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22 September 2003

Justice and Electoral Committee Secretariat
Bowen House
Parliament Buildings
Wellington

Email: Helena.strange@parliament.govt.nz

**SUBMISSIONS TO SELECT COMMITTEE: CARE OF CHILDREN BILL 2003**

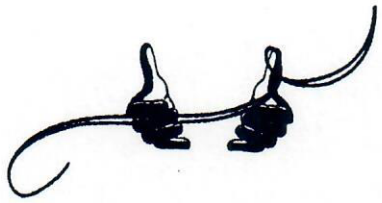
Please find **enclosed** submissions prepared on behalf of the Grandparents Raising Grandchildren Trust with respect to the Care of Children Bill 2003.

We confirm that 20 copies of this letter and the attached submissions are being forwarded to you by courier post.

The Grandparents Raising Grandchildren Trust would like the opportunity to be heard by the Select Committee on this proposed legislation.

Yours sincerely

**Kate Woodd**
GRG Trustee and Legal Adviser



# Grandparents Raising Grandchildren Trust

## Submissions on the

# Care of Children Bill 2003

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# 1. Background Information on Grandparents Raising Grandchildren Trust

1.1 The Grandparents Raising Grandchildren Trust was established on 23 October 2001. It is an incorporated charitable trust. The Trust Head Office is currently located in Birkenhead, North Shore at the home of Diane Vivian, Trustee/National Convenor and founder of the organisation.

1.2 The organisation was borne from local needs identified in the North Shore City in March 1999 when a local support group was first established. Over the following two years, support groups throughout the country were established to meet the local needs of grandparents raising grandchildren as primary caregivers from Whangarei/Northland to Invercargill.

1.3 There is currently 30 local support groups nationwide run by local coordinators. The Grandchildren Raising Grandchildren Trust has approximately 2000 members nationwide. The GRG Trust notes that at the last census in 2002 there were 4416 grandparents in New Zealand who recorded they were raising their grandchildren as primary caregivers.

1.4 The Trustees of the Grandparents Raising Grandchildren Trust are:

- Diane Vivian, (National Convenor)
- Debbie Gillies (Secretary)
- Birgitt Rehbein

- Jill Worrall (Senior Lecturer, School of Social and Cultural Studies, Massey University
- Samina Corbett (Coordinator of West Auckland GRG Incorporated)
- Kate Woodd (Legal Advisor)
- Miriama Paraone-Davies (GRG Trust Cultural Advisor)

1.5 The Aims and Objectives of this organisation are:

- ▶ To provide support to grandparents who are the primary caregivers of their grandchildren
- ▶ To provide opportunities for the grandchildren to meet others in the same situation
- ▶ To raise public awareness as to the role of grandparents in this primary caregiver role
- ▶ To undertake research to establish the numbers of grandparents in the primary caregiver role in New Zealand
- ▶ To facilitate legislative change to result in equitable laws for children and grandparents raising them.

1.6 The organisation published ***"A Handbook for Grandparents and Other Kin Caregivers"*** authored by Jill Worrall in July 2001 that includes information about the law relating to the care of children. It is now in its second edition and is widely distributed to members, Child Youth and Family, Office of the Commissioner for Children and other community organisations.

## 2. Summary of the GRG Trust's primary issues of concern regarding the care of children

2.1 The GRG Trust made submissions on the ***Discussion Paper: Responsibility for Children – Especially when parents part;*** a Review of the Laws about Guardianship, Custody and Access in September 2000.

2.2 In those submissions, the GRG Trust outlined its support for the objectives set out in the Ministry of Justice's Discussion Paper.

