

30 November 2018

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

**By email only:** [familylaw@alrc.gov.au](mailto:familylaw@alrc.gov.au)

Dear Panel Members,

### **Response to the Review of the Family Law System: Discussion Paper**

Hume Riverina Community Legal Service (HRCLS) welcomes the opportunity to respond to the Review of the Family Law System: Discussion Paper as released on 2 October 2018.

#### **About HRCLS**

HRCLS is uniquely positioned as a cross border community legal centre. Based in Albury-Wodonga on the Victorian–New South Wales border, the centre receives Commonwealth, Victorian and NSW funding to provide generalist legal services to a vast catchment area of 17 Local Government Areas in North East Victoria and the Southern Riverina of New South Wales. HRCLS is classed as a regional, rural and remote community legal centre.

Services provided include legal advice and casework assistance with family law issues (such as parenting, property disputes, child support and spousal maintenance), family violence, child protection, credit and debt problems, fines, motor vehicle accidents, consumer law and tenancy issues.

HRCLS assists those who are vulnerable and disadvantaged, and in particular, people who are not eligible for legal aid, but cannot afford a private lawyer. HRCLS also provide family law assistance to clients in receipt of Victorian and NSW grants of legal aid.

We value a society where all people in our communities enjoy equality of opportunity and have equal access to the law.

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## **General Comments**

HRCLS endorses the submissions made by the following organisations:

1. Community Legal Centres NSW (CNSW) and
2. Women's Legal Services Australia.

This submission focusses on some of the issues identified in the discussion paper with a particular focus on the provision of family law assistance in a regional area.

## **EDUCATION, AWARENESS AND INFORMATION**

HRCLS clients often experience low literacy and struggle with written information, including plain English fact sheets. Lawyers often restrict the giving of fact sheets as even in their simplest of forms, this information is at times overwhelming and later disregarded without consideration. There is often no substitute for individual advice and explanation.

For example, HRCLS assists many clients who are unable to obtain a grant of legal assistance and cannot afford a private lawyer. Despite all the available resources, including templates and family law factsheets, comments such as *"it seems so simple when you provide the information"* are common when assisting self-represented clients.

HRCLS supports information being available in a variety of ways, including interactive methods. However, information packages need to be specifically tailored to regional areas, noting that not all resources available in metropolitan areas are currently available regionally.

## **SIMPLER AND CLEARER LEGISLATION**

HRCLS agrees that the Family Law Act should be re-written in clear and simple terms. This is particularly relevant where there are high rates of self-representation. For instance, in the November 2018 sittings of the Federal Circuit Court at Albury, approximately 50% of clients were self-represented on the first day of the circuit. In circumstances where those parties are unrepresented, it is even more important that the legislation be written in a way that is easy to comprehend and apply, without legal knowledge.

Terms commonly used such as "parental responsibility" require change. Even with explanation, these terms are not easily understood and can create a great deal of uncertainty. Similarly, "equal" shared parental responsibility gives rise to conflict where it is often impracticable for most parents to share this responsibility on a supposedly equal basis.

## **GETTING ADVICE AND SUPPORT**

HRCLS supports the establishment of Families Hubs and again raises the importance of such Hubs being available in regional areas and being appropriately resourced.

HRCLS strongly supports health justice partnerships, and endorses the numerous benefits of such partnerships for clients accessing legal and non- legal advice, support and assistance. HRCLS strongly values its existing partnerships and gives testament to the obvious benefits to clients which flow from joined up services.

## **DISPUTE RESOLUTION**

HRCLS supports the increase of family dispute resolution (FDR) services in regional areas. At present there are significant delays in matters reaching mediation. There are many families who cannot access FDR, and in the case of legally assisted FDR, those who cannot access a lawyer.

HRCLS would seek that legal aid guidelines be amended to allow grants of aid for property matters only (without children's matters) and that legally assisted family dispute resolution be available for small property disputes.

Regionally there is very little alternative for those who wish to resolve small property claims other than using a community legal service or with parties often negotiating their own settlements, which may result in an unfair division of property (assets and debt). The cost of engaging a private mediator for property only matters is largely unachievable for most of our clients.

Due to geographical issues, there needs to be more FDR services which are available by telephone. HRCLS clients are often unable to travel (due to costs and lack of public transport) for the purpose of dispute resolution.

HRCLS agree that the guide for suitability for FDR should be included in the Act, rather than the regulations for the ease of reference, particularly for self-represented parties.

HRCLS experiences many parties in a dispute who withhold financial disclosure and delay matters as a way of control. Delays are already experienced in accessing FDR, engaging lawyers (many of whom are at capacity) and having matters determined (there are only 5 hearing weeks a year in the Albury FCC Registry). The option of cost consequences for parties who do not comply with their obligations of disclosure (ie. a % of the property pool on top of a costs order) may be an effective method of having parties comply with obligations.

