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Executive Director

Australian Law Reform Commission  
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## Submission to the Australian Law Reform Commission's Family Law System Review

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Dear Panel Members,

Community Legal Centres NSW welcomes the opportunity to make this submission to the Australia Law Reform Commission's review of the Family Law System in Australia.

This submission responds to the Discussion Paper's proposals and questions through the lens of the challenges in access to justice in family law for people, families and communities in regional, rural and remote NSW, particularly around issues of service coverage and costs and the digital divide in these communities. It also addresses the Commission's questions about the authorisation of sterilisations of children with a disability and intersex medical procedures. Community Legal Centres NSW acknowledges the contributions of Western NSW Community Legal Centre and Kingsford Legal Centre to the content of this submission.

Community Legal Centres NSW also endorses the submission made by our member organisations Inner City Legal Centre, Marrickville Legal Centre, Shoalcoast Community Legal Centre and Women's Legal Service NSW.

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## 1. ABOUT COMMUNITY LEGAL CENTRES NSW:

Community Legal Centres NSW is the peak representative body for almost 40 community legal centres in NSW. Community legal centres are independent, non-government organisations that provide free legal services to people and communities facing economic hardship, at times when that help is needed most.

Community Legal Centres NSW represents the views of community legal centres to government and the broader community, advocates on key law reform and policy issues, and supports community legal centres to improve the efficiency and quality of services they deliver to the community, with the aim of increasing access to justice for people in NSW.

Most community legal centres in NSW help people and families to navigate the family law system. Community Legal Centres NSW is advised on matters relating to family law by our Care & Protection Network and our Regional Rural and Remote (RRR) Issues Committee. This submission is informed by our member organisations' deep understanding of the significant access and safety issues that people facing economic hardship experience in this system in NSW.

## 2. SUMMARY OF RECOMMENDATIONS:

1. Reforms should specifically guarantee access to justice for people experiencing financial, geographic, cultural and other forms of disadvantage or exclusion.
2. Reforms designed to improve access to family law services must be fully accessible to and tailored to the needs of rural, regional and remote communities. This includes specialist court lists, Family Hubs and expanded FASS services.
3. Greater funding should be allocated to judges, court services and community-based legal assistance services in rural, regional and remote areas to ensure that people have access to timely, affordable services.
4. There should be more sitting dates for the Federal Circuit Court in rural, regional and remote area to prevent unjust delays.
5. Subsidies should be provided to clients with limited resources to travel to attend court or face-to-face family dispute resolution.
6. Filing fees should be further reduced or fully waived for self-represented litigants who are in financial hardship and receiving assistance from a community legal centre, particularly for divorce applications.
7. Court registries should continue to accept hard-copy application forms and cash payments for filing fees, particularly in rural, regional and remote areas.
8. Reforms must be fully costed and must address funding issues affecting the family law system, including chronic underfunding of the Family Court, Legal Aid and community-based legal assistance services.
9. The Commission's final report should consider the impact and efficacy of proposed structural reforms to the Federal Circuit and Family Court of Australia, currently before the Commonwealth parliament.

10. Reforms should prioritise sophisticated community legal education strategies over the development of additional, static information resources.
11. Family Law information packages must be developed in consultation with people in regional, rural and remote communities, particularly remote Aboriginal and Torres Strait Islander communities and the Aboriginal-controlled organisations that support them.
12. Family law information packages must be available in hard copy. Hard copy packages should be distributed to all community-based legal assistance services and legal aid organisations to deliver to clients, including on outreach.
13. Family law systems should accommodate the limits of communications technology, particularly in rural, regional and remote areas.
14. Computers should be made available for those with a family law matter to use in the registry, and an administrator should be employed to assist people to use these computers.
15. Hard copy forms must be maintained for all family law applications, including for divorce. All courts must guarantee that they will continue to accept hard copy applications.
16. Family Hubs should not be established or funded at the expense of existing family law and family support services.
17. Family Hubs should co-locate existing, specialist legal and non-legal services and services should be delivered by specialist family law practitioners.
18. Family Hubs should be accessible by people in rural, regional and remote communities, including through direct and outreach service delivery.
19. Family Hubs should be available to outlying local courts as well as existing Federal Circuit Court registries.
20. Family dispute resolution services should be made available in a greater number of rural towns.
21. The timeframes for property and financial settlements for separating or divorcing spouses should be extended.
22. Specialist Indigenous, family violence and small property claims lists should operate in or be expanded to regional, rural and remote areas.
23. The federal government should prohibit medically unnecessary procedures on intersex children until they are old enough or mature enough to make an informed decision for themselves.
24. The federal government should prohibit the sterilisation of children, except where there is a serious threat to life or health, and the sterilisation of adults with a disability in the absence of their fully informed and free consent.
25. National guidelines should be enacted, in consultation with medical experts, people with disability, intersex people, and their peak bodies, to ensure a human rights-based approach is taken in decision-making for any medical treatment relating to sterilisation of children with disability or relating to intersex medical procedures.

26. Medically necessary sterilisations and intersex procedures should be authorised by the Family Court.

### 3. GENERAL COMMENTS ON THE DISCUSSION PAPER:

#### **Community Legal Centres NSW generally welcomes the proposed reforms**

Community Legal Centres NSW welcomes the overall direction of the proposals in the Discussion Paper, particularly the focus on:

- safety for women and children experiencing domestic violence;
- the need to improve access for a range of other vulnerable groups, including Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse (CALD) communities, LGBTIQ+ people, and people with disabilities;
- the need to involve marginalised groups in the design of reforms that affect their participation and wellbeing.

Community Legal Centres NSW believes that the needs and interests of people experiencing financial and other forms of disadvantage must be placed at the centre of any reform of the Australian family law system. As such, we generally support proposals to:

- simplify and clarify legislation, with the aim of improving accessibility for disadvantaged groups;
- simplify procedures and triage processes, noting that simplified processes must be tailored to rural regional and remote areas, rather than attempts to adapt an inherently urban system to regional needs;
- implement Family Hubs, which may offer a significant step in reprioritising the family law system towards people experiencing disadvantage, provided that Family Hubs are well funded, well adapted for remote areas, and co-designed with their representative client groups and their support organisations.

To ensure these systems function properly, we also welcome the proposals for system oversight and evaluation, and support the development of public education programs and workforce capability plans.

At the same time, Community Legal Centres NSW believes that the Discussion Paper continues to overlook some significant and well-recognised systemic barriers to justice for people experiencing disadvantage, particularly in rural, regional and remote areas.

Similarly, we would like to see further detailed articulation of the proposed reforms, particularly how they will be funded and where and by whom they will be implemented.

The remainder of this section addresses overlooked access to justice issues for people in rural, regional and remote areas. The submission then comments on selected proposals and questions posed by the Discussion Paper.

#### **Reforms must prioritise access to justice for disadvantaged people**

In its 2014 inquiry into access to justice in Australia, the Productivity Commission reported widespread concerns that Australia's civil justice system is too slow, too expensive, too adversarial and is inaccessible to many Australians.<sup>1</sup> The report acknowledged that people

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<sup>1</sup> Productivity Commission, *Access to Justice Arrangements: Overview* (Report No 72, 5 September 2014).

experiencing financial and other forms of disadvantage are most likely to face significant difficulties accessing the justice system.

