



Aboriginal Family Violence Prevention
& Legal Service Victoria

FVPLS Victoria

Submission to the Senate Standing
Committees on Community Affairs

Grandparents who take primary
responsibility for raising their
grandchildren

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Introduction

The Aboriginal Family Violence Prevention and Legal Service Victoria (FVPLS Victoria) welcomes the opportunity to provide input to the Senate Standing Committee on Community Affairs' Inquiry into grandparents who take primary responsibility for raising their grandchildren. FVPLS Victoria would be pleased to provide further information in addition to this submission if required.

About FVPLS Victoria

FVPLS Victoria provides legal advice, referral and ongoing casework to Aboriginal and Torres Strait Islander victims/survivors of family violence and sexual assault. This legal assistance encompasses civil law areas such as family violence intervention orders, child protection, family law, victims' compensation applications, and other legal problems related to family violence issues. FVPLS Victoria also assists the carers of Aboriginal children who in many cases are also grandparents of those children.

The FVPLS Victoria head office is based in Collingwood and provides services in metropolitan Melbourne and some regional areas. Regional offices are located in Bairnsdale, Mildura and Warrnambool. FVPLS Victoria is one of fourteen services funded by the Department of Prime Minister and Cabinet under the national FVPLS program. FVPLS Victoria also receives some funding from the Victorian Government, Victoria Legal Aid and philanthropic trusts.

Our service is an independent, not-for-profit, Aboriginal controlled community organisation. We pride ourselves on providing a culturally safe service to Aboriginal victims/survivors of violence. A culturally safe environment is one where Aboriginal people feel safe and draw strength from their identity, culture and community.

To reduce the incidences of violence and abuse in Aboriginal communities, FVPLS Victoria delivers early intervention and prevention programs across the state as well as community legal education programs that encourage access to justice. FVPLS Victoria utilises its knowledge and expertise of working with Aboriginal community members, particularly Aboriginal women, to advocate for systemic change and to improve access to justice.

Background

Aboriginal and Torres Strait Islander¹ children are vastly over-represented in child protection matters at all stages in Victoria. Sixteen per cent of Aboriginal children and young people are on care and protection orders in Victoria, despite comprising 1.2 per cent of the state population.²

¹ Hereafter 'Aboriginal'.

² Department of Premier and Cabinet, *Report of the Protecting Victoria's Vulnerable Children Inquiry*, Volume 1, State of Victoria, 2012, xxvi.

Family violence is present in 64 per cent of child protection cases in Victoria where Aboriginal and Torres Strait Islander children are involved.³ Our organisation routinely sees violence as a root cause or as a contributory cause to the involvement of child protection authorities within Human Services Departments.

Currently, legislative requirements in the *Children, Youth and Families Act 2005* (Vic), which ensure that Aboriginal children maintain cultural knowledge and kinship ties, are not being met. The wellbeing of Aboriginal children and their meaningful connection to culture must be addressed as a priority. This can be achieved via adequately funded Aboriginal support programs, consistent application of the Aboriginal Child Placement Principle, better training and oversight of Department of Human Services' workers and the strengthening of culturally appropriate practices and procedures across the child protection system more generally. In addition, culturally safe legal support for Aboriginal families and for carers of Aboriginal children is crucial and is an important theme throughout this submission.

The *Family Law Act 1975* (Cth) safeguards Aboriginal children's and Torres Strait Islander children's right to enjoy their Aboriginal or Torres Strait Islander culture.⁴ The *Family Law Act 1975* also states that children must have the support, opportunity and encouragement necessary to appreciate and fully explore their culture⁵ – which in many cases can be related to access to and cultural learning from their grandparents. The *Family Law Act 1975* also explicitly recognises the role and importance of grandparents in children's lives in provisions s 60B(2)(b) and s 60CC(3)(b)(ii).⁶

(b) the role and contribution of grandparents raising their grandchildren, and how this should be recognised;

It is important to note that Aboriginal culture conceptualises family differently from non-Aboriginal cultural understandings which prioritise the nuclear family unit.⁷ Children are the responsibility of the entire family rather than the biological parents alone.⁸ For this reason, the removal of Aboriginal children to non-Aboriginal foster care arrangements profoundly affects children's broader family members, as well as their biological parents and, of course, the child. Therefore, there are obligations on Human Services Departments to ensure that foster carers facilitate contact with children's extended family members wherever appropriate. In the experience of our FVPLS Victoria lawyers, cultural plans in Victoria rarely include contact with a child's grandparents. This responsibility rests with Human Services Departments. Culturally safe services such as FVPLS Victoria are attuned to these omissions and advocate for cultural plans to include contact with grandparents. However, there are clients across Victoria represented by many different services and FVPLS Victoria cannot provide this checking mechanism if they are not acting for a party.

