

Remembering the Forgotten: *Legal advocacy services keep families better connected?*

REDFERN LEGAL CENTRE
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Redfern Legal Centre ('RLC') submits for discussion and consideration how legal advocacy might:

- ❖ reduce the 'risk of removal' for children under investigation by DoHS;
- ❖ assist families to avoid situations from developing into removal of the their children; and/or
- ❖ assist families staying connected during statutory care.

As a not for profit organization, funded by The Legal Aid Commission of NSW ('Legal Aid') and other agencies, Redfern Legal Centre ('RLC') provides legal advice in general areas of law as well as some Family law, and advocacy for victims of domestic violence through the Sydney Women's Domestic Violence Advocacy Service ('SWDVAS').

RLC does not provide legal representation to clients who are involved in care and protection matters commenced by Department of Human Service ('DoHS'¹). Clients are referred to Legal Aid or Aboriginal Legal Service ('ALS') private practitioners who are considered specialists in this field of law.

The concern about what was happening with care and protection matters in RLC's intake area initially arose through RLC contact with domestic violence clients who risked having their children removed into state care as they struggled to break free of the cycle of domestic violence and dealing with their own trauma of state care experience.

When approached by clients facing care and protection proceedings RLC can only provide preliminary legal advice, referral, some assistance in preparation of notes to assist in instructing legal representatives, and advice, assistance and referral on other aspects of legal problems they might have.

RLC through its provision of casework services was already working towards reducing the stressors on families which could lead to removal, but remained concerned that there were gaps in services and people were not getting legal advice or assistance until problems had escalated.

Previously, as a way of building a better understanding of the care and protection processes RLC entered into a partnership project of referral for case management and casework with legal practitioners specializing in care and protection matters in the private sector with the aim of gaining greater understanding of the operation of care and protection law and the practice as it related to our clients.

¹ Formerly known as Department of Community Services.

This Project

To address its ongoing concerns RLC determined to undertake a limited project to assess aspects of when, how and what legal assistance the families 'at risk' required and to what extent additional legal advocacy needs existed and if addressed, might reduce the 'risk' of removal, loss of contact and damage associated with removal from family

It was never the intention of RLC to limit participation in the project to one group in RLC catchment's area, however, during the timeframe for the project members of the local Aboriginal community serviced by RLC came seeking legal advice regarding issues they had or were having with DoHS and it was decided with the consent of the participants to conduct the project with these participants.

The concept of 'legal advocacy' assisting clients was visualized by RLC twofold:

- ❖ Firstly, utilizing the skills of legal advocates as an intervention strategy to build on the existing skills and network base of the RLC within its geographical location. Thus reducing the 'risk' of removal contemplated by a number of RLC clients, and in particular domestic violence victims and their children.
- ❖ Secondly, the intervention of legal advocacy would assist clients to move from a position of disadvantage to one of strength. Thus clients assisted through legal advocacy would be able to:
 - instruct their legal representative competently;
 - participate competently in the legal process; and
 - gain better outcomes for their legal matters.

The aim of the project was to assess the theory held by RLC that the "risk of removal" of children from their families can be reduced by legal advocacy services being made available earlier to the family at the investigation stage, during care proceedings and finally ensuring court ordered contact occurs.

The methodology used for the project involved face to face consultation with the clients who came to RLC seeking legal advice regarding their rights in circumstances where the:

- ❖ Family were under a current investigation by DoHS,
- ❖ Family had unfulfilled court ordered contact with children in state care,
- ❖ Family under supervision order with a non government agency, or
- ❖ Removed children had been placed without proper consultation.

In addition, informal discussions were held with caseworkers in RLC and with private practitioners conducting care and protection matters.

The issues identified as arising from the study group were reviewed against RLC's caseworker experience of other matters over a number of years and concurrent with the study period.

Defining the type of assistance a client required of the advocate was cached under terms such as 'information', 'advice', and 'referral'. This was further broken down into what type of information, or advice the client required and whether this information or advice was oral or written, such as briefing information to a solicitor or a letter of referral.

The Children and Young Persons (Care & Protection) Act 1998 (C&P (CP)) does not define 'risk of harm'; instead the only guideline that one can follow is what would the "reasonable person" consider to be a risk of harm. Risk of harm may be considered where children are exposed to domestic violence, homelessness, drug and alcohol abuse, or simply poor parenting.

The objectives of the project were to:

- ❖ Ascertain advocacy needs of RLC clients;
- ❖ Identify what type of assistance each individual client required; and/or
- ❖ Assess whether legal advocacy assisted in reducing the 'risk of removal' thus preventing another 'Stolen Generation'.

RLC was satisfied that the focused advice and advocacy provided to its clients in the study significantly improved their ability to act on their own behalf where appropriate, make use of relevant legal representation and understand the context in which they were operating more fully.