More recently, the 2017 Cameron Review of the community legal sector in NSW articulated the specific ways in which disadvantage operates to limit access to justice.<sup>2</sup> The Review found that people experiencing financial and social disadvantage:

- are more likely to experience legal problems, and to have a greater number of legal problems. Each additional form of disadvantage a person experiences increases the likelihood they will experience legal problems. People who experience six or more forms of disadvantage experience an average of 12.5 legal problems. This is 6.5 times the average number of legal problems experienced by people who do not have any forms of disadvantage, as measured by the Law and Justice Foundation Legal Australia Wide (LAW) Survey.<sup>3</sup>
- face more challenges when it comes to solving legal problems. This includes poorer knowledge about rights and legal processes, as well as fewer financial resources to access legal advice.<sup>4</sup>
- are significantly more likely than other members of the community to ignore or avoid problems or to act without the benefit of legal or non-legal advice, resulting in worse outcomes.<sup>5</sup>

Community Legal Centres NSW believes that any reform to Australia's legal system must prioritise improving access to just processes and just outcomes for people who are most disadvantaged in the community. As academic Larissa Behrendt argues, we must place people who experience intersectional disadvantage at the centre of our national dialogue when establishing the overall priorities for reforming our legal system.<sup>6</sup>

If the legal system works for those most marginalised in our communities, it has a good chance of working for everyone. If it does not work for – or is inaccessible to – them, it cannot be said to be an equitable system that works for all.

### **Reforms must address existing access to justice barriers in rural, regional and remote areas**

Beyond personal disenfranchisement, disadvantage also accumulates in more persistent social patterns. These patterns arise from the geographical concentration of complex disadvantage in urban fringes, as well as rural, regional and remote areas.<sup>7</sup> Any reform program that seeks to improve access to justice must therefore consider and address the way that geography structures and perpetuates disadvantage.

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<sup>2</sup> NSW Department of Justice, *Review of Community Legal Centre (CLC) Services ('Cameron Review')* (December 2017).

<sup>3</sup> *Ibid*, p 68.

<sup>4</sup> *Ibid*, pp 29-30.

<sup>5</sup> *Ibid*, p 31.

<sup>6</sup> Larissa Behrendt, 'Law Stories and Life Stories: Aboriginal Women, the Law and Australian Society' (2005) 20(47) *Australian Feminist Studies* 245, 249.

<sup>7</sup> Tony Vinson et al, *Dropping off the Edge 2015: Persistent Communal Disadvantage in Australia* (Jesuit Social Services and Catholic Social Services Australia, 2015) <[http://k46cs13u1432b9asz49wnhcx-wpengine.netdna-ssl.com/wp-content/uploads/0001\\_dote\\_2015.pdf](http://k46cs13u1432b9asz49wnhcx-wpengine.netdna-ssl.com/wp-content/uploads/0001_dote_2015.pdf)>.

Conservative estimates suggest that half a million Australians miss out on the legal help they need each year.<sup>8</sup> Access to justice is therefore a critical national issue, which is exacerbated in rural, regional and remote areas.<sup>9</sup> Distance and isolation limit people's ability to access legal and non-legal services and can reduce the quality of available services.

Because of a lack of available services, conflicts of interest often arise: a party may be denied legal assistance because the only available service is representing the other party to their dispute.<sup>10</sup> Technological solutions designed to deliver system-wide efficiencies can potentially further limit access to justice for people experiencing disadvantage in rural, regional and remote areas.

The cost of legal assistance is one of the most significant barriers to access to justice in Australia, and its impact is multiplied by the effects of remoteness. As a result, the cost of filing applications in the Family Court, particularly for divorce, is often prohibitive for many community legal centre clients. This situation is exacerbated in rural, regional and remote areas. Applications for divorce do not attract a full waiver of fees even where the party qualifies for Legal Aid or has a Centrelink concession card. Instead, fees are reduced to \$300. For many people experiencing disadvantage in rural, regional and remote communities, this is an enormous financial burden. Introducing payment plans, or allowing courts to order a full waiver of filing fees for circumstances of serious disadvantage, would greatly assist parties who would otherwise be prevented from applying for a divorce.<sup>11</sup>

Court policies in handling fee payments also add to the cost of seeking a court's assistance. Increasingly, credit cards are the only form of payment courts will accept, with and cheques or money orders no longer accepted in many locations. For many people experiencing disadvantage in rural, regional and remote areas, this means they are unable to access filing at all, unless they turn up and pay in person. Given the vast distances some people need to travel to a registry, this can add considerable cost to the process.<sup>12</sup>

The case study below demonstrates many of the access to justice barriers people experiencing financial and other disadvantage experience in rural, regional and remote areas.

### CASE STUDY: GEOGRAPHIC BARRIERS TO ACCESS TO JUSTICE IN RRR AREAS

Jane is a young single mother of three children, who lives in a small country town about four hours from the nearest regional centre. She ended an extremely violent relationship with the children's father, Tom, several years ago. Since then, Tom, who also has a history of serious drug abuse, has had limited contact with the children.

A week before Jane sought legal advice, Tom contacted her and demanded to see the children that day. Jane agreed to let the children spend several days with him. However, before the children were due to return to Jane, Tom told her he would not return them.

Jane sought advice from a community legal centre outreach location at the earliest opportunity – two days after Tom refused to return the children. As the town court only sits

<sup>8</sup> Australia Institute, *Justice for All: Giving Australians Greater Access to the Legal System* (institute Paper No 8, March 2012).

<sup>9</sup> Western NSW Community Legal Centre, private communication to Community Legal Centres NSW.

<sup>10</sup> Western NSW Community Legal Centre, private communication to Community Legal Centres NSW.

<sup>11</sup> Western NSW Community Legal Centre, private communication to Community Legal Centres NSW.

<sup>12</sup> Western NSW Community Legal Centre, private communication to Community Legal Centres NSW.

once a month, she was advised that she would have to travel four hours to her nearest regional centre, or eight hours to Sydney, to file a recovery application. The regional Legal Aid office could not help her, due to a conflict of interest. The Legal Aid Early Intervention Unit could only help if Jane travelled to Sydney and sought advice in person, which she could not afford to do. Community legal centres in neighbouring areas could not help her file an application in their regions, because of distance or capacity.

By the time she had exhausted these options, she had not seen her children for almost a week, which caused her considerable distress.

In order to file the recovery orders Jane, who can't drive, had to ask a family member to drive her to the court registry in the nearest regional centre and back – an eight-hour return trip. They left at 5am, hoping the court might deal with the matter the same day. Instead, the court adjourned the matter for two weeks to allow Tom to file his evidence. By the time of the hearing, Tom will have had the children for four weeks. If the court does not make the order, Jane will have to wait a further 10 days to pursue the matter in the Federal Circuit Court when it sits next in her region.

