

**Submission  
No 33**

**INQUIRY INTO REPARATIONS FOR THE STOLEN  
GENERATIONS IN NEW SOUTH WALES**

**Organisation:** Women's Legal Services NSW

**Date received:** 27/10/2015

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27 October 2015

The Director  
General Purpose Standing Committee No. 3  
Parliament House  
Macquarie Street  
Sydney NSW 2000

By email: [gpscno3@parliament.nsw.gov.au](mailto:gpscno3@parliament.nsw.gov.au)

Dear Director,

### **Inquiry into reparations for the Stolen Generations in New South Wales**

1. Women's Legal Services NSW (WLS NSW) thanks the General Purpose Standing Committee No. 3 for the opportunity to comment on the inquiry into reparations for the Stolen Generations in New South Wales.
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 specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
3. WLS NSW has an Aboriginal Women's Legal Program (IWLP). This program delivers a culturally sensitive 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 quarterly to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. There is a representative from the Aboriginal Women's Consultation Network on the WLS NSW Board.
5. Many of our Aboriginal clients reflect on the impact of being forcibly removed from their families on their lives, including telling us that they themselves are a member of the Stolen Generations or they have family members who are part of the Stolen Generations.



6. We acknowledge the important work undertaken by PIAC in consultation and collaboration with Aboriginal and Torres Strait Islander communities in NSW regarding reparations for the Stolen Generations over the past two decades. We have read the Public Interest Advocacy Centre Ltd (NSW) submission to the Committee dated 7 October 2015 (PIAC Submission) and endorse their recommendations regarding a Stolen Generations Compensation Tribunal.
7. It has been nearly twenty years since the recommendations were made in the *Bringing them home: The 'Stolen Children' (Bringing them home) report*. Given many members of the Stolen Generations are elderly and may not be in good health, the issue of reparations, particularly the establishing of a reparations tribunal as outlined in PIAC's submission, should be addressed as a matter of urgency. We submit that there is no justification for further delay in addressing this issue.
8. Recommendation 3 in the *Bringing them home* report defines reparations to include:
  - a. acknowledgment and apology;
  - b. guarantees against repetition;
  - c. measure of restitution;
  - d. measures of rehabilitation; and
  - e. monetary compensation;

and we acknowledge the importance of each of the five elements of reparations which has been borne out in our work with Aboriginal and Torres Strait Islander clients. This is echoed in the Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation Report*.<sup>1</sup>

9. We also believe that it is extremely important to acknowledge that the impact of the Stolen Generations extends not only to those children who were removed but there has been, and continues to be, trans-generational traumas experienced by the children, grandchildren and extended family members of the Stolen Generations.
10. In addition to the trauma experienced as a result of loss of identity, belonging, community, country connection and impact on wellbeing, many have also experienced trauma as a result of sexual and/or physical abuse which occurred following the forced removal of children from their families.
11. There are also concerns expressed by Aboriginal and Torres Strait Islander people that core values, such as sharing, caring and respect have been fractured as a result of dispossession of land and country and forced removal of children from their families. While reparations can never undo the harm caused, the five elements of reparations are essential for healing.
12. The focus of this submission will largely be about guarantees against repetition as this issue in particular arises in our casework.

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<sup>1</sup> Royal Commission into Institutional Responses to Child Sexual Abuse *Redress and Civil Litigation*

13. In summary we recommend:

- a. Reparations for the Stolen Generations should be made as a matter of urgency and in a manner as outlined in PIAC's submission;
- b. In seeking to address the second of five elements of the definition of reparations contained in recommendation 3 of the *Bringing them home* report, namely 'guarantees against repetition', the over-representation of Aboriginal and Torres Strait Islander children in NSW must be urgently addressed;
- c. Urgently addressing the over-representation of Aboriginal and Torres Strait Islander women in prison;
- d. A comprehensive community education campaign amongst Aboriginal and Torres Strait Islander communities about a family law pathway as an early intervention strategy in child protection, including access to early free legal advice;
- e. Adherence to the Aboriginal and Torres Strait Islander placement principles in child protection;
- f. A fee waiver for birth certificates for Aboriginal and Torres Strait Islander people.