RLC acknowledges that it is too early to fully determine the extent their provision of services. RLC did observe, in some of the clients, a real growth in their ability to manage systems, which should be applicable across a range of life circumstances. Other clients had their circumstances ameliorated but not resolved.

The project identified a number of tensions, gaps and needs where legal services would benefit the families' ability to understand their rights and act accordingly.

Identified issues

1. Meeting between client and DoHS
 - a. People have had actual past experiences or have a community knowledge of dealing with bureaucracies which, while obtaining personal information ostensibly to help the person, have subsequently used that information to their detriment, to prosecute and/or to remove children. In this regard there are tensions of working with welfare workers and officers of DoHS who are documenting observations subsequently used in removal proceedings at the same time as they are smiling encouragingly at the family.

- b. Welfare workers and DoHS officers working with families where there is a risk of removal of children are balancing care and support and encouragement with monitoring for risk with a view to potential removal. Those workers are placed in a situation, which almost inevitably means they will disguise from the family the legal consequences of certain actions. There is a conflict between their support role and their regulatory role.
- c. People do not obtain care & protection legal advice at a time when knowing the potential outcomes might allow them to change behaviour or take action to prevent the decision to remove the child. Where legal information is provided, persons can better plan their pathways.

2. Disclosure of information to RLC of current investigation

- a. People are frightened that, even if they tell their legal advisers of issues that may affect assessment of children at risk, DoHS will be told and there is a real risk of removal. Even when assured that legal advisers are not mandatory reporters they are often reluctant to speak freely. Some of this is about “shame” but much of it is a perception of lawyers as part of the establishment and hence related to the government bureaucracy. Assurances of legal professional privilege are not readily understood.

3. Historical disadvantage of the client

- a. Of the clients dealt with in the course of the project, removal and external placement of children had happened in the extended family and in a number of generations.
- b. Disadvantaged persons with children with any issues of no or inadequate housing, family violence or of inadequate income are within the potential field of care and protection, as their children may be assessed as being at risk.

4. Mental Illness

- a. Mental illness of a parent may be a factor leading to assessment of a child being at risk, but it is in any case a major cause of disadvantage leading to and/or aggravating other risk factors such as homelessness, income insecurity and family violence. Many victims of domestic violence may be experiencing some level of post traumatic stress.
- b. Mental illness is a factor in failures of effective access and use of legal services as currently available.
- c. That a person who might be capable of managing their mental illness reasonably at or before a child is removed may be quite

unwell by the time a matter comes to hearing. In this regard the removal becomes self-fulfilling.

5. Clients working co-operatively with DoHS

- a. Parents are meant to continue working with DoHS cooperatively and constructively and politely despite having extensive allegations, often hearsay, set out in affidavits, not being allowed to express or report concerns for fear of being seen as undermining foster care and being obstructive.
- b. In litigation this is an odd situation. In a criminal matter, a lawyer would never send their client to the police unrepresented to have meetings to discuss ongoing matters, including how and what they did in the incidents in question, while the matter is before the courts. In a civil matter, where lawyers are acting for each party, contact will generally be between the lawyers. The lawyers representing people should be more involved with interim matters.
- c. The imbalance in power, resources and skills of the DoHS officers as against the parents should be acknowledged. If DoHS wish to rely on Practice Rules about legal representatives talking to legal representatives, they should be ready to provide legal officers to attend those meetings

6. Other remedies and areas of Law

- a. People are frequently unaware of other legal remedies they might have, for instance, victims compensation for sexual assault where a compensation payout would increase the comfort level of the family, increase their independence and validate the person's experience so that their sense of self and value in the community is enhanced.

7. Disadvantage in Accessing Justice

- a. Clients are frequently asked by their legal advisers to draft their response to an affidavit or undertake obtaining of evidence when the client has poor literacy skills, is very stressed, has no training or experience of marshalling information in an analytic or evidentiary mode, may not have access to even a telephone and certainly not an untimed one.
- b. Legal representatives are hard to reach, being at court frequently and not in offices.
- c. Parents frequently did not know whether or not a legal practitioner was acting for them or even that person's name or the name of their firm.

- d. Parents frequently were unaware of the nature of orders made, the date of hearings or at what stage the matter is.
- e. Parents were frequently concerned at being pressured to agree to interim orders that the child was at risk. While this may reflect a genuine assessment by the practitioner that the Court will be obliged to reach that view on the DoHS evidence and that it is better to not rush into evidence on inadequate instructions, it is still worrying.
- f. Most clients end up with duty solicitors or barristers. Further consideration should be given to whether adjournments or alternate dispute resolution should be requested more frequently to enable challenge to DoHS action or resolution of the matter at this stage.