## Reforms must be well-costed and adequately funded

Community Legal Centres NSW welcomes proposals in the Discussion Paper that aim to build capacity through education and training, and to deliver extensive new services through Family Hubs. However, it is important that reforms are both well-costed and ensure the practical delivery of equivalent service functionality for people in rural regional and remote areas.<sup>13</sup>

The Australian family law system is chronically underfunded. In a recent media release responding to the Commonwealth Government's proposal to merge the Federal Circuit and Family courts of Australia, the Law Council of Australia noted:

'Chronic underfunding for more than a decade has led to a court system which continually struggles to meet the needs of the community. The funding of the court system has failed to keep pace with the growth in the number of Australians who need access to it. The breadth and complexity of the issues dealt with by the courts on a daily basis have also increased, including as a result of the proper recognition afforded to the prevalence and impact of family violence. As it stands, the measures introduced into parliament provide no extra funding for the chronically under-resourced court system or associated support services, which enable the court system to deal with cases more quickly.'<sup>14</sup>

Governments in all jurisdictions have failed to map increases in family law funding to increases in caseloads, or with reference to the unique complexity of problems that participants bring. This has led to unmanageable court delays.<sup>15</sup> Instead, endemic funding shortfalls and budgetary

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<sup>13</sup> Marrickville Legal Centre, private communication to Community Legal Centres NSW; Shoalcoast Community Legal Centre, private communication to Community Legal Centres NSW.

<sup>14</sup> Law Council of Australia, 'As it stands, merger unlikely to alleviate family law crisis' (23 August 2018) <<https://www.lawcouncil.asn.au/media/media-releases/as-it-stands-merging-courts-unlikely-to-alleviate-family-law-crisis>>.

<sup>15</sup> Law Council of Australia, *Justice Project: People who Experience Family Violence* (August 2018).



freezes throughout the family law system and its associated services have become commonplace.<sup>16</sup>

Community-based legal assistance services that provide family law advice and assistance to people experiencing financial disadvantage, including alternative and legally assisted dispute resolution, have also been systematically underfunded. Studies show that community-based government-funded legal assistance services are efficient and effective at what they do and generate net benefits to the community.<sup>17</sup> The Productivity Commission also noted that attempts to squeeze further efficiency gains from the legal assistance sector will do little to address service gaps for people experiencing disadvantage. Rather, more resources are required to better meet their legal needs.

Where funding is limited, services are stretched. Geographic isolation exacerbates this problem. Community Legal Centres NSW is mindful that system-wide underfunding is felt particularly in rural, regional and remote areas, as an intersecting function of factors like the cost and time impact of distance, reduced court sittings, lower quality facilities, opportunities for conflict of interest in service providers, amongst others.

The current environment of under-resourcing and remuneration for legal representation in rural, regional and remote areas means that clients are currently poorly served, and the quality of outcomes is significantly diminished.<sup>18</sup> A failure to raise current funding levels would have an adverse effect on the future capacity of service providers to deliver services that assist people in rural, regional and remote areas to access the family law system and these adverse effects will be felt particularly in communities experiencing intersecting disadvantages, such as Aboriginal and Torres Strait Islander people.<sup>19</sup>

Overall, the Commission's proposals represent reform in the right direction. However, it is critical that they are both well-costed and adequately funded by an injection of additional resources into the system. Any reform proposal taken up by government must not be implemented at the expense of existing, already over-stretched services – particularly in regional, rural and remote areas. It would be helpful for the Commission's final report to consider the funding implications of any proposals of the in the context of a chronically underfunded system.

To this end, Community Legal Centres NSW believes that a stable and realistic funding commitment is required to ensure the success of Family Hubs in regional areas. Success will also require increased duty lawyer accessibility, the delivery of culturally safe regional legal services that specialise in family law, and a wider set of criteria for granting legal assistance to ensure that representation is available to a larger number of people experiencing disadvantage.<sup>20</sup> We also support the co-design of these services in rural, regional and remote

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<sup>16</sup> Pasanna Mutha-Merrenge, 'Insights into Inequality: Women's Access to Legal Aid in Victoria' in Asher Flynn and Jacqueline Hodgson (eds), *Access to Justice and Legal Aid: Comparative Perspectives on Unmet Legal Need* (Bloomsbury, 2017).

<sup>17</sup> Productivity Commission, *Access to Justice Arrangements: Overview* (Report No 72, 5 September 2014), NSW Department of Justice, *Review of Community Legal Centre (CLC) Services ('Cameron Review')* (December 2017).

<sup>18</sup> Shoalcoast Community Legal Centre, private communication to Community Legal Centres NSW.

<sup>19</sup> NATSILS, Submission No 157 to Issues Paper 48, ALRC Family Law System Review (31 May 2018) 6.

Queensland Law Society, Submission No 5 to the Senate Legal and Constitutional Affairs Committee, *Federal Circuit and Family Court of Australia Bill* (28 September 2018).

<sup>20</sup> NATSILS, Submission No 157 to Issues Paper 48, ALRC Family Law System Review (31 May 2018) 7; Marrickville Legal Centre, No 137 to Issues Paper 48, ALRC Family Law System Review (2018) 9.



communities, particularly where they relate to improving the ability of Aboriginal people in rural regional and remote areas to access family law services.<sup>21</sup>

### **The Review must consider proposed structural changes to the Federal Circuit and Family Courts of Australia**

Community Legal Centres NSW is concerned that the Discussion Paper doesn't consider proposed reforms to the structure of the Federal Circuit and Family Courts of Australia. These reforms are contained in the *Federal Circuit and Family Court of Australia Bill 2018* currently before the Commonwealth Parliament. The Senate Standing Committee on Legal and Constitutional Affairs is considering submissions on the Bill and is due to report in April 2019.

We acknowledge that structural court reform is outside the scope of the Commission's terms of reference. However, in our view it is both ill-advised and impractical to conduct a review of the efficiency, effectiveness and responsiveness of the family law system that does not explicitly address the structure and functioning of the courts.

Submissions to the Senate Standing Commission Inquiry from the legal community raise significant concerns about the Bill. These include that structural court reforms:

- will lead to a loss of specialisation within the family law system at a time when more not less specialisation is needed to address the increasing complexities of modern Australian society, families and the needs of children
- prioritise economic efficiencies over safety and fail to address the chronic underfunding of the family court.

We encourage the Commission to examine the potential impacts of these reforms on the family law system and to recommend alternative reform pathways that address the legal sector's significant concerns about the proposed merger of the Federal Circuit and Family Court of Australia through the review process.

#### **RECOMMENDATIONS**

1. Reforms should specifically guarantee access to justice for people experiencing financial, geographic, cultural and other forms of disadvantage or exclusion.
2. Reforms designed to improve access to family law services must be fully accessible to and tailored to the needs of rural, regional and remote communities. This includes specialist court lists, Family Hubs and expanded FASS services.
3. Greater funding should be allocated to judges, court services and community-based legal assistance services in rural, regional and remote areas to ensure that people have access to timely, affordable services.
4. There should be more sitting dates for the Federal Circuit Court in rural, regional and remote area to prevent unjust delays.
5. Subsidies should be provided to clients with limited resources to travel to attend court or face-to-face family dispute resolution.