HRCLS submits that a mediator should consider such matters, and any imbalances of knowledge of financial matters in determining whether FDR is appropriate. HRCLS lawyers often see one party using financial control in property matters as a way of perpetrating ongoing family violence. HRCLS submits that mediators should be able to identify on S60I certificates whether disclosure was provided and whether there was any delay or imbalance of power.

HRCLS would support greater funding for legally assisted FDR to take place in regional areas. HRCLS would also support funding models for CLCs to work with legal providers including other CLCs, Legal Aid and private practitioners, in conjunction with a Family Relationship Centre to provide legal advice and representation to clients participating in legally assisted FDR, including in small property matters.

HRCLS supports targeted Aboriginal and Torres Strait Islander FDR services with trained professionals and utilising locations such as community health services, noting that our region does not have a local Aboriginal Legal Aid or ATSI focused CLC service.

HRCLS recognises the need for a simpler process for clients to legally finalise agreements reached at FDRs. At present the process of filing consent Orders is complex, especially in relation to property matters where the preference is for clients to have engaged a lawyer. HRCLS often see clients who have not properly finalised property matters and who are experiencing problems many years after what they thought was a final outcome.

## **SPOUSAL MAINTENANCE**

HRCLS supports the application of an administrative process to determine spousal maintenance claims, such as that used in child support. Similarly, HRCLS would support a departure method to enable matters to be determined based on their particular circumstances. HRCLS often see clients electing not to pursue spousal maintenance in circumstances where the only option is a court application. This is particularly the case where applicants have experienced family violence.

### **Case study:**

*After many years Rita decided to leave Paul. Paul was on a high income and Rita obtained Newstart benefits after the separation. Paul used his finances as a way of controlling Rita throughout the relationship. Paul continued to “drip feed” Rita, and Rita who was financially disadvantaged, reluctantly took the money so that she could provide for herself and the children. Rita was advised of her options to pursue spousal maintenance from Paul. Rita had struggled to navigate the Centrelink and Child Support systems and was loathe to take on any new proceedings. She **settled for less**, to avoid confrontation with Paul. Paul continued to control her with money.*

## **RESHAPING THE ADJUDICATION LANDSCAPE**

### **Small property claims and family violence lists**

HRCLS supports specialist lists for small property claims and family violence. However, these lists need to be available in regional courts. There would need to be a substantial increase in hearing weeks at the Registry of the Federal Circuit Court at Albury to enable this to occur.

HRCLS clients experience extreme difficulties in travelling to metropolitan Courts. By car, where available, the travel to Melbourne is 4 hours one way. By train, this often results in an overnight stay in Melbourne, or leaving at 4am and returning at 10pm. Many HRCLS clients are financially disadvantaged and simply unable to do this.

### **Co-location of Courts**

HRCLS supports the co-location of Courts, particularly in circumstances where this would result in less cost and travel for clients. HRCLS notes however that for State Courts to take on a bigger role in family law matters, there would need to be substantial resources allocated for higher staff allocation and training of Magistrates and staff.

A concern held by the HRCLS would be the potential for parenting matters to be made concurrently with family violence Intervention Orders, where the safety of the parties should be the primary focus.

#### **Case study:**

*Sally applied for a Family Violence Intervention Order against Kevin for the protection of herself and the children. At Court she was represented by a duty lawyer. Kevin was at Court and was also legally represented. Kevin's lawyer was instructed to negotiate parenting arrangements in exchange for him consenting to the intervention Order. The proposal put was not one that was in the children's best interests in the circumstances. There were numerous safety concerns that had not been addressed at that point. The risk was that arrangements made on that day, in a rushed and busy setting, would impact significantly on the family in the future. Sally was advised by her lawyer to put hers and the children's safety first and not to negotiate parenting arrangements on the day.*

HRCLS recommends that there must be proper resources put in place including specialised training for Court staff, trained and experienced lawyers available to give considered advice, and proper time allocated for such matter to ensure that early resolution does not result in poor outcomes for families.

## **Post order Conflict and enforcement proceedings**

Many clients seek advice following the making of final Orders as the Orders are either not workable or one party is not complying. On occasion, HRCLS has not had the opportunity to close a file following final Orders being made, as problems have immediately arisen. HRCLS notes that many families are ill equipped to move forward post final Orders.