### Guarantees against repetition

#### *Aboriginal and Torres Strait Islander children in out of home care (OOHC)*

14. WLS NSW is greatly concerned by the large numbers of Aboriginal and Torres Strait Islander children and young people in OOHC. As at 30 June 2014 there were 14,991 Aboriginal and Torres Strait Islander children in out of home care in Australia.<sup>2</sup> Aboriginal and Torres Strait Islander children are removed at the rate of almost ten times that of non-Indigenous children.<sup>3</sup>

15. The *NSW Child Protection Legislative Reform Discussion Paper* states that 'at 30 June 2011 there were 6060 Aboriginal children and young people in OOHC' in NSW.<sup>4</sup>

16. We note with concern that the second most common substantiation type is neglect.<sup>5</sup>

17. Through our advice and casework, we have seen many examples of Family and Community Services (FaCS) staff with poor cultural competence and very little understanding of how a child is raised in an Aboriginal and/or Torres Strait Islander community. Placing western standards on Aboriginal and Torres Strait Islander community and family is not appropriate or helpful. There are many things to consider in determining what is best for the child including issues such as identity,

<sup>2</sup> Productivity Commission, Report on Government Services 2015, Vol F at 15.13.

<sup>3</sup> Australian Institute of Family Studies Children and Care Resource Sheet, June 2015 at <https://aifs.gov.au/cfca/publications/children-care>

<sup>4</sup> NSW Government, *Child Protection Legislative Reform Discussion Paper*, November 2012 at 33.

<sup>5</sup> Australian Institute of Health and Welfare, *Child Protection*, accessed on 15 November 2014 at: <http://www.aihw.gov.au/child-protection/>

belonging, community, country connection and wellbeing. Within the parameters of safety from harm essential for all children, a nuanced approach to judgment about child wellbeing should be applied. Care needs to be given around judging an established culture by a different culture's standard.

18. Parents who are living with the effects of trans-generational traumas and disenfranchised grief should be provided support and genuine help including parenting skills with a view to creating safe families.
19. With the forced removal of children from their families many of these children did not have the opportunity to learn parenting skills from their own parents, aunts, uncles and grandparents. As a result of trans-generational traumas, the cycle of removal of Aboriginal and Torres Strait Islander children from their parents continues and so many children continue to miss out on learning parenting skills from watching and modelling their family members. It is therefore essential that parents have access to strengths-based parenting skills mentoring programs.<sup>6</sup>
20. The NSW *Child Death 2010 Annual Report* recommends 'working with intergenerational risk factors'.<sup>7</sup> This issue has continued to be raised in Child Death Annual Reports since then.<sup>8</sup> Further work is required to ensure culturally responsive, trauma-informed, strengths based services are available for families facing intergenerational disadvantage at the time the families need such services. Significantly, timeframes for working with families where their children are at risk of removal, must be realistic.
21. There needs to be much greater emphasis on early investment. We note with concern, for example, that 'in 2013-14, combined real expenditure on intensive family support and family support programs was \$6.7 million, compared to \$2.1 billion for out-of-home care services'.<sup>9</sup>
22. It has been the experience of clients that there is inadequate consultation with families and communities affected by the removal of children both before the removal and after.
23. We are contacted by mothers who have been unaware that they have been monitored by FaCS until after their child/children has/have been removed from their care. See, for example, the case study below.

### **Case study**

*Jacque\* is under eighteen and had just given birth to a healthy baby who she was breastfeeding. When she was younger and living in another state she had to live with a relative for a while because of safety concerns in her family.*

*The day after she gave birth FaCS came to the hospital and told her they were placing the baby in the care of the Minister and that she could not take her baby with*

<sup>6</sup> For example, Mudgin-Gal's 'Healthy Family Circle' program developed in partnership with Relationships Australia. See Mudgin-Gal Aboriginal Corporation, *Seeding Hope*, accessed on 27 October 2015 at: <http://www.redfernfoundation.org.au/mudgingal.pdf>

<sup>7</sup> Family and Community Services, *Child Death 2010 Annual Report* at 8.