2.3 The GRG Trust's primary concerns and issues regarding the guardianship laws and the care of children from the grandparents perspective can be summarised as follows:

2.3.1 Children need adequate and proper parenting to help them achieve their full potential;

2.3.2 There is a need to ensure that parents fulfil their responsibilities concerning the care, welfare and development of their children;

2.3.3 The law needs to recognise and maintain the support and relationships within their wider family/whanau which children have established and in particular to give those people standing before the court where appropriate;

2.3.4 The law and the agencies mandated to assist must ensure that children are protected from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment,

maltreatment or exploitation, including sexual abuse while in the care of their parents, legal guardians or caregivers;

2.3.5 There is a need to ensure that where appropriate, children receive effective counselling and/or therapy following the trauma of separation and/or domestic violence and/or mental illness;

2.3.6 There is a need to ensure that where appropriate, parents and/or caregivers receive effective counselling, therapy and/or support programmes to assist them in the parenting role as primary and secondary caregivers to children;

2.3.7 The law must ensure that where appropriate, children are able to effectively express their wishes or views either directly or indirectly through an advocate or representative in dispute resolution forums;

2.3.8 There is a need to refine the key definitions in the legislation affecting the care of children (i.e. "custody", "access" and "guardianship"). To ensure that the language used will more effectively generate a positive response and attitude to the role of parents and/or caregivers engaged in decisions or disputes about their children. To this end, the GRG Trust recommended the emphasis should be placed on the "*duties, responsibilities and obligations*" of a parent or caregiver to ensure that a child's welfare and developmental needs are adequately provided.

2.3.9 There is a need to ensure that the legislation properly protects children in disputes about their care by ensuring that any order made for contact between a child and his/her parent or caregiver

is in fact one that is in his/her best interests and will promote his/her welfare and development;

2.3.10 There is a need to empower the court to remove the guardianship rights of a parent or caregiver where there is evidence which satisfies the court that such an order would be in a child's best interests;

2.3.11 There is a need to empower the court to place an embargo on further litigation when it is in the opinion of the court that a child is settled with one party and it is not in the child's best interests for the matter to be brought back to court. There needs to be a greater emphasis placed on achieving a sense of permanency and security for children.

2.3.12 The legal system needs to provide for an early intervention and assessment (by specialists) of the needs of a family coming before the court in a time of conflict or crisis over the care arrangements for children. In order to work towards an effective parenting plan for children; the legal framework needs to ensure that the issues involved in the particular case are properly and appropriately addressed to safeguard the welfare and best interests of the children. For example the system needs to address issues such as:

(a) The need for counselling or therapy for the parents / caregivers or children;
(b) Drug and alcohol issues
(c) Domestic violence
(d) Contact between the children and other significant family members

2.4 In essence, the GRG Trust has confined its consideration of the Care of Children Bill to a consideration of its provisions in the context of the above primary issues and concerns. Due to time and resource issues, the GRG Trust's focus for these submissions is therefore on provisions set out in parts 1, 2 (excluding sub-parts 3-4), 3 concerning guardianship and the care of children.

# 3. Executive Summary

3.1 In principle, the GRG Trust supports the Care of Children Bill ("the Bill") and its provisions being passed into law. The GRG Trust believes the Bill appropriately recognises:

3.1.1 That there are many and varied types of family units that care for children; and

3.1.2 That in many cases children need the support of grandparents, or other family/whanau members to care for them on a day to day basis or to play a significant role in their upbringing and accordingly those significant people need to be recognised under the law, in so far as the role they play can affect and impact on the welfare and best interests of a child;

3.1.3 That the current legislation and definitions relating to care of children (i.e. custody, access and guardianship) are outdated and ill defined. The Bill makes better provision for positive definitions of guardianship that are more reflective of the principle that the welfare and best interests of a child is of paramount importance.

3.1.4 That there is a need to curb the predilection (in some cases) to institute repeat litigation over care arrangements for children;

3.1.5 That there is a need to empower the court to remove rights of guardianship from a parent or caregiver in some cases in order to safeguard the welfare and best interests of a child.

3.1.6 To this end, the GRG Trust is pleased that the Bill recognizes and makes provision for the concerns set out in paragraphs 2.3.1 to 2.3.12 above.