### **Case study:**

*George contacted our service as Lisa had failed to follow the Court orders in relation to their children. Initially this was a drop off of phone calls, or a failure to communicate medical procedures. Lisa then said that George was not allowed to attend the School at all, even though the Orders provided for changeover at the school. After 14 months in the Court system, the Orders had only been in place for 2 months. He loathed the thought of going back to Court for enforcement or contravention proceedings.*

HRCLS strongly encourages greater supports being placed around families post Orders. HRCLS would support increased funding to programs best equipped to work with families in these circumstances.

## **Safe & accessible court environment**

Regional courts are often inadequately built to cater for the large number of clients in attendance. This is particularly the case where there are safety concerns. HRCLS lawyers report providing advice to clients on park benches, in stairwells or in open public places, without privacy or security, due to the lack of meeting rooms.

Many regional courts have one entry and exit point, and clients wait in the one area which creates safety issues. If a safe room is available, it is often in use by other clients.

Waiting areas often do not have sufficient space to accommodate clients, family supports and service providers.

HRCLS would support an improvement to court facilities to provide for the safety of attendees and staff.

## **CHILDREN IN THE FAMILY LAW SYSTEM**

HRCLS supports specialist training being delivered to practitioners working with children, including the proposed child advocates, mediators and other professionals. Consideration must be given to additional resources in regional areas to ensure that children are well supported.

In circumstances where there are safety concerns, or family violence, there needs to be appropriate support to ensure that a child who is expressing a view is not placed in greater risk.

In regional areas there is often a lack of qualified Independent Children's Lawyers. Matters seem to be increasingly complex and the work that is required is often inadequately remunerated. Without proper resourcing there is a risk that fewer lawyers will take on these positions, resulting in greater delays, or in matters not being effectively managed, at the risk to the child.

HRCLS agrees that children should be able to access simplified and age appropriate information regarding the legal process and the decisions that are being made about them.

## **REDUCING HARM**

### **Misuse of systems and process of family violence**

HRCLS supports the broadening of the definition of family violence.

HRCLS lawyers regularly see the misuse of systems including; IVO process being abused, dragging matters out to further intimidate and control, failure to comply with disclosure, lawyer shopping to create conflicts of interest (with major impact in rural areas where lawyer options are limited) and repeated Applications for contravention and/or varying of final Orders.

This form of abuse is devastating for clients who have experienced significant family violence. The use of these tactics by perpetrators results in declines in mental health and recovery and has a significant impact on the parent's ability to parent.

#### ***Case study:***

*Kylie had six different applications filed by her ex husband after final Orders had been made including Applications to Vary and for Contravention. On each occasion the husband's Applications were struck out or not proven, however Kylie had to continually engage a lawyer and go through the stress and fear of the court process.*

### **Use of subpoena**

HRCLS submits that there needs to be greater protections afforded to clients in family law disputes where sensitive information is made available to all parties. Whilst it is appreciated that relevant evidence needs to be put before the Court in parenting matters, consideration must be given to the potential for abuse and ongoing harm. Currently there are only limited grounds for objecting to a Subpoena.

Many of our clients engage with services for counselling and support both during and subsequent to separation. Disclosures are made in that “safe” environment, including historical sexual assaults. It is an abuse of process for this information to potentially be made available to the other party, particularly when that party may have been the perpetrator. It is noted that many self-represented litigants are inspecting material without lawyers.

This area requires much greater oversight.

## **ADDITIONAL LEGISLATIVE ISSUES**

### **Supported decision making**

HRCLS agree that stronger and clearer legislative provisions and definitions of supported decision making in family law matters would assist in ensuring that people with disabilities are able to access and maintain legal services.

The issue of determining ‘legal capacity’, particularly on a duty basis, is fraught with problems. As a result, many clients will not be represented or receive legal advice. HRCLS agree that greater supports need to be put in place. Practical consideration needs to be given to rural and regional areas to ensure that there is sufficient funding for those supports. For instance, if lawyers are unable to act for a person with a disability until the necessary supports are in place, then this could result in lengthy delays for the client to access legal services and outcomes.

## **SKILLED AND SUPPORTED WORKFORCE**

HRCLS supports greater funding by legal aid services for private practitioners to undertake legal aid work. In regional areas there is a gross shortage of practitioners either on the panels, or taking on clients on a legal aid basis. This is often due to the low remuneration received for what are very complex and time consuming matters. Many lawyers undertaking legal aid work are at capacity, and there are often significant delays in engaging with a lawyer. Better funding would potentially result in more experienced lawyers these complex matters.

HRCLS supports lawyers and other practitioners working with children requiring a higher level of training, and specialised annual training being available for such practitioners. Again such training needs to be delivered regionally, or be available via online means.

Should any further information be required, please do not hesitate to contact us on (02) 6055 8090 or via email at [cls@umfc.com.au](mailto:cls@umfc.com.au).

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