<sup>8</sup> For eg Family and Community Services, *Child Death 2012 Annual Report* at 11, 65.

<sup>9</sup> The Senate Community Affairs References Committee, *OOHC Report*, August 2015 at paragraph 5.22

*her when she was discharged. FaCS indicated that they had no concerns about her capacity as a mother, but they did have safety concerns about her family.*

*Jacquie had not had any contact with FaCS prior to this time and nor had she been referred to early intervention services throughout her pregnancy. Further, no one had ever told her that they were concerned about where the baby would be living.*

*Jacquie was not told by FaCS about her right to get legal advice until the day before the first court date.*

*\* Not her real name*

24. Women continue to tell us of incidences where FaCS does not contact parents to offer support and early intervention assistance and the opportunity to address issues of concern prior to the sudden removal of a child. It is particularly traumatic when babies are removed from their mother's care in hospital immediately after birth. While in some cases babies are restored to their families, this would likely have an impact on attachment.
25. We note that FaCS has developed a prenatal program in at least three local districts in NSW which engages and supports mothers during their pregnancy. We have had positive engagement with the programs and have found them to be both responsive and proactive in assisting our clients. We welcome supportive programs that are strength based. However, little is known about this program and there is a real fear, particularly within Aboriginal and Torres Strait Islander communities, that by engaging with services children will be removed from their parents' care. We recommend that there be better community education about these programs.

### **Early legal advice**

26. Based on the experience of our clients, there is a need for earlier intervention in matters involving child protection concerns. Parents and/or primary caregivers should be informed of child welfare authority concerns and referred for free legal advice at an early stage.
27. In NSW, following the 2014 legislative amendments to the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* which included a greater focus on early intervention and permanency planning, FaCS funded Legal Aid NSW to provide early legal advice to parents and primary caregivers.
28. Legal Aid NSW is working with Community Legal Centres in NSW as well as the Aboriginal Legal Services NSW to provide such services. The focus is on legal advice for parent responsibility contracts, parent capacity orders and alternative dispute resolution processes for contact disputes.
29. This is an excellent initiative to engage families with early intervention legal services.<sup>10</sup> Access to early free legal advice is particularly important in the context of the move towards permanency planning within legislated timeframes.

<sup>10</sup> Unfortunately, inadequate funding has been provided for this role, and referrals have been slow to develop. For example, most Community Legal Centres receive funding for 1 day a week for this service. These are matters for monitoring and development of the initiative.

30. There is also great value in expectant parents, parents and primary caregivers being able to access free legal advice following their first interaction with FaCS or a non-government organisation child protection service, that is, at an earlier stage than is currently happening.
31. The purpose of such legal advice would be to help the expectant parents/parents/primary caregivers understand the reason for the contact with the child protection service, identify issues that need to be addressed and discuss what the expectant parent/parent/primary caregiver can reasonably do to address these issues – including ensuring the service(s) with whom they engage are accessible, available and affordable.

### **Over representation of Aboriginal and Torres Strait Islander women in prison**

32. We are also concerned that the over-representation of Aboriginal and Torres Strait Islander women in prison is impacting on the over-representation of Aboriginal and Torres Strait Islander children in OOHHC.
33. In NSW, Aboriginal and Torres Strait Islander women represent 29.4% of women in prison.<sup>11</sup> Aboriginal people are incarcerated at 13 times the rate of non-Aboriginal people<sup>12</sup> and Aboriginal women are the fastest growing group in NSW prisons. While it is not clear how many Aboriginal women in NSW had children in their care before being incarcerated, based on our experience of working with women in prison, many children would have been removed from their primary caregiver mother for this reason.
34. As Stathopoulos notes, Aboriginal women generally serve shorter sentences, often for minor offences such as driving infringements and non-payment of fines and are more likely than non-Aboriginal women to be on remand.<sup>13</sup> This raises concerns about over-policing. It is also of great concern that women are being incarcerated because they are poor. As Stathopoulos further acknowledges 'prisoners who are on remand are usually not eligible to participate in programs'.<sup>14</sup>
35. If there is no statutory risk of significant harm issues for the children and the issue is the absence of the mother when she enters custody, we recommend an alternative pathway than FaCS and the Children's Court. This is to reduce the stigma which is associated with Children's Court matters and the stress the mother and children may experience where there are no risk of significant harm issues.
36. We support an assessment of *all* placement options as it is the experience of some of our clients in custody that where there are no risk of significant harm issues in relation to the mother, the child may be placed with a violent father or a paternal relative who may alienate the children from the mother.