<sup>21</sup> Marrickville Legal Centre, No 137 to Issues Paper 48, ALRC Family Law System Review (2018) 9.

6. Filing fees should be further reduced or fully waived for self-represented litigants who are in financial hardship and receiving assistance from a community legal centre, particularly for divorce applications.
7. Court registries should continue to accept hard-copy application forms and cash payments for filing fees, particularly in rural, regional and remote areas.
8. Reforms must be fully costed and must address funding issues affecting the family law system, including chronic underfunding of the Family Court, Legal Aid and community-based legal assistance services.
9. The Commission's Final Report should consider the impact and efficacy of proposed structural reforms to the Federal Circuit and Family Court of Australia, currently before the Commonwealth Parliament.

## 4. THE NEED FOR EDUCATION, AWARENESS & INFORMATION

### **Sophisticated community legal education should be prioritised over more information**

Community Legal Centres NSW endorses Marrickville Legal Centre's submission with respect to the proposed information, awareness and education campaign.<sup>22</sup> Firstly, information alone will not remedy current service gaps and cannot replace the need for adequately funded community-based legal services.

Secondly, in order to effectively build the community's awareness about family law systems, information packages will need to be disseminated using sophisticated, integrated and interactive community legal education techniques. Simply publishing more information will be ineffective, particularly if government elects to implement an information and awareness campaign as the primary avenue for reform. Instead, ongoing community legal education about family law is required.

### **Information packages must be accessible to rural, regional and remote communities**

A person's starting point for accessing justice is an awareness of their rights and the services that are available to them. People in rural, regional and remote areas often lack this awareness, a situation fostered by a lack of both relevant local media coverage and local service delivery. Community Legal Centres NSW therefore supports proposals 2.2, 2.7 and 2.8, as a step towards shifting the balance.

In addition to the groups identified in the Commission's proposals, information packages should also be co-designed with people and organisations in rural, regional and remote communities. This will help to ensure that packages adequately address the unique set of issues affecting these communities. We support Shoalcoast Community Legal Centre in asserting that it is mandatory that these packages are developed in consultation with rural, regional and remote

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<sup>22</sup> Marrickville Legal Centre, Submission to Discussion Paper 86, ALRC Family Law System Review (2018) 2-3.

Aboriginal organisations, to ensure that all family law educational packages are culturally appropriate.<sup>23</sup>

Given the limited availability of digital communications in rural, regional and remote communities, particularly among Aboriginal and Torres Strait Islander communities in those areas (discussed further below), all information packages must be made available in print. Family Hubs, regional community legal centres, legal aid organisations, and other local support services could operate as local distribution points for hard-copy packages to clients, including on outreach to remote areas.

## RECOMMENDATIONS

10. Reforms should prioritise sophisticated community legal education strategies over the development of additional, static information resources.
11. Family Law information packages must be developed in consultation with people in regional, rural and remote communities, particularly remote Aboriginal and Torres Strait Islander communities and the Aboriginal-controlled organisations that support them.
12. Family law information packages must be available in hard copy. Hard copy packages should be distributed to all community-based legal assistance services and legal aid organisations to deliver to clients, including on outreach.

## 5. THE NEED FOR SIMPLER, CLEARER LEGISLATION

### **Simplified legislation will improve access to justice for people experiencing disadvantage**

Community Legal Centres NSW welcomes proposals to simplify and clarify the *Family Law Act 1975 (Cth)*. In particular, we support proposals 3.7, 3.13 and 3.17. Parental responsibility is a particularly confusing term, as it means a great many different things in a range of cultural and social contexts. Legislation and the courts must set out clearly what parental responsibility is and the decisions it involves. The clearer the language and the more comprehensible the language used, the better it will help people to reach constructive agreement (3.7).

Community Legal Centres NSW also supports the development of debt division protocols as a means of ensuring that family violence perpetrators cannot delay a property settlement process in order to abuse their victim-survivor former partners (3.13).

Finally, we support the development of tools to assist parties to create superannuation splitting orders (3.17). Such tools would ensure that self-representing parties who are experiencing disadvantage to minimise the costs associated with obtaining these orders, including through avoiding fees charged by superannuation companies to process Form 6 requests for information about their ex-partners.

### **Remoteness limits the accessibility and effectiveness of online services**

Remoteness acts as a significant barrier to accessing justice in the family law system. The Federal Circuit Court does not run circuits to every local court registry, and family law matters

<sup>23</sup> Shoalcoast Community Legal Centre, Submission to Discussion Paper 86, ALRC Family Law System Review (2018).

can be handled by local court magistrates, who may have limited specialisation in family law or Aboriginal cultural awareness specialisation.<sup>24</sup> As such, remoteness particularly compounds the disadvantage experienced by Aboriginal and Torres Strait Islander people and communities. In part, this is because Aboriginal and Torres Strait Islander people are much more likely to live in a very remote region than the average: 17% nationally, compared with 0.5% for other groups.<sup>25</sup> Similarly, 14% of Aboriginal people in NSW live in rural, regional and remote communities.<sup>26</sup>

The prioritisation of online service delivery, such as the push for online dispute resolution, has long been advocated as a panacea for the disadvantageous effects of remoteness in family law.<sup>27</sup> However, online dispute resolution still finds itself described in terms of ‘potential’ and ‘opportunity’.<sup>28</sup> Compounding this situation for Aboriginal people in rural, regional and remote areas is that 26% of Aboriginal households in NSW have no internet access.<sup>29</sup> Despite the introduction of the NBN Skymuster satellite, the Mobile Black Spots program, state co-investment programs and the Community Phones program, a digital divide still persists in rural, regional and remote Australia.<sup>30</sup>

Furthermore, the long-term ramifications of the decision in *Yarmirr*, which permits incomplete performance of statutory duties where they are deemed aspirational ideals,<sup>31</sup> suggests that regional communications service limitations that impede delivery of digital services to rural, regional and remote communities may continue for the foreseeable future.

The use of digital communications may also result in unintended negative outcomes, particularly for people experiencing disadvantage.<sup>32</sup> For example, video, being framed, cannot fully account for all non-verbal cues, limiting parties’ ability to undertake credibility assessments.<sup>33</sup> The use of audio-conferencing services also faces difficulties in remote contexts. In mediation, it limits the mediator’s influence, risking power imbalances and party disengagement.<sup>34</sup> Its slower pace, with less facial and body language content,<sup>35</sup> disadvantages Aboriginal cultures that can often understand spatiality and silence in communication differently to Western norms.<sup>36</sup> More

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<sup>24</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 13.

<sup>25</sup> NADRAC, *Indigenous Dispute Resolution and Conflict Management* (Report, Attorney-General's Department, January 2006) 9.

<sup>26</sup> Australian Bureau of Statistics, *Census of Population and Housing* (2016).

<sup>27</sup> NADRAC, *The Resolve to Resolve — Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (Report, Attorney-General's Department, September 2009) 75; Tania Sourdin and Chinthaka Liyanage, ‘The Promise and Reality of Online Dispute Resolution in Australia’, in Mohamed Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution Theory and Practice* (Eleven International, 2011) 483-4.