3.2 However, the GRG Trust notes that the provisions of Parts 1-3 regarding guardianship and the care of children (apart from widening the scope of eligible persons who may apply to the court for orders and the definition of guardianship) are still closely aligned to the present Guardianship Act framework. The GRG Trust does not take issue with that factor per se, but notes that resolution of conflicts over the care of children will necessarily take place within the same contextual framework (i.e. the Family Proceedings Act and Rules) that have operated for the past 20 years or so.

3.3 The GRG Trust submits that, not until the procedural aspects of the Family Court are overhauled to provide for more effective dispute resolution and early intervention and assessment in cases where children are at risk of abuse (in its variety of forms), will the legal system be more effective in assisting parents, caregivers, legal advisers, judges and specialists to reach decisions that better provide for the welfare and best interests of the children involved.

3.4 The GRG Trust also submits that there are a number of areas in which the proposed guardianship and care of children provisions need to be changed. The GRG Trust's recommendations are set out in the following section.

# 4. Recommended Changes to the Care of Children Bill

## 4.1 Current Clause 9: De facto relationship defined

*"(1) For the purposes of this Act, a* ***"de facto relationship"*** *is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)--*

*(a) who are both aged 16 years or older; and*

*(b) who live together as a couple; and*

*(c) who are not married to one another.*

*(2) Despite subsection (1)(a), for the purposes of section 17(3) and (4) a de facto relationship may exist between a child's mother and father even though they are not both aged 16 years or older.*

*(3) Despite subsection (1), a person younger than 18 years of age does not have a de facto relationship with another person for the purposes of this Act (except section 17(3) or (4)) unless,--*

*(a) if the person is under the guardianship of the Court, the Court has on an application for the purpose consented to the relationship; and*

*(b) in every other case, the person's parents and guardians have consented to the relationship.*

*(4) In determining whether 2 persons live together as a couple, all the circumstances of the relationship are to be taken into account, including any of the following matters that are relevant in a particular case:*

*(a) the duration of the relationship:*

*(b) the nature and extent of common residence:*

*(c) whether or not a sexual relationship exists:*

*(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:*

*(e) the ownership, use, and acquisition of property:*

*(f) the degree of mutual commitment to a shared life:*

*(g) the care and support of children:*

*(h) the performance of household duties:*

*(i) the reputation and public aspects of the relationship.*

*(5) In determining whether 2 persons live together as a couple,--*

*(a) No finding in respect of any of the matters stated in subsection (4), or in respect of any*

*combination of them, is to be regarded as necessary; and*

*(b) a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case.*

*(6) For the purposes of this Act, a de facto relationship ends if--*

*(a) the de facto partners cease to live together as a couple; or*

*(b) 1 of the de facto partners dies."*

### 4.2 Recommended Change to Clause 9:

The GRG Trust recommends that sub-clause 9(2) should be **deleted**. The rationale for this recommendation is based on the following analysis of the Bill:

4.2.1 If a parent of a child is under 16 years of age, that parent is either:

(a) a child under the guardianship of his or her parent(s) or caregiver(s); or

(b) a child under the guardianship of the Chief Executive.

**4.2.2** In either case the parent of the child is a child. If the child is or claims to be in a de facto relationship, the effect of that clause (i.e. 9(2)) will be to extinguish the rights and abilities of the parent/caregiver of that child (who is an under 16 year old parent) or the court (via wardship proceedings) to exert guardianship over that child.

**4.2.3 See Clause 27(1)(c) below:**

***"27 Time at which guardianship ends***

*(1) The duties, powers, rights, and responsibilities of a guardian of a child end when the first of the following events occurs:*

*(a) the child turns 18 years:*

*(b) the child marries:*

***(c) the child lives with another person as a de facto partner:***

*(d) the guardian is removed by an order under section 28:*

*(e) if the guardian was appointed under section 26(2) for a specific period or a specific*

*purpose, the period expires or the purpose is achieved.*

*(2) However, nothing in this section affects the appointment of, or the High Court's powers in respect of, a litigation guardian."*

4.2.4 The problem with this scenario is that parents and caregivers today already face significant and often uphill hurdles trying to protect and guide their children in decisions about sexual relationships at a young age.