<sup>11</sup> Corrective Services NSW, *Facts and Figure Corrections research, Evaluation & Statistics, March 2013* at [correctiveservices.justice.nsw.gov.au](http://correctiveservices.justice.nsw.gov.au)

<sup>12</sup> Corrective Services NSW, *Statistical Profile of Offenders*, 2009.

<sup>13</sup> Research cited in Mary Stathopoulos, *Addressing women's victimisation histories in custodial settings*, ACSSA, No 13, 2012 at 3.

<sup>14</sup> *Ibid.*

37. There are additional concerns when the mother and children are Aboriginal or Torres Strait Islander and the father is not. The importance of cultural identity and connections are not necessarily given adequate attention.
38. Once the mother is released from custody she often faces significant difficulty in having the children returned to her care.
39. Additionally, courts are not generally well informed about the pathways to prison for women as a result of family violence, including sexual assault. A high proportion of women in prison have been victims of violent crime prior to coming into custody. The *2009 NSW Inmate Health Survey* found that: 66% of female inmates had been involved in at least one violent relationship and 29% of female inmates had been subjected to at least one form of sexual violence.<sup>15</sup>
40. Lawrie's 2003 study of Aboriginal women in NSW prisons found that over 75% of Aboriginal women had being sexually assaulted as a child, just under 50% had been sexually assaulted as adults and almost 80% were victims of family violence.<sup>16</sup>
41. As Stathopoulos observes, 'the most significant co-occurrence of child sexual abuse sequelae is substance addiction and mental health issues ... [which] is intertwined with mental health problems and pathways to offending'.<sup>17</sup> As Herman explains, drugs are a coping mechanism, providing relief and a form of escape from reality.<sup>18</sup>
42. Helping women to address their trauma, including trans-generational trauma as a result of the ongoing trauma experienced as a result of the Stolen Generations, is key to reducing recidivism. Reducing recidivism for mothers in prison is important so as to limit disruption to the care of children.
43. When a vulnerable parent is in custody it is an ideal time to offer treatment and support programs and encourage contact between mothers and children in an environment where they are free of fear and offenders. These programs should also be available to those on remand.
44. We also believe that in sentencing and considering possible diversionary options, consideration should be given to primary caregiving responsibilities for a child/ren, any history of violence experienced and any history of mental health and substance abuse. This is consistent with the United Nations Bangkok Rules.<sup>19</sup> Imprisonment of a primary carer for crimes other than violent offences should be as a last resort.
45. If a mother is imprisoned for a non-violent crime, wherever possible, her children under six years of age should be able to live with her. We note this currently occurs very successfully at Emu Plains Correctional Centre and recommend this be expanded to other prisons.

<sup>15</sup> Devon Idig, Libby Topp, Bronwen Ross, Hassan Mamoon, Belinda Border, Shalin Kumar and Martin McNamara, *2009 NSW Inmate Health Survey*, Justice Health, Sydney 2010 at 131

<sup>16</sup> Lawrie cited in Natalie Taylor & Judy Putt, 'Adult sexual violence in Indigenous and culturally and linguistically diverse communities in Australia,' *Trends and Issues in crime and criminal justice*, Australian Institute of Criminology, September 2007 at 2.

<sup>17</sup> Mary Stathopoulos, Note 9 at 6.