³ Department of Planning and Community Development, *Victorian Government Indigenous Affairs Report 2007/08*, State Government of Victoria, 2009, 47.

⁴ *Family Law Act 1975* (Cth) s 60CC (6).

⁵ *Ibid.*

⁶ *Ibid* s 60B(2)(b) and s 60CC(3)(b)(ii).

⁷ Daryl J Higgins, *Community Development Approaches to Safety and Wellbeing of Indigenous Children*, Closing the Gap Clearinghouse, Australian Institute of Family Studies, 2010, 5.

⁸ Victorian Aboriginal Child Care Agency, *Working with Aboriginal Children and Families: A Guide for Child Protection and Child and Family Welfare Workers*, 2006, 33.

Family law and child protection provisions are drawn from the Western view of the nuclear family where children have only one or two primary care-givers. When Human Services Departments are involved with Aboriginal families, it is crucial to note that 'individually-focussed models of child placement fail to take into account differences in Indigenous communal and personal identities' and therefore, a 'whole of community approach' is more appropriate.⁹

The Aboriginal Child Placement Principle in the Victorian *Children, Youth and Families Act 2005* states that 'as a priority, wherever possible, the child must be placed within the Aboriginal extended family or relatives and where this is not possible other extended family or relatives'.¹⁰ The importance of raising children and young people in contact with their own cultures is also emphasised in the *National Plan for Foster Children, Young People and Their Carers 2004-2006*. The United Nations *Declaration on the Rights of Indigenous Peoples* states that Aboriginal people 'have the right to practise and revitalize their cultural traditions and customs (... including) the right to maintain, protect and develop the past, present and future manifestations of their cultures'.¹¹ The participation of children and young people in cultural activities is vital in ensuring that knowledge, culture and traditions are transmitted and continued into the future.

In FVPLS Victoria's experience, grandparents hold significant cultural knowledge that may not have been passed on to the younger generations. This is largely due to intergenerational trauma and the multiple forms of disadvantage that lead to disconnection from cultures and communities. Kinship care by grandparents is very important for Aboriginal children who have special rights to access and maintain cultural and traditional practices, outlined above. 'Kinship care is associated with greater stability of care, more contact with parents and other family members, less trauma in separation from parents, and less stigma'.¹²

(c) other challenges that grandparents raising their grandchildren face in undertaking their role, including in circumstances complicated by family conflict, mental illness, substance abuse, homelessness, child abuse or neglect, or family violence;

Many clients of FVPLS Victoria face intergenerational trauma, family conflict, mental illness and experiences of child abuse and neglect. Many children are removed from their parents due to poor parenting skills and/or exposure to violence. FVPLS Victoria recommends to the Senate Standing Committees that culturally safe and sufficiently accessible support is increased for Aboriginal grandparents caring for children, such as parenting and relationship support, respite and crisis support, emotional support and financial support. A 2013 study undertaken in New South Wales reveals how Aboriginal grandparents caring for their grandchildren severely lack financial and other more

⁹ Libesman and Cunneen cited in Deborah Brennan et al, *Grandparents raising Grandchildren: Towards Recognition, Respect and Reward*, University of New South Wales Social Policy Research Centre, Report No 14/13, 2013, 4.

¹⁰ *Children, Youth and Families Act 2005* (Vic) s 13(2)(a).

¹¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007) art 11.

¹² Child Safety Commissioner, *'It Is the Story of All of Us': Learning from Aboriginal Communities About Supporting Family Connection*, State of Victoria, 2011, 6.

generalised support services.¹³ In addition, there is often a lack of awareness in Aboriginal communities about the existence of support services, people's eligibility to access them,¹⁴ and the human rights context and implications of this.¹⁵ FVPLS Victoria's community legal education program has recently uncovered anecdotal evidence of the lack of support grandparents receive in trying to prevent their grandchildren being moved into foster care, and the general lack of supports available to them when they come into contact with Human Services Departments.