<sup>28</sup> Michael Legg, *The Future of Dispute Resolution: Online ADR and Online Courts* (2016) 27(4) *Australasian Dispute Resolution Journal* 227, 227.

<sup>29</sup> Australian Bureau of Statistics, *Census of Population and Housing* (2016).

<sup>30</sup> Indigenous Remote Communications Association, Submission to the Regional Telecommunications Independent Review Committee 2018 Regional Telecommunications Review (August 2018) 4.

<sup>31</sup> *Yarmirr & Ors v Australian Telecommunications Corporation* (1990) 96 ALR 739, 749 (Burchett J).

<sup>32</sup> Michael Legg, *The Future of Dispute Resolution: Online ADR and Online Courts* (2016) 27(4) *Australasian Dispute Resolution Journal* 227, 233.

<sup>33</sup> Samantha Hardy, ‘Online Mediation: Internet Dispute Resolution’ (1998) 9(3) 216, *Australasian Dispute Resolution Journal* 224.

<sup>34</sup> Helen Shurven and Archie Zariski, ‘The Pros, Cons, and Maybes of Telephone Mediation: A Conversation about the “Fourth Party”’ (2015) 26(3) *Australasian Dispute Resolution Journal* 146, 147-8.

<sup>35</sup> *Ibid*, pp 148-9.

<sup>36</sup> Diana Eades, ‘Understanding Aboriginal Silence in Legal Contexts’ in H Kotthoff and H Spencer-Oatey (eds), *Handbook of Intercultural Communication* (Mouton de Gruyter, 2007) 289.

practically, Aboriginal people in rural, regional and remote areas often face difficulties in simply accessing a telephone.<sup>37</sup>

Technological solutions do have advantages. They can be more effective uses of limited resources, and they may save geographically remote clients from having to undertake costly travel across long distances to access services.<sup>38</sup>

Videolink facilities should certainly be implemented as part of the proposed Family Hub system. However, failing a significant improvement in Australia's rural, regional and remote telecommunications implementation, it is hard to see how a digital communications focus can address the broader spectrum of needs in rural, regional and remote communities at present. Research is additionally required to determine whether matters heard via videolink facilities produce comparative results to those heard in person.

Particularly, an attempt to make digital communications technologies a significant component of any proposed family mediation service may limit the potential for benefits to flow to Aboriginal people living in regional, rural and remote areas. Twenty years after the introduction of the Universal Service Obligation framework, a considerable percentage of Aboriginal people in remote areas still have no connection to even basic home telephony,<sup>39</sup> let alone digital media.

### **Hard copy application forms must be maintained for disadvantaged litigants**

Community Legal Centres NSW strongly supports the need for more accessible and user-friendly court forms (Proposal 3-2). However, it is imperative that paper forms remain available for litigants to use, particularly in rural, regional and remote areas where there is limited access to court sittings, family court registries, and support services. The current trend towards reduced acceptance of paper applications for family law matters raise access to justice issues, particularly for litigants in rural, regional and remote areas.

For example, community legal centres have noted that regional Federal Circuit Courts are increasingly unwilling to accept hard copy applications for divorce. This forces litigants who don't have a computer to seek costly legal assistance from private solicitor with access to the court portal. Previously 'Application for divorce kits' were available in Federal Circuit Court registries for litigants to complete themselves. Their removal has pushed further work back onto already under-funded community legal centres for simple matters like divorce applications that litigants should be able to complete themselves.

If smart forms are to be implemented, then open-access computers should be made available for family law system participants to use, either at registries, or at the proposed Family Hubs.<sup>40</sup>

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<sup>37</sup> NADRAC, *Indigenous Dispute Resolution and Conflict Management* (Report, Attorney-General's Department, January 2006) 9.

<sup>38</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 14; Federation of Community Legal Centres (Victoria), Submission No 65 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 25.

<sup>39</sup> Indigenous Remote Communications Association, Submission to the Regional Telecommunications Independent Review Committee 2018 Regional Telecommunications Review (August 2018) 9.

<sup>40</sup> Western NSW Community Legal Centre, private communication to Community Legal Centres NSW.

## RECOMMENDATIONS

13. Family law systems should accommodate the limits of communications technology, particularly in rural, regional and remote areas.
14. Computers should be made available for those with a family law matter to use in the registry, and an administrator should be employed to assist people to use these computers.
15. Hard copy forms must be maintained for all Family Law applications, including for divorce. All courts must guarantee that they will continue to accept hard copy applications.

## 6. THE IMPORTANCE OF GETTING ADVICE AND SUPPORT

Community Legal Centres NSW supports proposal 4-1, that the Federal Government should work with state and territory governments to establish community-based Family Hubs. However, the proposal needs to be further developed to make clear how and where services would be established, how they will be funded and who will deliver them. Community Legal Centres NSW's view is that in order to be effective, Family Hubs services should:

- Co-locate existing specialist, legal and family support services that are delivered by sufficiently experienced staff;
- If delivered as a universal service, ensure priority access for people experiencing financial hardship or other forms of disadvantage;
- Be accessible to people in regional, rural and remote areas, including through outreach service delivery;
- Be adequately funded in addition to existing service offerings.

We also note that Family Hubs may face opposition from Aboriginal and Torres Strait Islander communities if they are perceived as being dominated by non-Aboriginal special interest groups.<sup>41</sup> Building trust is critical. As a result, we support the Aboriginal Legal Service NSW's submission that an Aboriginal mediation service be instituted as part of the Family Law System's early intervention strategies.

These services should be embedded in regional Family Hubs and should be delivered by Aboriginal and Torres Strait Islander practitioners.<sup>42</sup>

### **Family Hubs should co-locate existing services rather than establish a new service model**

The co-location of services within Family Hubs, including lawyers, family relationship counsellors, domestic and family violence specialists, social workers and community legal educators offers an opportunity to develop a public perception of the family law system as one

<sup>41</sup> NADRAC, *Indigenous Dispute Resolution and Conflict Management* (Report, Attorney-General's Department, January 2006) 9.

<sup>42</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 3.



that encourages personal choice and autonomy in how people manage their post-separation arrangements, rather than as one designed primarily to benefit the legal profession.<sup>43</sup>

Current hub-style services, such as those offered by the Indigenous List, already demonstrate the benefits of integrated service delivery. The Indigenous List's range of integrated services enables Aboriginal legal support organisations to help their clients with their specific family law matters, while also addressing the potentially detrimental impact of their broader, intertwined general legal issues and social service requirements. As a result, they have proven popular with both staff and clients.<sup>44</sup>

Geographic isolation must be taken seriously in conceptualising Family Hubs. The location of court registries and Family Hubs must be determined by a practical assessment that does not simply pay lip service to rural, regional and remote needs. We recognise that servicing every rural, regional and remote town will be difficult. However, it will be important that Family Hubs are accessible to as many communities as possible. This could be achieved through a circuit outreach model. For example, Family Hubs could be located in key regional centres such as Dubbo, with staff circuiting out to remote towns at regular intervals.

