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7 May 2018

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
SYDNEY NSW 2001

Dear Sir/Madam,

**Review of the Family Law System – Hunter Community Legal Centre Submission on the Issues Paper produced by the Australian Law Reform Commission**

The Hunter Community Legal Centre (HCLC) is a not for profit, Community Legal Centre that provides free legal services to people in the Hunter Valley, Newcastle, Lake Macquarie, Port Stephens and Great Lakes area.

Our family law solicitors provide advice and minor assistance to self-represented litigants in family law matters. We limit our service to parenting, property, and divorce matters. Our service generally provides advice to all clients who meet our conflict check and other requirements. We also provide minor assistance to some clients, primarily those who are disadvantaged, and unable to afford a private solicitor but not able to receive a grant of Legal Aid. These clients remain as self-represented litigants and often struggle with understanding the procedures and legal jargon required to run their own matter. Our family law solicitors provide assistance to these clients in the following ways;

1. Assistance drafting court documents and advice on filing and serving court documents;
2. Advice on family law legislation and court procedures;
3. Negotiating with other parties; and
4. Providing representation to a party in a legally-assisted mediation.

HCLC also provides a duty service at the Newcastle Registry of the Federal Circuit Court of Australia and the Family Court of Australia. Subject to a conflict check, anyone can approach the service, and the duty solicitor uses their discretion as to how much assistance is provided at court to the client.

A large majority of our family law clients have approached our service because they are unable to receive assistance from Legal Aid, but require family law advice or assistance immediately. There are numerous reasons as to why Legal Aid has not been able to assist, but the main reasons our clients experience include the following;

1. The client requires urgent assistance, such as initiating court proceedings for urgent recovery of a child, but the Legal Aid application would take weeks to process; or
2. The client is wishing to pursue a property matter; or

3. The client does not meet Legal Aid's merit test because of the circumstances of the matter and/or the orders being sought (such as orders for overseas travel and passports or change of name); or
4. The client falls outside the Legal Aid's means test, but cannot afford a private solicitor.

We offer services that Legal Aid are unable or choose not to assist with, and can provide advice or assistance in a timelier manner than Legal Aid. The majority of our clients are either disadvantaged, or unable to afford a private solicitor. We therefore provide a valuable service to our community.

We have addressed four questions from the Issues Paper. First, we provide a submission on our experience in the particular area. We then provide a case study to support our submission.

**Question 12: What other changes are needed to support people who do not have legal representation to resolve their family law problems?**

An increase in funding for Community Legal Centres who provide free family law advice and assistance, such as ours, is a change that is needed to support people who do not have legal representation to resolve family law problems.

Our family law solicitors provide free advice to all clients who have questions about their family law related issues. We empower our clients by helping them understand the basics of the family law system, and how to run their own matters if they proceed to court. Additionally, our Duty Service is invaluable, as often our clients are unable to access the Legal Aid Duty Services due to a conflict or Legal Aid policy. Our solicitors are able to improve a client's outcomes at court by representing them on a duty basis, often finalising a matter that would have otherwise continued through the court process.

Changing the legal process alone, to assist self-represented litigants, ultimately may not assist in reaching sensible outcomes in matters, especially those involving high risk issues such as domestic violence, drug and alcohol abuse, or child abuse, amongst others.

As well as changing the court procedures to make it easier for people to self-represent, providing services such as ours with more funding would result in more self-represented litigants being empowered to run their own matters whilst still being guided by a solicitor.

The type of assistance outlined above can be very effective at the early and middle stages of proceedings, assisting self-represented litigants to identify relevant issues, obtain useful evidence, and put in place appropriate interim arrangements.

However, as proceedings enter the later stages, especially when they are listed for final hearing, the assistance available to clients becomes very limited. Duty and advice services such as HCLC will often not have sufficient background in a matter by this stage. It is unlikely they have been involved in all previous appearances, and they will not have had access to evidence such as subpoena material. They are therefore unable to provide advice about the merits of a self-represented litigant's position, and can generally not appear in a final hearing.

Advice at this stage is largely limited to the procedure for a hearing, such as cross examination and tendering of evidence. This however is difficult to teach in the course of an advice session.

A better way to equip self-represented litigants for a trial may be to provide funding for a course or classes in litigation that can be undertaken by self-represented litigants. Though this would not eliminate the disadvantage of being self-represented, it is likely to reduce it and importantly makes it more likely that relevant evidence is brought to the attention of the court by way of tendering of subpoena evidence and cross-examination.

Such courses could be provided by Community Legal Centres.

### **Case Study:**

We were contacted by a support worker from a domestic violence and homelessness service. The worker was assisting a client who had recently experienced relationship breakdown and was at risk of homelessness. She was a Thai immigrant, who spoke limited English, and had four children under 18. The father of her two youngest children was her husband. It was alleged that he had been physically abusing her for years. She was struggling financially, with no financial support from her husband. He owed approximately \$30,000 in Child Support when we were first approached for advice. All property was in the Husband's sole name.