(d) the barriers that grandparents raising their grandchildren face in acquiring legal recognition of their family arrangements, including Legal Aid entitlements for grandparents seeking to formalise their custodial arrangements through the Family Law Courts;

Child Protection

Changes to Victoria Legal Aid guidelines in early 2013 mean that grants of aid in child protection matters are severely restricted for grandparents in Victoria. This significantly disadvantages the grandparents of Aboriginal children, many of whom are elderly and as discussed above, not engaged by Human Service Departments or courts, and unaware of their legal rights. FVPLS Victoria stresses the importance of grandparents being proactively included in Aboriginal Family Led Decision-Making Conferences in Victoria, preferably upon the initiative of the Department of Human Services, or otherwise court ordered. FVPLS Victoria solicitors in some geographical regions note that a larger number of Aboriginal Family Led Decision-Making Conferences are occurring before a protection application is issued, rather than vice versa. This is an encouraging trend because it allows for options for family respite to be identified earlier.

Family Law

Restrictions to Victoria Legal Aid guidelines have also had a detrimental impact on access to justice for grandparents in the Family Law jurisdiction. 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.

¹³ Deborah Brennan et al, *Grandparents raising Grandchildren: Towards Recognition, Respect and Reward*, University of New South Wales Social Policy Research Centre, Report No 14/13, 2013.

¹⁴ *Ibid*, 4.

¹⁵ Mick Gooda, Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 9-13 July 2012, available [online] <http://www.humanrights.gov.au/statement-aboriginal-and-torres-strait-islander-social-justice-commissioner-mick-gooda-australian> and Melanie Schwartz, Fiona Allison and Chris Cunneen, *The Civil and Family Law Needs of Indigenous People in Victoria*, Report of the Australian Indigenous Legal Needs Project, James Cook University, 2013, 66.

(e) the practical measures that can be implemented by the Commonwealth, state and territory governments and the community sector to better support grandparents raising their grandchildren, including key priorities for action;

FVPLS Victoria stresses the importance of adherence to the Aboriginal Child Placement Principle, the formulation of cultural plans, the need for improved cultural responsiveness of courts across Australia, and the detrimental impact of changes to legal aid guidelines in the state of Victoria.

The Child Placement Principle and Cultural Plans

Legislation requires that any Aboriginal child on a permanent care order or long-term guardianship order in Victoria must have a cultural plan, even if they are living with an Aboriginal family.¹⁶ The Secretary of the Department of Human Services is responsible for monitoring compliance with the cultural plan.¹⁷ It is clear however that there is a need for greater accountability in the Secretary's exercise of this responsibility, in order to ensure the completion of cultural plans, the integrity of cultural plans, and the incorporation of contact with grandparents within such plans.

The submission *Koori Kids: Growing Strong in Their Culture*, addressed to the attention of the Victorian Commissioner for Aboriginal Children and Young People, details the failure of the Victorian Department of Human Services to meet the legislative and practice requirements of cultural plans.¹⁸ FVPLS Victoria directs the Senate Standing Committees to this submission. In Victoria, only 15 Aboriginal children (or 8 per cent) in out-of-home care had a completed cultural plan.¹⁹ The newly created role of Victorian Commissioner for Aboriginal Children and Young People will enable resources to home in on rectifying the non-adherence to legislation to date by the Victorian Department of Human Services. The creation of this inaugural position is supported by FVPLS Victoria and commended to the Committees as an initiative worthwhile for other states and territories.

Cultural Responsiveness of Courts

The Koori Court and the Koori Children's Court (both in the criminal jurisdiction) are actions arising from the Aboriginal Justice Agreement that are practical examples of how government can implement culturally appropriate court procedures. However, more is required in the family law and child protection jurisdictions. Despite the extremely successful Koori Court evaluation, there is no Aboriginal-specific list in the Children's Court of Victoria (Family Division) or the Family Court of Australia.

FVPLS Victoria refers the Commission to the Victorian Department of Justice's discussion paper *Koori Children, Families, and the Family Division of the Children's Court*,²⁰ which

¹⁶ *Children, Youth and Families Act 2005* (Vic) s 176.

¹⁷ *Ibid*, 176(4).