Family Hubs may also work to mediate the impact of geographic isolation by helping to reverse the trend towards regional court closure. As many local courts in remote areas are closing, and those which remain often sit sporadically, proposals only to co-locate family registries at local courts will not necessarily address regional access issues.

However, the additional co-location of Family Hub services at regional courts, with outreach into local outlying communities, may help to reverse this trend. The additional range of broader services on offer from Family Hubs may permit efficiencies that allow courts to remain open in remote communities, as part of a broader service mix.

### **Family Hubs should be co-designed with rural, regional and remote communities**

Community Legal Centres NSW also agrees with proposal 4.4, that local service providers, including Aboriginal and Torres Strait Islander, culturally and linguistically diverse, LGBTIQ+ and disability organisations, specialist family violence services and legal assistance services, including community legal services, should play a central role in the design of Families Hubs to ensure cultural safety, accessible, responsiveness, and articulation into existing local networks and services. Given the specific barriers to access to justice they experience, it is important that Family Hubs are also developed in consultation with people and organisations in rural, regional and remote communities.

### **Existing services should be adequately funded to meet need**

Community-based legal assistance services, including community legal centres, Aboriginal Legal Services and legal aid offices, are ideally positioned to participate in the delivery of legal and family support services through Family Hubs. Being community-based, they are well-attuned to the social and relational aspects of family law disputes. They take a holistic approach to dispute resolution that often leads to positive outcomes for their clients. A number of community legal centres across the state already work in partnership with family relationship centres to deliver co-located legal and family support services to people navigating the family

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<sup>43</sup> Marrickville Legal Centre, No 137 to Issues Paper 48, ALRC Family Law System Review (2018) 9.

<sup>44</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018), p 13.

law system. As such, the sector's recognised efficiency<sup>45</sup>, experience in managing successful service partnerships and effective delivery of access to justice for people experiencing disadvantage provides a cost-effective model for the design of Family Hubs.

However, like many parts of the family law system, community-based legal assistance services are under-resourced to meet current community needs. An injection of funding and resources into the sector would enable these organisations to develop stronger networking relationships and would be an economically efficient way to grow the kind of holistic and community-oriented family law services networks that Family Hubs will represent.<sup>46</sup> For example, FASS is currently limited in the geographic range of its service delivery, and does not currently extend to all rural, regional and remote areas. With appropriate funding, community-based legal assistance services could help extend its reach into rural regional and remote communities through Family Hub participation.<sup>47</sup>

## RECOMMENDATIONS

16. Family Hubs should not be established or funded at the expense of existing family law and family support services.
17. Family Hubs should co-locate existing, specialist legal and non-legal services and services should be delivered by specialist family law practitioners.
18. Family Hubs should be accessible by people in rural, regional and remote communities, including through direct and outreach service delivery.
19. Family Hubs should be available to outlying Local Courts as well as existing Federal Circuit Court registries.
20. Family dispute resolution services should be made available in a greater number of rural towns.

## 7. COMMENTS REGARDING DISPUTE RESOLUTION

Community Legal Centres NSW strongly supports extending the time limits on applications for property and financial settlements under the Family Law Act 1975 (Cth) (Question 5.1). The one- and two-year timeframes in the current Act are overly onerous and operate as a barrier to justice, particularly for people experiencing disadvantage and those in rural, regional and remote areas.

Firstly, many community legal centre clients do not even understand that a property settlement is different from a divorce. Many clients approach community legal centres asking for help with a divorce, when what they actually mean is a property settlement. Secondly, many clients get divorced before they seek legal advice, so that by the time they see a solicitor the time they have to apply for a property or financial settlement is already reduced or even expired.

<sup>45</sup> NSW Department of Justice, *Review of Community Legal Centre (CLC) Services* ('Cameron Review') (December 2017), p 52.

<sup>46</sup> Women's Legal Service NSW, private communication to Community Legal Centres NSW.

<sup>47</sup> Shoalcoast Community Legal Centre, private communication to Community Legal Centres NSW.

People then have to either apply to the court to have the matter heard out of time, this is complicated, and it is hard to know if they will be successful or not, or they have to try and get a settlement through another court for example supreme court. Clients experiencing domestic and family violence are often more vulnerable in this area. They put off starting proceedings for property matters for fear of provoking the perpetrator, and then they are out of time.

## **CASE STUDY: IMPACT OF SHORT TIMEFRAMES FOR PROPERTY SETTLEMENTS FOR DOMESTIC VIOLENCE VICTIMS**

A community legal centre located in regional NSW has been assisting Linda with a property matter since November 2016. At her first visit, she was already outside the timeframe for property settlement.

During her marriage, Linda's ex-husband, Peter, subjected her to domestic violence, including coercion, control and emotional and financial abuse. The abuse continued after their separation and divorce, and was the key reason Linda did not apply for a property settlement within the required timeframes.

After their separation, Linda moved out of the home they owned jointly and into rental accommodation with her three children. She and Peter reached an informal agreement that he would continue to pay the joint mortgage on the house and outgoings and Linda would pay the rent on her new accommodation and outgoings. Linda took on a consolidated personal loan, which included his car loan. Peter also coerced her into returning money the Australian Tax Office had withheld from him to pay part of a large child support debt he owed her.

By the time Linda sought help from the community legal centre, both the bank and the local council were chasing her for mortgage debts and rates on the house, which Peter had failed to pay. A private solicitor had quoted her \$50,000 in legal fees to help her respond – more than she earned in a year.

Over the next two years, the community legal centre solicitor helped Linda to lodge a complaint against the bank with the Financial Ombudsman and, through that, to negotiate an agreement. Under it, the bank agreed to stay proceedings against her and to seek orders and costs from Peter. The solicitor also helped arrange pro bono legal assistance for Linda to seek orders to have the property sold.

Through this period, Peter defaulted on the mortgage payments several times. However, each time, he resumed making payments after the bank served notice on he and Linda, but before proceedings commenced. Each time, the bank dropped proceedings against him. However, as a result, the firm helping Linda seek sale orders closed her file because they did not want to risk starting proceedings when the bank might do so again.

Now, two years later, Linda is waiting for Peter to default on the mortgage payments again and for the whole process to being again. If the time limitations on property settlement were not so short Linda would not have had to go through so much stress. This matter still continues. The community legal centre notes that while Linda's case is extreme, they have had many other clients come in to see us in similar situations.

## RECOMMENDATIONS

21. The timeframes for property and financial settlements for separating or divorcing spouses should be extended.

## 8. THE NEED TO RESHAPE THE ADJUDICATION LANDSCAPE

### The Indigenous and small property claims lists should be improved and expanded

Community Legal Centres NSW supports proposal 6-3, that specialist court pathways should include a simplified small property claims process, a specialist family violence list, and the Indigenous list. We endorse Women's Legal Service NSW's submission on the specific factors that need to be considered in establishing the family violence list to ensure that women's and children's safety is prioritised. The remainder of this section focuses on the effective operation of the Indigenous and small property claims lists in rural, regional and remote communities.

