and family law courts as daunting, our experience is that there is a particular reluctance on the part of many Aboriginal people to engage with the legal system due to associating legal proceedings with the criminal justice system and with the removal of children. This was recognised in the Report of the Family Law Council of Australia into Indigenous and culturally and linguistically diverse clients in the family law system⁵ as it is problematic if parties do not seek orders at the appropriate time, at an early stage of a dispute. "....help was often sought at a point of crisis, such as when a recovery order was required. At this juncture, a lack of understanding of the process could be a source of significant frustration as well as an impediment to securing the child's timely and safe return".⁶

⁴ Inquiry into the Child Protection System in the Northern Territory 2010

⁵ February 2012

⁶ Ibid, p. 42

In a recent matter, a grandparent approached the NTLAC for advice in respect of very young children placed in her care by DCF, as the parents were unable to provide care due to disability. NTLAC made submissions to DCF to intervene, DCF declined on the basis that the grandmother was a suitable carer and could apply to the family law courts for parenting orders. A grant of legal aid was made to assist her in making this application to the court. The initial difficulty for the grandmother was not having parental responsibility to consent to a routine medical procedure for the children. Another significant issue for the grandmother was financial support. She had to give up her full-time job to provide care for the children and was reliant on support from Centrelink (which was limited to a parenting payment and the family tax benefits). Neither biological parent was capable of providing financial support. Had a child protection order been made, the grandmother would have received carer payments from DCF in addition to other financial support for the children.

Q4. Genuinely I am asking the people in the system about the nexus. You did give some suggestions in your report, but if there is anything else you can add to how we look at that hitting the block of the legal system and the need in our current system to have a legal status.

We confirm our belief that key to “hitting the block”, is the understanding of all relevant government agencies (e.g. in health, justice, human services etc) across the Commonwealth and the States and Territories of the intersection between the family law (Commonwealth) and child protection and family violence (state) systems, and the effects of this intersection on children and their carers.

In this regard, the work of the Commonwealth Attorney-General’s Department in relation to the interface between the two systems is noted and strongly supported. NLA understands that a further national collaboration meeting involving at least some of the relevant agencies is being scheduled for November. Legal aid commission representatives from around the country have been invited to, and will attend this collaboration meeting.

As has been identified in the case study of the aboriginal grandmother referred to in response to Q3, the issues associated with legal recognition of parental responsibility are broader than the sharing of information and the management of clients moving between the family courts and the state child protection courts. They include the authorisation of medical treatment and financial support in the kinship/placement context, and the management of care arrangements for children the subject of child protection orders who move between states and territories. NLA suggests that to facilitate collaborative stakeholder engagement in the current environment of limited resources, that agendas to resolve the issues for grandparent and other carers should clearly reflect these shared issues.

We also confirm our suggestion that where the CPA has identified a child in need of care and is satisfied that a grandparent (or other person) is an appropriate care giver, then funding should be provided for the CPA to make an application or to fund an application to the family law courts for parenting orders. Legal aid commissions are

prepared to assist in providing or arranging for representation, and to be party to any associated protocol as appropriate.

Conclusion

Please do not hesitate to contact us if you require any further information.

A handwritten signature in black ink, appearing to read "G. Turnbull". The signature is fluid and cursive, with the first letter "G" being particularly large and stylized.

Yours sincerely,
George Turnbull
Chair