¹⁸ Various Aboriginal Community Controlled Organisations and Community Service Organisations, *Koori Kids: Growing Strong in Their Culture – Five Year Plan for Aboriginal Children in Out-of-Home Care*, 2013, available [online] <http://www.cyp.vic.gov.au/downloads/submissions/submission-koorie-kids-growing-strong-in-their-culture-nov13.pdf>.

¹⁹ *Ibid*, 3.

²⁰ Courts and Tribunals Unit, Department of Justice Victoria, *Koori Children, Families and the Family Division of the Children's Court: A Discussion Paper for the 'Children's Koori Court (Family Division)' Project*, 2010, 59.

recommended in 2010 that a Koori Children's Court be established within the Family Division.

Changes to Victoria Legal Aid Guidelines

In response to Victoria Legal Aid's need to responsibly and sustainably manage its legal aid fund, new criteria were introduced on 7 January 2013 which severely restrict third parties from receiving a grant of legal assistance in child protection matters. VLA's correspondence states that '[f]unding in child protection matters will only be provided to children and people defined as parents (...) except where the Court forms the view that the (third) party's participation in the proceedings with legal representation is *critical* to the Court's ability to make a decision that is in the child's best interests'.²¹

Despite the introduction of these eligibility guidelines FVPLS Victoria continues to argue for the involvement of grandparents in children's lives where appropriate and endeavours to assist grandparents required to appear as self-represented litigants.

When considered together, VLA guidelines and current practices of Human Services Departments are not empowering Aboriginal people to participate in decisions for the care and protection of their grandchildren.

(g) other related matters.

FVPLS Victoria, as an Aboriginal community controlled legal service, is in a unique position to advise the court of the need for contact with grandparents to be included in Aboriginal Family Decision-Making Conferences and cultural plans in child protection matters and to inform the court of cultural considerations in family law matters. Without the option for families to access culturally safe services such as FVPLSs, the extended kinship network of Aboriginal families and the rights of Aboriginal grandparents are too often overlooked in the civil law arena. It is worth noting that about only half of Aboriginal people in Australia have access to an FVPLS service, and much of this coverage in remote areas is extremely limited.²²

²¹ Victoria Legal Aid, *Financial Sustainability: Changes to Eligibility Guidelines 2013*, 11 December 2012, 2, emphasis added.

²² NOUS Group, *Family Violence Prevention Legal Services – Research and Needs Analysis Report*, for Commonwealth Attorney-General's Department, 2013, 5.

Annexure

Child Protection Case Study

Our client is a young Aboriginal woman with three young children. Our client is incarcerated and maintains regular contact with her children when they come to visit her in prison. The Department of Human Services has full care of her children and sought to continue this arrangement, with the children remaining in foster care with a non-Aboriginal carer on Custody to Secretary Orders.

FVPLS Victoria was engaged late in the matter and requested an adjournment to proceedings for final orders. As an Aboriginal Family Decision-Making Conference had not occurred, our lawyer requested that this take place particularly in light of the fact that our client had identified a viable Aboriginal family care option which had not been adequately explored by the Department.

Our client proposed Jo-Ann, an Aboriginal woman, as a potential carer of her children. Our client's biological mother died soon after she was born and Jo-Ann assumed the role of mother figure early in our client's life. Our client considers Jo-Ann to be her mother and the three children understand Jo-Ann to be their grandmother.

Jo-Ann was enthusiastic about caring for our client's children long-term and was of the understanding that the Department were moving to put that in place. However, the Department had only assessed Jo-Ann to have access to the children; not to be their ongoing carer.

FVPLS Victoria was able to convey to the Court the importance of having an Aboriginal grandparent in the lives of the three young children. However, under the current Victoria Legal Aid guidelines, Jo-Ann was unable to receive funding for a grant of aid and was therefore unrepresented in the Children's Court proceedings. The Department have been continuing to assess Jo-Ann as a potential carer for our client's children over the past year. During this time the children remain living with a non-Aboriginal family in foster care.

Without FVPLS Victoria involvement, final orders would have been made resulting in these children being permanently placed with non-Aboriginal carers thus severely limiting their ability to meaningfully engage with their culture and maintain close connections with their grandparent and, through her, their extended kinship network. However, without funding, Jo-Ann is unable to participate in the proceedings and effectively advocate to speed up the process so that the children's current dislocation from culture can begin to be repaired.