<sup>18</sup> Herman cited in Mary Stathopoulos, Note 9 at 6

<sup>19</sup> United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, E/2010/30 adopted by the UN General Assembly on 21 December 2010, Rule 41(b)



46. Clients consistently tell us that maintaining a relationship with children while in prison is an important factor that can contribute to reducing recidivism. Similarly, an inability to maintain contact with children contributes to recidivism. Toohey cites several studies which found children's coping skills were also enhanced and 'problematic behaviour' was reduced by maintaining contact with their incarcerated parents.<sup>20</sup>
47. SHINE for Kids is an organisation which supports children with a parent who is incarcerated. They provide transport for children to prison where the child would not otherwise be able to visit their parent and they also facilitate child/parent activity days in prison. It is very important that parents in prison and those caring for the children of parents in prison are aware of this service and that SHINE for Kids is adequately and sustainably funded to continue this work.
48. Upon release from prison it is also important that women are supported to 'transition effectively into the broader community'.<sup>21</sup> The WIPAN pilot mentoring program which was in place from May 2010 to November 2011 is an excellent example of the kind of support required for women leaving prison. In recently evaluating this pilot program it was found that '82% of the women who were engaged in the program for one year or more did not re-offend or return to prison'.<sup>22</sup> This is significant given that '93% of these women were recidivists and/or serial recidivists'.<sup>23</sup>
49. We further note the importance of having safe and secure housing as another factor that helps to reduce recidivism.<sup>24</sup> This is also a relevant factor to children living with their mother once she is released from prison.

### *Holistic response*

50. It is therefore important that Child Protection reform does not occur in isolation. It is imperative that it is part of a holistic response which includes: a focus on justice reinvestment; alternatives to custody for women offenders, particularly women who commit non-violent offences;<sup>25</sup> supporting parents suffering from the effects of trans-generational traumas and disenfranchised grief; and the National Plan to Reduce Violence against Women and their Children 2010-2022 (National Plan) and state and territory jurisdictional plans. Such responses are urgently needed for Aboriginal and Torres Strait Islander women and children and will benefit all women and children. Such responses are also consistent with the definition of reparations as outlined in Recommendation 3 of the *Bringing Them Home* report.
51. It has been over seven years since the National Apology to Australia's Aboriginal and Torres Strait Islander peoples. This was an important acknowledgment of the long-term and ongoing pain and suffering caused particularly to mothers and their children and also to extended family by removing children from their family's care as well as

<sup>20</sup> Julie-Anne Toohey, 'Children and Their Incarcerated Parents: Maintaining Connections – How Kids' Days at Tasmania's Risdon Prison Contribute to Imprisoned Parent-Child Relationships,' *Changing the Way We Think About Change*, The Australian and New Zealand Critical Criminology Conference 2012 at 33.

<sup>21</sup> *The Report: The Pilot WIPAN Mentoring Program 2009-2011*, WIPAN, August 2012 at 6.

<sup>22</sup> *Ibid.*

<sup>23</sup> *Ibid.*

<sup>24</sup> See, for example, WIPAN, *Dreaming of a safe home - Consumers and community workers' perspectives on housing and support needs of women leaving prison in NSW*, August 2012.

<sup>25</sup> See Corrective Services NSW Women's Advisory Council submission in response to the NSW Law Reform Commission Review Crimes (Sentencing Procedure) Act 1999 Special categories of offenders – Women, October 2012. (WLS NSW is a consultant member of the Corrective Services NSW Women's Advisory Council and contributed to this submission).

the loss of cultural identity, sense of belonging, community, country connection and impact on wellbeing.

52. Many in Aboriginal and Torres Strait Islander communities refer to the current high number of Aboriginal and Torres Strait Islander children and young people in care 'as the next generation of the Stolen Generations'. It is imperative that this is urgently addressed consistent with the definition of reparations that includes 'guarantees against repetition'.