8. Communications & Culture

- a. Legal Aid is running cultural awareness training for its solicitors and is to be commended for this.
- b. When people knew more clearly what the legal situation was, they were able to engage in communication more effectively and constructively without making unreasonable demands, become frustrated or walking, all of which would have interpreted adversely as them not coping or being aggressive and increasing the likelihood of an assessment that the children were at risk.

RLC Proposals from the Project for Discussion

To address the concerns raised in the project, RLC proposes the following for discussion:

That:

1. Community Legal Centres:

- a. Proactively identify and manage legal information provision and assisted referral to clients.
- b. To acknowledge the illiteracy of some of their clients and the complexities of their legal issues.

2. Legal Practitioners need:

- a. Cultural history and awareness training

- b. Adjustment of service delivery to meet actual needs of the client to achieve commensurate ability to instruct, understand and act on legal advice.
- c. To take steps to advise the client accordingly and refer appropriately to address the range of issues when dealing with parents without or inadequate housing and/or income to meet basic needs of the child, or where there is family violence, and a risk of care and protection issues arising.
- d. To acknowledge the illiteracy of some of their clients and the complexities of their legal issues.

3. Legal Aid NSW

- a. Should review its grants and service provisions to ensure that:
 - i. In-house services address the recommended legal practitioner requirements.
 - ii. That grants are sufficient to make it economical for private practitioners to meet the recommended requirements and that they undertake to do so on accepting the grant.
- b. To acknowledge the illiteracy of some of their clients and the complexities of their legal issues.

4. Legal Practitioners acting in Care & Protection Matters

- a. Should be able to and should be legally aided to attend with client's case conferences and ongoing interim meetings with DoHS.
- b. Duty solicitors or barristers attending at Children's Courts should not act regularly for DoHS as there is a perception of conflict or capture.
- c. To acknowledge the illiteracy of some of their clients and the complexities of their legal issues.

5. Department of Community Services

- a. To the extent that Practice Rules may prevent this they DoHS should waive the right or their legal representative should also attend.
- b. When DoHS identify a child 'at risk', they should fund the family obtaining legal information and advice and not only the care and protection issues but any other matter that may be affecting the family.
- c. To acknowledge the illiteracy of some of their clients and the complexities of their legal issues.

Attachment 1 - Overview of Indigenous Disadvantage²

“The cold statistics of Aboriginal over-representation in the child protection and out-of-home care systems indicate a substantial level of disadvantage for Aboriginal people ...”³

Statistical evidence of DoHS 2006/07 demonstrates that the intersection between Aboriginal communities and DoHS remains unbalanced.⁴

Child Protection Reports
Aboriginal children reported to DoHS doubled from 7,093 in 2001/02 to 15,820
In 2006/07, 75% of Aboriginal children reported to DoHS had a child protection history
Aboriginal children reported to DoHS by Police (57%) and Relatives/friends/neighbours (34%).
A reported issue of neglect recorded in reports of 44% of Aboriginal children
Carer issues recorded in the reports of 67% of Aboriginal children
Domestic violence was the most frequently reported issue (49%)
Aboriginal children reported with following issues in reports: <ul style="list-style-type: none"> ▪ carer alcohol (27%) ▪ carer drug (24%) ▪ carer drug and/or alcohol (43%)
Aboriginal children with 5+ reports (19%) was almost twice that for other children (10%).
Aboriginal children with a CP history and previous placement most likely to be re-reported.
The most significant factors determining re-reported were child protection history, age, Aboriginality and out-of-home care history.
Other less significant factors reported involving neglect/carers issues was mental health.
After first report, they were more likely to be reported again within 12 months.
Out of Home Care
30% of children in out-of-home care were identified as Aboriginal.
2002 and 2007, there is a 65% increase in the number of Aboriginal children in care
The overall rate of Aboriginal children in care is significantly higher than for other children (61 per 1,000 compared to 6 per 1,000)
64% of Aboriginal children in care were in Relative and Kinship Care at 30 June 2007.

² What DoCS data tell us about Aboriginal clients, December 2007, Statistical Report- Data sources: **Child Protection:** 2006/07: Key Information and Directory System (KiDS) – Annual Statistical Extract: **Out-of-home care:** 2006/07 cohort analysis: Integrated Substitute Care Database statistical extracts: 2005/06 and 2006/07: Corporate Information Warehouse Annual Statistical Extracts

³ Message from the Director-General, *DoCS Aboriginal strategic commitment 2006-2011*, NSW Department of Community Services, 2006.

⁴ What DoCS data tell us about Aboriginal clients, December 2007, Statistical Report- Data sources: **Child Protection:** 2006/07: Key Information and Directory System (KiDS) – Annual Statistical Extract: **Out-of-home care:** 2006/07 cohort analysis: Integrated Substitute Care Database statistical extracts: 2005/06 and 2006/07: Corporate Information Warehouse Annual Statistical Extracts