We attempted to negotiate a property settlement on behalf of our client. The husband refused to negotiate, or even provide financial disclosure. We assisted with drafting court documents, including her Initiating Application, Financial Statement, and Affidavit. The husband avoided service so we assisted with seeking substituted service. We represented our client for each mention on a duty basis. The husband refused to engage in the court process so the matter proceeded undefended. The husband owned two blocks of land that were unencumbered. Just prior to the undefended hearing, it was discovered that the Child Support Agency had put caveats on the blocks of land in an attempt to secure the unpaid Child Support debt. We negotiated with the Child Support Agency to have the caveats lifted, then assisted our client with the undefended hearing.

Our client received a judgment in her favour. In this case, our client would have continued to have struggled financially as a single mother with young children and no financial support from her husband. She faced multiple disadvantages, including her limited English and understanding of our legal system, history as a domestic violence victim, financially dependent on government payments, and unable to access Legal Aid due to the nature of her matter. Without our service assisting her, she would likely have continued to experience hardship. The positive outcome in this matter highlights our commitment and contribution to social justice in our community.

### **Question 14: What changes to the provisions in Part VII of the *Family Law Act* could be made to produce the best outcomes for children?**

The separated couples who find themselves in court arguing over the arrangements for their child are generally there because they were unable or unwilling to negotiate an agreement informally, with or without assistance from a third party or legal advocate.

Exercising equal shared parental responsibility would likely be in a child's best interests if the parties were able to rationally discuss issues that concern their child, and reach an agreement on every issue in a timely and respectful manner. Unfortunately, this is not the norm. It is unrealistic to expect separated parents to rationally discuss and agree on every major long-term issue concerning the child.

Rebutting the presumption of equal shared parental responsibility is difficult and requires extensive evidence gathering and the complex (and often expensive) formulation of legal arguments.

Many clients are close to reaching an agreement, but parental responsibility remains as the only issue in dispute, so the parties reluctantly agree to equal shared parental responsibility in order to finalise the matter. The uncommunicative parties, who to date have been assisted by legal representatives, find themselves having to communicate about major-long term issues concerning their children, but unable to rationally discuss and/or reach an agreement.

For the above reasons, a final order for equal shared parental responsibility increases the likelihood of further litigation. An order for sole parental responsibility is often more appropriate, reducing the opportunities for further conflict between the parties.

It is therefore our experience that the current presumption of equal shared parental responsibility is problematic.

### **Case Study:**

Our client previously ran a parenting matter through the Family Court, and had final orders by consent. The orders provided that the two children live with our client (their mother), spend regular time with the other party (their father), and that the parties had equal shared parental responsibility.

Once the matter was finalised, the parties were able to follow the orders without notable issues arising. Their communication, however, was practically non-existent. Although it could be argued that this is always problematic and not in a child's best interests, it became an imminent issue when the mother tried to change the children's school.

The children attended a primary school, located approximately 10 kilometres from the mother's and child's residence, and approximately 27 kilometres from the father's residence. The mother wanted to change the children's school to one that was less than 500 metres from the mother's and child's residence, and approximately 17 kilometres from the father's residence. The father ignored the mother's attempts to negotiate, and refused to attend mediation. Rather than turning his mind to what may be in the children's best interests, the father wilfully ignored the mother's attempts to exercise equal shared parental responsibility, presumably out of spite.

We advised the mother not to contravene the court order by making a unilateral decision to change the children's school, and to initiate court proceedings in the Federal Circuit Court if she wanted to pursue the matter. Although she ultimately followed our advice and filed court proceedings, this is a matter in which equal shared parental responsibility is not appropriate due to the inability of the parties to communicate and reach agreements that benefit their children.

Under the current legislation, it would have been difficult for our client to have demonstrated why an order should have been made for her to have sole parental responsibility when the matter was first before the court. The presumption is problematic in many matters, partly due to the difficulty in rebutting it.

**Question 17: What changes could be made to the provisions in the *Family Law Act* governing property division to improve the clarity and comprehensibility of the law for parties and to promote fair outcomes?**

Many of our client's seek our assistance when drafting court documents for property matters.

Our experience is that the current approach (i.e. the step-by-step approach set out in *Stanford and Stanford* (2012) 247 CLR 108) provides a straightforward guide for litigants to follow when drafting their affidavits and formulating the orders they are seeking. For example, when drafting their affidavits we advise our clients to succinctly address financial contributions, non-financial contributions, contributions to the welfare of the family, initial contributions, and post-separation contributions, as well as financial resources. Once this has been explained to a client they are generally equipped with enough knowledge on the law to enable them to run their own matter, just seeking advice from our service at each stage of the proceedings.