### *Family law pathway as early intervention in child protection*

53. Part of a solution to addressing the over representation of Aboriginal and Torres Strait Islander children in OOHC is to see a family law pathway as an early intervention strategy in child protection. Rather than intervening at a late stage and pursuing matters through the Children's Court, parents/primary caregivers should be referred for early legal advice to see if the matter could more appropriately be resolved in the family law system.
54. WLS NSW adopts such an early intervention approach. In our experience 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.
55. There needs to be further training and education within Aboriginal and Torres Strait Islander communities and with service providers about the family law pathway. This is particularly important as given the history of the Stolen Generations there is a fear of engaging with FaCS.
56. We refer to the DVD entitled *Looking After Family* produced by Northern Rivers Community Legal Centre as a good example.<sup>26</sup>
57. This is further supported by recommendations in the 2012 Family Law Council inquiry report: *Improving the Family Law System for Aboriginal and Torres Strait Islander Clients*.
58. Where it is safe and there is an appropriate carer, for example, a parent or family member, FaCS should provide evidence to support an application through the family law pathway as recommended in the Australian and NSW Law Reform Commissions Family Violence report.<sup>27</sup>
59. This evidence to be used in family law proceedings could be in the form of a letter addressed to an appropriate parent/carer which is prepared by Child Protection services (statutory and voluntary) which explains the child protection concerns and that the taking of family law proceedings is deemed sufficient by FaCS to address the child protection concerns.
60. It is the experience of our clients that such evidence is not forthcoming. Furthermore, if the father does not participate in mediation, our clients are left not knowing whether they should pursue the matter further by filing a family law

<sup>26</sup> Northern Rivers Community Legal Centre, *Looking After Family*, accessed on 15 October 2015 at: <http://www.lookingafterfamily.org.au>

<sup>27</sup> ALRC and NSWLRC, *Family Violence – A National Response*, 2010, Recommendation 19.3.

application. If they do file such an application they generally cannot afford legal representation and are not eligible for a grant of aid because the children are living with them, and so are left to self-represent. Furthermore, when clients contact FaCS to seek evidence to support their family law application in such circumstances, FaCS routinely refuses to provide such evidence.

61. Supporting evidence from child protection services is also important because despite the 2012 family violence amendments to the *Family Law Act 1975 (Cth)* which prioritises safety over a meaningful relationship with both parents, a meaningful relationship with a parent who uses family violence is still given more weight than in the child protection system.

### ***Improving outcomes for children in out of home care (OOHC)***

#### **Aboriginal and Torres Strait Islander placement principles**

62. WLS NSW has made several submissions to inquiries about the importance of adhering to Aboriginal and Torres Strait Islander placement principles, including in response to the NSW Government's Child Protection Legislative Reform Discussion Paper (March 2013) and the Senate inquiry into Out of Home Care (OOHC) (December 2015).

63. A key factor that can positively influence outcomes for children in OOHC is connection to their culture and identity. This is particularly important for Aboriginal and Torres Strait Islander children.

64. If restoration to parents is not possible for Aboriginal and Torres Strait Islander children, guardianship is an option most preferred by kinship carers. This allows the child to remain within the family while transferring the responsibilities for the child to the adult that is considered to be the best carer. This provides continuity of identity and culture for the child.

65. We refer to the Aboriginal and Torres Strait Islander placement principles, as outlined in s13 of the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* ('Care Act')

66. These principles outline a hierarchy of placement of Aboriginal and Torres Strait Islander children:

- 1) with the child's or young person's extended family or kinship group;
- 2) with a member of the Aboriginal or Torres Strait Islander community to which the child or young person belongs;
- 3) with a member of some other Aboriginal or Torres Strait Islander family residing in the vicinity of the child's or young person's usual place of residence; or
- 4) a suitable person approved by the Director General after consultation with members of the child's or young person's extended family or kinship group and such Aboriginal and Torres Strait Islander organisations as are appropriate to the child or young person.