Community Legal Centres NSW believes that the Indigenous list addresses the fundamental concern that Aboriginal people are under-represented in the family law system,<sup>48</sup> and consequently tend to seek solutions outside the system.<sup>49</sup> We support the Aboriginal Legal Service's position that this fact is caused by a nexus of disadvantage and legitimate distrust of intimidating, culturally inappropriate system, often exacerbated by remoteness.<sup>50</sup> While disadvantage can be categorised in a number of discrete ways,<sup>51</sup> most categories intersect with each other, meaning that an Aboriginal person may be disadvantaged in several interrelated and complex ways<sup>52</sup> and this can compound over time.<sup>53</sup>

Several family law groups in the Aboriginal community have noted that there is general support for the Indigenous list among Aboriginal people.<sup>54</sup> This support derives from the way in the which Indigenous list matters are run: informally, with cultural awareness, and with a commitment to a process of meaningful dialogue between the parties rather than traditional

<sup>48</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) p 2.

<sup>49</sup> Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) p 20.

<sup>50</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) p 5.

<sup>51</sup> Mary Anne Noone, 'The Disconnect between Transformative Mediation and Social Justice' (2008) 19(2) *Australasian Dispute Resolution Journal* 114, 116; Law Council of Australia, *The Justice Project*, Final Report (August 2018) p 51.

<sup>52</sup> Law Council of Australia, *The Justice Project*, (Final Report, August 2018) p 51.

<sup>53</sup> Pascoe Pleasence et al, 'Reshaping Legal Assistance Services: Building on the Evidence Base' (Discussion paper, Law and Justice Foundation of New South Wales, 2014) p 5.

<sup>54</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 2; Wirringa Baiya Aboriginal Women's Legal Centre, Submission No 164 to Issues Paper 48, ALRC Family Law System Review (7 May 2018) pp 12-13.

adversarial legal practices. This allows parties to feel a sense of self-determination and agency in resolving their issues.<sup>55</sup>

There is general support among community legal centres for the expansion of the Indigenous list. Given the accessibility issues that geographic isolation places on Aboriginal people in rural, regional and remote areas, Indigenous lists must be made available in regional centres.<sup>56</sup> A single Indigenous list in Sydney is insufficient.

We therefore agree with the Aboriginal Legal Service's position that an expansion of the Indigenous list into regional areas should be undertaken at least to Parramatta and Dubbo.<sup>57</sup> We also agree with Wirringa Baiya Aboriginal Women's Legal Service's position that significant Aboriginal populations near Family Court registries in Dubbo (14.6% of population), Coffs Harbour (5.6%) and Lismore (6.2%) suggest that the expansion of the list into additional rural, regional and remote areas would also be warranted.<sup>58</sup> As some regional circuits are already informally introducing Indigenous list equivalents, which aim to ensure Aboriginal people feel comfortable and engaged in the family law process and better outcomes are obtained for children, families and the broader community,<sup>59</sup> an organised expansion with formal support would likely be welcome. As there is currently no detailed consideration on exactly how far the list might be expanded, a review process should be undertaken to guide service expansion.<sup>60</sup>

Community Legal Centres NSW also supports the small property claims list. Such a list is essential for people who have a small property pool with limited equity and cannot afford legal representation. The list should operate through Federal Circuit Court registries, as Federal Circuit Court magistrates are family law specialists. Matters should also be simplified so that parties can act for themselves in a manner that resembles self-represented actions for small claims in the local court.<sup>61</sup> By operating in this fashion, a small property claims list can assist in minimising the impact of property disputes in a wide range of family law situations, thus assisting in reducing the complexity of legal problems facing people experiencing disadvantage in rural, regional and remote areas.

## RECOMMENDATIONS

22. Specialist Indigenous, family violence and small property claims lists should operate in or be expanded to regional, rural and remote areas.

<sup>55</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 13; Wirringa Baiya Aboriginal Women's Legal Centre, Submission No 164 to Issues Paper, p 48, ALRC Family Law System Review (7 May 2018) pp 12-13.

<sup>56</sup> Shoalcoast Community Legal Centre, private communication to Community Legal Centres NSW.

<sup>57</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 14.

<sup>58</sup> Wirringa Baiya Aboriginal Women's Legal Centre, Submission No 164 to Issues Paper 48, ALRC Family Law System Review (7 May 2018) 13.

<sup>59</sup> Aboriginal Legal Service (NSW & ACT), Submission No 210 to Issues Paper 48, ALRC Family Law System Review (1 June 2018) 14.

<sup>60</sup> Shoalcoast Community Legal Centre, private communication to Community Legal Centres NSW.

<sup>61</sup> Western NSW Community Legal Centre, private communication to Community Legal Centres NSW.

## 9. ADDITIONAL LEGISLATIVE ISSUES – FORCED STERILISATIONS AND INTERSEX MEDICAL PROCEDURES

### **Sterilisations of children with disability and intersex medical procedures without consent should be prohibited**

Community Legal Centres NSW endorses Inner City Legal Centre’s submission in response to Question 9-1. The forced sterilisation of people with a disability and unnecessary intersex medical procedures are significant violations of human rights under a range of international treaties to which Australia is a state party. These practices amount to cruel, inhumane and degrading treatment,<sup>62</sup> and deny people’s rights to security,<sup>63</sup> privacy,<sup>64</sup> and equality before the law.<sup>65</sup> In cases of forced sterilisation of disabled children and persons, and in some cases of medically unnecessary intersex medical procedures, affected persons are explicitly denied protection against discrimination,<sup>66</sup> as the procedure denies their right to retain their fertility,<sup>67</sup> and their general physical and mental integrity,<sup>68</sup> on an equal basis with others.

International opinion stands against these practices. The United Nations Committee on the Rights of the Child views the sterilisation of women and girls with disabilities as a form of violence.<sup>69</sup> The United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment notes that ‘discriminatory notions that they are ‘unfit’ to bear children’ make people with a disability the common target of involuntary sterilisation

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<sup>62</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 7; United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121<sup>st</sup> sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 4-5; United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 22<sup>nd</sup> sess, Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013) 11.

<sup>63</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 9; United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121<sup>st</sup> sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 5.

<sup>64</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) art 17; United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121<sup>st</sup> sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 5.

<sup>65</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, (entered into force 23 March 1976) arts 2, 26; United Nations Human Rights Committee, *Concluding observations on the sixth periodic report of Australia*, 121<sup>st</sup> sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 4-5.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 23(1)(c); United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Australia*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) 10-11.

<sup>68</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008) art 17; United Nations Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, 10<sup>th</sup> sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 5-6.

<sup>69</sup> United Nations Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention: Concluding observations: Australia*, 60<sup>th</sup> sess, UN Doc CRC/C/AUS/CO/4 (28 August 2012) 10-11.



laws.<sup>70</sup> Locally, both the Australian Human Rights Commission,<sup>71</sup> and Women with Disabilities Australia,<sup>72</sup> have argued that forced sterilisation is a serious human rights violation that can only be justified where there is serious risk to the person's life.