4.2.5 It is conceivable that situations will arise on a frequent basis where a young teenage girl (e.g. a 13 or 14 year old) who is sexually active, becomes involved with an older male and becomes pregnant.

4.2.6 It is also conceivable that the circumstances may involve drug or alcohol dependency; or circumstances where the teenage girl is in a vulnerable position in the relationship with her partner. Domestic violence and power and control issues as between the parties to the relationship may also be a factor.

4.2.7 The parent(s) or caregiver(s) may or may not have approved of the relationship and the question as to whether consent to the de facto relationship has been given or not will be an arguable question of fact – which under the proposed legislation would necessitate a court to hold a hearing to determine the issue. In the GRG Trust's view, this will unnecessarily complicate matters.

4.2.8 It is conceivable that because of clauses 9(2) and 27(1)(c) that in these circumstances a parent/caregiver or the court will be unable to exercise guardianship jurisdiction in respect of the teenage girl, and be unable to obtain the necessary counselling, support and help she might need.

4.2.9 The only recourse for the court or the grandparents or other concerned family member would be to seek orders in respect of the grandchild if there are care and protection issues involved. In these circumstances the young teenage parent is cast into the role of an adult who becomes polarised from the other parties involved at a time when she is most vulnerable – and is herself still a child.

4.2.10 The GRG Trust submits that this situation is likely to occur relatively frequently and it would be most undesirable for the court and/or the teenage parent's parents or caregivers to have no ability to exert guardianship rights and responsibilities in respect of the teenage parent to protect her and foreseeably her child.

## 4.3 *Clause 15: Further examples of guardianship*

*"(1) Further examples of duties, powers, rights, and responsibilities of a guardian of a child are the guardian's--*

*(a) contributing with other guardians of the child to the child's intellectual, emotional, physical, social, cultural, and other personal development; and*

*(b)* ***determining (for or with the child), or helping the child to determine****, questions about matters (for example, those in subsection (2)) affecting the child (in each case with other guardians of the child).*

*(2) The matters referred to in subsection (1)(b) are--*

*(a) the child's name (and any changes to it); and*

*(b) where, and with whom, the child lives; and*

*(c) medical treatment for the child; and*

*(d) where, and how, the child is to be educated; and*

*(e) the child's religious denomination and practice."*

***"Clause 5: Child's views***

*In all proceedings under this Act,--*

*(a) a child must be given a chance to express views on matters affecting the child; and*

*(b) any views the child expresses (either directly or through a representative) must be taken into account.*

**Recommended Change to Clause 15(1) (b) and (2):**

4.3.1 The GRG Trust submits that clause 15(1)(b) when read in the context of sub-clause (2) is ill conceived and should be changed to read:

*"....(b) determining questions about matters (for example, those in subsection (2)) affecting the child (in each case with other guardians of the child)."*

4.3.2 The rationale behind this recommended change is that clause 15(1)(b) is wide open to abuse by guardians. This is particularly likely in circumstances where guardians are engaged in a dispute over where and with whom the child will live. It is foreseeable that a guardian who engages in "coaching" or manipulation of a child can justifiably say that engaging in discussions with a child about where and with whom they will live is simply exercising the guardian's rights of guardianship.

4.3.3 The GRG Trust submits that children need to be guided and protected from such forms of abuse and manipulation. The Bill highlights the requirement that a child's views are to be taken into account and naturally the child must communicate those views to someone, whether it is a guardian or representative appointed by the Court. However to include the words "*...determining (for or with the child), or helping the child to determine...*" potentially courts disaster where guardians don't altruistically put the welfare and best interests of the child first before acting on their own agenda in disputes between competing guardians. In short, the GRG Trust submits that the words in that sub-clause are undesirable and not necessary. They don't add value to the overall description of a guardians rights and responsibilities.