67. This is subject to the objects of the *Care Act*, including that 'children and young people receive such care and protection as is necessary for their safety, welfare and well-being',<sup>28</sup> permanency planning principles,<sup>29</sup> and the best interests of the child.
68. We regularly advise Aboriginal and Torres Strait Islander clients who report to us that Family and Community Service (FaCS) workers have failed to apply the Aboriginal and Torres Strait Islander placement principles when considering placements for removed children.
69. A number of Aboriginal and Torres Strait Islander women have contacted our service wanting to find out how they can become kinship carers for nieces and nephews who are already in care and living with unrelated caregivers. We are often told that these women only discover their nieces and nephews are in care long after their initial removal. They are not contacted at the point of removal and therefore are not given an opportunity to be assessed as appropriate caregivers.
70. Failure to adhere to the Aboriginal and Torres Strait Islander placement principles occurs in spite of the Wood Inquiry which recommended the development of guidelines to ensure compliance with these principles.<sup>30</sup>
71. The failure to adhere to Aboriginal and Torres Strait Islander placement principles is also acknowledged in the *Children's Rights 2013 Annual Report*.<sup>31</sup>
72. This problem could be addressed in part if better family assessments are undertaken and more comprehensive family trees are established.
73. We are concerned that as rigid timeframes and a permanency principles hierarchy, which came into effect in October 2014 as part of the NSW Child Protection Legislative Reforms, pressure decisions for long-term care, many Aboriginal and Torres Strait Islander children will miss out on culturally appropriate care.
74. We submit that there needs to be greater focus on the development of cultural plans which need to be more extensive than attending events during NAIDOC Week. Cultural plans should be in place when children are taken into care or shortly thereafter and should not be left until the matter is being finalised.
75. We further submit that it is essential that members of Aboriginal and Torres Strait Islander families have early access to free legal advice.
76. We do acknowledge the important work of the NSW Children's Court President in trying to address the issue of the failure to adhere to Aboriginal and Torres Strait Islander placement principles<sup>32</sup> and the importance of including a cultural action plan within the Care Plan.<sup>33</sup> This is an issue that needs to be constantly monitored.

<sup>28</sup> *Children and Young Persons (Care and Protection) Act 1998*, section 8(a)

<sup>29</sup> *Children and Young Persons (Care and Protection) Act 1998*, section 8(a1) and section 9(2)(g)

<sup>30</sup> The Hon James Wood, *Report of the Special Commission of Inquiry into Child Protection*, November 2008, Recommendation 11.5.

<sup>31</sup> *Children's Rights 2013 Annual Report* at 72.

<sup>32</sup> See, for example, President of the Children's Court, the Hon Judge Peter Johnstone, 'The five critical issues confronting the Children's Court of NSW,' *ACWA Research Forum*, 23 July 2014, paragraphs 59-73 accessed on 15 October 2015 at: [http://www.acwa.asn.au/downloads/research\\_forums/presentations/Johnstone-ACWA\\_Research\\_ForumFINAL23July.pdf](http://www.acwa.asn.au/downloads/research_forums/presentations/Johnstone-ACWA_Research_ForumFINAL23July.pdf)

<sup>33</sup> President of the Children's Court, the Hon Judge Peter Johnstone, 'The impact of the care and protection reforms on the Children's Court in NSW,' *Legal Aid Care and Protection Conference*, 7 August 2015, paragraphs 43-50.

77. There is also a need for FaCS workers and NGO child protection staff to be more transparent and accountable for the decisions they make from removal to long-term care arrangements.

78. To facilitate adherence to the placement principles, where removal of children is a possibility, parents should be asked by government or NGO early intervention/child protection services that in the event of their child being removed from their care who would they like to be assessed to be the carer. As this process takes some time, the question should be asked before the child/ren are removed from the parents' care.

### Supports available for relative/kinship care

#### *Kinship care – need for parity of support*

79. Kinship carers are predominantly grandparents, and financial and other non-financial support for these kinship carers is vital.

80. Where formal guardianship orders may create ongoing family tensions that will impact on the child, consideration needs to be given to a child remaining with informal kinship carers.

81. Where informal arrangements are made, primary caregivers should receive parity of financial and other assistance as compared to foster carers. Our clients report this is not the case.