We disagree with the suggestion that the adoption of a community property regime would be more appropriate than our current approach. We also disagree that a presumption of equal contributions or equal sharing would achieve a fair outcome. In either of these circumstances consideration should still be given to specific contributions, such as inheritances or financial gifts from relatives, meaning that the process would be similar to the one we currently use anyway. Family law matters are complex by nature, because interpersonal relationships are complex and unique. Taking a "one size fits all" approach in order to simplify the legal process would ultimately result in less discretion provided to the courts, and would not result in fairer outcomes.

We agree that amendments should be made to allow for the splitting or transferring of unsecured joint debts and liabilities by way of court orders. Often separating parties have a significant amount of joint debt, but only a small amount of assets. Parties may not be in a financial position to refinance the debts into one party's sole name. Our experience is that many clients are financially bound to their ex-partner because of the joint debt and are unable to end the financial relationship. Providing the court with the discretion to split or transfer unsecured joint debts and liabilities would assist those clients who should not have to be financially bound to their ex-partner after a relationship has ended.

We agree that the Act's complex superannuation splitting provisions should be simplified. The current provisions are convoluted and almost always require professional legal drafting, thus making it impossible for self-represented litigants to complete a simple superannuation split with their ex-partner. For example, a standard form of order for superannuation splits of accumulation funds would be advantageous.

**Case Study:**

We assisted a client who suffered from an acquired intellectual disability. He had been in a de facto relationship with a woman for three years. During the relationship, our client arranged to purchase a house using \$250,000 of his own money, and \$260,000 from his father (who secured a mortgage over the property). At the time the title documents were drafted, our client's father was unwell, so the de facto wife handled the paperwork on behalf of our client. Unbeknownst to our client or his father, the de facto wife put her name on the title as joint tenants. Shortly after the parties moved into the property, the de facto wife was convicted of assaulting our client, and an Apprehended Domestic Violence Order with a no contact order was made protecting our client.

The de facto wife did not make any financial contributions during the relationship, there were no children of the relationship, and she put the parties in significant debt by using multiple credit

cards in our client's name, and she did not contribute to the household or to the care of our client (who was cared for by nurses and his father).

Our client approached us for assistance in selling the property. The de facto wife was unwilling to agree to the sale, and she was insistent on her entitlement to half the sale proceeds.

In this matter, a community property approach would not be considered just and equitable. Applying the current approach used by the court, however, should result in a fair outcome for the parties, and it is a step-by-step approach that is explainable to a self-represented litigant.

**Question 24: Should legally-assisted family dispute resolution processes play a greater role in the resolution of disputes involving family violence or abuse?**

Our service is in partnership with the Family Relationships Centre and the Central Coast Community Legal Centre, providing legally assisted mediation (LAM) to separated parents. The clients who are offered this service may otherwise have been considered inappropriate for mediation, possibly due to allegations of domestic violence.

We also assist clients who have been invited to attend a Legal Aid Conference, but who are unable to pay for their own solicitor to represent them. These clients would generally be at a disadvantage during the conference if they remained unrepresented whilst their former partner is represented by a Legal Aid solicitor. We do not receive Legal Aid funding for these conferences, and we do not charge our clients for our services.

It has been our experience that LAMs are more effective at reaching an outcome that is in the children's best interests and leaves both parties feeling satisfied than those engaged in the formal court process. A successful LAM is generally one in which a Parenting Plan is agreed upon. Parenting Plans can be reviewed periodically, and amendments are easily made. This approach is more affordable than the court process, and can lead to better outcomes for some parties.

We agree that the LAM process can be an 'empowering' process, as the parties have more control than if they were engaged in the formal court process.

**Case Study:**

We were approached by a client who was having difficulty with his parenting matter. He had two children with his ex-partner. Both children lived with the mother, and he spent as much time with the children as she would allow. She was unwilling to follow a plan, often changing the arrangements for the children with little notice. She was refusing to attend mediation or negotiate a Parenting Plan. Our client had been issued with a Section 60i certificate. He would have preferred mediation, however, he was willing to initiate proceedings in the Federal Circuit Court as he was eager to have something formal in place.

We assisted with drafting court documents, including his Initiating Application, Notice of Risk, and Affidavit. The mother received a grant of Legal Aid, and our client was invited to attend a Legal Aid Conference. One of our solicitors assisted our client at the Conference as his legal representative. An agreement was reached and Consent Orders were prepared. The matter settled at the second mention by consent.

In this matter, legally-assisted mediation was successful in bringing a cost effective and timely resolution to a matter. Both parents had significant input to the final agreement, and both expressed satisfaction with the outcome.

Please contact our office if you have any questions about our submission or our service.

Yours faithfully

**Hunter Community Legal Centre**

A handwritten signature in cursive script, appearing to read 'Bronwyn Ambrogetti', with a small mark above the final 't'.

**Bronwyn Ambrogetti**  
**Managing Solicitor**

**Clair Tait**  
**Solicitor**  
**Family Law Program**