## 4.4 Clause 27: Time at which guardianship ends

*"(1) The duties, powers, rights, and responsibilities of a guardian of a child end when the first of the following events occurs:*

*(a) the child turns 18 years:*

*(b) the child marries:*

***(c) the child lives with another person as a de facto partner:***

*(d) the guardian is removed by an order under section 28:*

*(e) if the guardian was appointed under section 26(2) for a specific period or a specific purpose, the period expires or the purpose is achieved.*

*(2) However, nothing in this section affects the appointment of, or the High Court's powers in respect of, a litigation guardian."*

### 4.4.1 Recommended Change to Clause 27:

As discussed at paragraphs 4.2.3-4.2.10 above the GRG Trust submits that clause 27(c) should be deleted.

## 4.5 Clause 133: Power to restrict commencement of proceedings

*"(1) This section applies to a Court if, and only if, the Court--*

*(a) is satisfied that a person has persistently instituted vexatious proceedings under this Act or under any former Act (whether those proceedings were in respect of the same person or matter or different persons or matters); and*

*(b) has given the person a chance to be heard.*

*(2) The Court may order that the person may commence either of the following only with the leave of the Court:*

*(a) proceedings under this Act of any kind; or*

*(b) proceedings under this Act of any specified kind or in respect of any specified person or matter.*

*(3) Nothing in this section limits section 88A of the Judicature Act 1908 (which empowers the High Court to make orders restricting the institution or continuation of vexatious proceedings)."*

4.5.1 The GRG Trust supports the enactment of clause 133. However it is submitted that the Court should be empowered (other than by simply exercising its broader discretionary powers to make orders as it sees fit) to place an embargo on the filing of any further applications in relation to a child, for a specified time, in

circumstances where the Court is satisfied that would be in the welfare and best interests of the child.

4.5.2 At present clause 132 enables the court to **dismiss** applications when it considers they are not in the best interests of the child, but it does not prevent **new applications** from being filed in the same circumstances. Clause 133 is limited to circumstances where the court considers applications to be vexatious or frivolous.

4.5.3 The GRG Trust submits that a clear message needs to be sent to litigants within the text of the legislation that the court can restrict the filing of further applications in these circumstances. It is submitted that this would detract from the commonly held view by many engaged in the court process that an order made today can be revisited and challenged in fresh proceedings a few months down the track.

4.5.4 The GRG Trust submits that there needs to be a greater emphasis placed upon the needs of children who have been embroiled in a dispute over their care, to have a sense of permanency about their placement allowing them to settle in with a routine that gives them some security and normality in their lives.

**4.5.5 Recommended Addition to Clause 133:** The GRG Trust therefore submits that clause 133 be amended to read as follows (new provisions highlighted in bold).

**" Power to restrict commencement of proceedings**

*(1) This section applies to a Court if, and only if, the Court--*

*(a) is satisfied that a person has persistently instituted vexatious proceedings under this Act or under any former Act (whether those proceedings were in respect of the same person or matter or different persons or matters); and*

*(c) has given the person a chance to be heard; or*

**(d) *where the court is satisfied upon the making of an order in Part 2* [guardianship and care of children] *that the filing of an application for any order or the commencement of proceedings under this Act would be contrary to the welfare or best interests of the child, in which case the court may make an order specifying -***

***(i) the period during which no application may be made; or***

*(2) The Court may order that the person may commence either of the following only with the leave of the Court:*

*(a) proceedings under this Act of any kind; or*

*(b) proceedings under this Act of any specified kind or in respect of any specified person or matter; or*

*(3) Nothing in this section limits section 88A of the Judicature Act 1908 (which empowers the High Court to make orders restricting the institution or continuation of vexatious proceedings)."*