82. It seems incongruous that where grandparents or other family members intervene to care for children at risk, but before FaCS removes the children from their parents' care, that there is little or no financial and practical assistance from Government. Yet, if the same family members waited until FaCS removed the children and placed the children formally in their care, they would be eligible to receive greater financial and practical assistance.

83. In *Kinship Care in NSW – Finding a Way Forward*, 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'.<sup>34</sup> They also speak of the challenges when DoCS, as they were then, and Centrelink are unable to provide accurate responses to questions about entitlements and support services.<sup>35</sup> They also raise the issue of the need for training, but being advised they are not eligible for such training or it was on at times that they were unable to attend.<sup>36</sup>

84. We note that one of the recommendations made in the Senate Committee's *Grandparents who take primary responsibility for raising their grandchildren report* ('Grandparents Inquiry Report'), was to extend foster care allowances to grandparents raising grandchildren without court orders.<sup>37</sup> We recommend this be inclusive of other family and kinship carers.

<sup>34</sup> Ainslie Yardley, Jan Mason, Elizabeth Watson, *Kinship Care in NSW – finding a way forward*, University of Western Sydney, November 2009 at 39.

<sup>35</sup> Ibid at 40.

<sup>36</sup> Ibid at 41.

<sup>37</sup> Senate Standing Committees on Community Affairs, *Grandparents who take primary responsibility for raising their grandchildren report* ('Grandparents Inquiry Report'), 2014, Recommendation 9.

*Financial support for other family members to provide respite*

85. 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 may in fact ensure the longevity of the care arrangements.
86. 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.
87. We understand that Aboriginal and Torres Strait Islander grandparents in particular are reluctant to disclose health issues for fear their children will be taken into care.
88. We note the life expectancy at birth in 2010-12 for Aboriginal and Torres Strait Islander males is estimated to be 69.1 years, and 73.7 years for females. There is a gap of 10.6 years for males and 9.5 years for females between Aboriginal and Torres Strait Islander life expectancy and non-Aboriginal and Torres Strait Islander life expectancy.<sup>38</sup>
89. 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. There is an intergenerational fear amongst Aboriginal and Torres Strait Islander communities of having children removed by the State.
90. 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.
91. Support could also include, for example, children attending day care one or two days a week while a grandparent attends a regular health appointment or social outing. It is important to provide holistic support as promoting the health and wellbeing of grandparents will very likely positively impact on the health and wellbeing of grandchildren.
92. It was further recommended in the *Grandparents Inquiry Report*, that respite services should be provided to grandparents raising grandchildren.<sup>39</sup> We recommend this be inclusive of other family and kinship carers. This should also be considered in the context of reparations for the Stolen Generations.

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<sup>38</sup> ABS, 3302.0.55.003 - *Life Tables for Aboriginal and Torres Strait Islander Australians, 2010-2012*, 15 November 2013 accessed on 15 October 2015 at: <http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3302.0.55.003Media%20Release12010-2012?opendocument&tabname=Summary&prodno=3302.0.55.003&issue=2010-2012&num=&view=>

<sup>39</sup> *Grandparents Inquiry Report*, Note 31, Recommendation 10.

***Fee waiver for birth certificates***

93. We understand that some non-government organisations in NSW enter an arrangement with the NSW Registry of Births, Deaths and Marriages to provide Aboriginal and Torres Strait Islander people in NSW a birth certificate for free.

94. This requires Aboriginal and Torres Strait Islander people in NSW to be aware of such a program and how they can access it.

95. Given the ongoing and intergenerational impacts of the Stolen Generations, we submit there should be a fee waiver for birth certificates for Aboriginal and Torres Strait Islander people. Such a fee waiver should be available directly from the NSW Registry of Births, Deaths and Marriages.

If you would like to discuss any aspect of this submission, please contact Liz Snell, Law Reform and Policy Co-ordinator or Gabrielle Craig, Senior Solicitor on 02 8745 6900.

Yours faithfully,  
Women's Legal Services NSW

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