Medically unnecessary intersex procedures are also opposed by international opinion. The UN Committee on the Elimination of Discrimination against Women considers them a 'harmful practice'.<sup>73</sup> The Joint Expert Statement on medically unnecessary intersex procedures notes they are often performed in response to social prejudice and stigmatisation, both of which are reinforced by administrative assignment of binary sex identity in birth registration procedures.<sup>74</sup>

The 2013 Australian Senate Standing Committee on Community Affairs recommended that the medical treatment of intersex people should occur under guidelines that embody a human rights framework that:

- minimises surgical interventions which primarily address parents' perceptions that intersex status may shape their child's social experience;
- maximises reliance on the intersex individual's consent.<sup>75</sup>

However, the Senate Standing Committee did not recommend that Australia prohibit medically unnecessary practices. As a result, Australia continues to be in violation of international law for its failure to prohibit these practices at a national level.

This failure of legislative intent has attracted international criticism, with several United Nations bodies making representations to Australia that these practices constitute grave failures to observe our international treaty obligations.<sup>76</sup>

The UN Committee on the Elimination of Discrimination against Women has recommended that Australia should:

- implement the Senate Standing Committee findings;
- explicitly prohibit medically unnecessary medical procedures;
- offer adequate counselling and support to families with intersex children;

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<sup>70</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 22<sup>nd</sup> sess, Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013) 11.

<sup>71</sup> Australian Human Rights Commission, Submission No 5 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* 2013, November 2012, 4.

<sup>72</sup> Women with Disabilities Australia, Submission No 49 to the Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* 2013, March 2013, 12.

<sup>73</sup> Committee on the Elimination of Discrimination against Women, *Concluding observations on the combined seventh and eighth periodic reports of France*, 64th sess, UN Doc CEDAW/C/FRA/CO/7-8 (22 July 2016).

<sup>74</sup> UN Human Rights Office of the High Commissioner, 'End violence and harmful medical practices on intersex children and adults, UN and regional experts urge' (26 October 2016) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20739&LangID=E>>.

<sup>75</sup> Senate Standing Committee on Community Affairs, Parliament of Australia, *Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* 2013, Final Report, 75.

<sup>76</sup> See e.g. International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Rights of the Child, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of Persons with Disabilities.

- Provide redress to intersex people who have undergone unnecessary medical treatments without their consent.<sup>77</sup>

Courts have taken an inconsistent approach to allowing such procedures.

In the absence of explicit legislation prohibiting unnecessary medical procedures on disabled and intersex children, the leading Australian case on point is *Marion's Case*.<sup>78</sup> In that case, the High Court held that the sterilisation of a *Gillick*-incompetent disabled child (whose capacity for personal choice about medical treatment had not matured sufficiently to displace parental consent powers), where that procedure is not ancillary to appropriate surgery to treat a malfunction or disease, requires court consent as a special medical procedure. This decision arguably applies to intersex medical procedures that can be characterised as special medical procedures, as *Marion's Case* has been applied in other medical contexts outside sterilisation.<sup>79</sup>

Two fundamental reasons were advanced for court supervision of special medical procedures in *Marion's Case*. First, the uncertain context of such cases creates a significant risk of decision-making error concerning a child's potential capacity to consent, or what their best interests actually are. Second, the consequences of such error are 'particularly grave.'<sup>80</sup> In sterilisation cases, these consequences go to the denial of the affected person's reproductive and personal autonomy, with the likelihood that their sense of identity, social place and self-esteem over their lifetime would be gravely compromised.<sup>81</sup> As a result, a special medical procedure should only be authorised as a step of last resort. That is, where any alternative or less invasive procedures have failed or are deemed certain not to enable the affected person to lead a fulfilling life within their own needs and capacities.<sup>82</sup>

Without strong oversight, the risk arises that medically necessary procedures may be conflated with purely psychosocial ones.<sup>83</sup> Where medical treatment is for the purposes of social normalisation, this cannot be considered sufficiently therapeutic to evade judicial oversight.<sup>84</sup> Although commonly-accepted medical terminology may denote all intersex presentations as 'disorders of sex development', this categorisation does not determine the special medical procedure question at law. Further, any rule that allows guardians to consent at will could enable procedures like clitoridectomy, or the removal of a healthy organ for transplant to another child, to proceed without court oversight.<sup>85</sup>

In the context of birth registration, the High Court has recently recognised that 'not all human beings can be classified by sex as either male or female'.<sup>86</sup> It is therefore arguable that some

<sup>77</sup> United Nations Committee on the Elimination of Discrimination against Women, *Concluding Observations on the eighth periodic report of Australia*, 70<sup>th</sup> sess, UN Doc CEDAW/C/AUS/CO/8 (20 July 2018).

<sup>78</sup> *Secretary, Department of Health & Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218.

<sup>79</sup> *Secretary, Department of Health & Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 252 (Mason CJ, Dawson, Toohey and Gaudron JJ); see also *Re GWW and CMW* (1997) 21 Fam LR 612, 618.

<sup>80</sup> *Secretary, Department of Health & Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 250 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*

<sup>83</sup> Fiona Kelly and Malcolm Smith, 'Should Court Authorisation be Required for Surgery on Intersex Children? A Critique of the Family Court Decision in *Re Carla*' (2017) 31 *Australian Journal of Family Law* 118, 119.

<sup>84</sup> Skye O'Dwyer, 'Treatment of Intersex Children as a Special Medical Procedure' (2017) 24 *Journal of Law and Medicine* 870, 878-9.

<sup>85</sup> *Secretary, Department of Health & Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 252 (Mason CJ, Dawson, Toohey and Gaudron JJ); see also *Re GWW and CMW* (1997) 21 Fam LR 612, 618.

<sup>86</sup> *Registrar of Births (NSW) v Norrie* (2014) 250 CLR 490, 492 (French CJ, Hayne, Kiefel, Bell and Keane JJ).

intersex procedures serve as attempts to rationalise a child's sexual identity, based on a socialised binary dichotomy that is not supported at common law. While disorder implies a 'treatment', the idea of diversity does not. Therefore, procedures grounded in socialised concepts of gender can be characterised as culturally informed, non-therapeutic interventions that are not essential to the sustenance of the child's life.<sup>87</sup>

Regrettably, Australian case law concerning enforced sterilisation and intersex medical procedures often falls short of the findings of the Senate Inquiry, and position taken in the Joint Expert Statement. Indeed, for intersex children there has been some inconsistency in how court practice addresses their interests.

The recent case of *Re Carla* stands as a clear example of the problems with the court's current approach. The court made a declaration that sterilisation procedures on intersex children did not require court consent. However, in reviewing the facts of the case, the court did not consider medical opinion and literature on whether Carla could have grown up male.<sup>88</sup> The proposal to monitor the child's development and postpone irreversible surgery was dismissed based on psychosocial concerns.<sup>89</sup> Troublingly, prior unsupervised normalisation surgery was accepted as a matter of historical fact and not recognised as potentially contravening the principles established in *Marion's Case*.<sup>90</sup>

*Re Carla* reveals how existing legal frameworks can fail to provide adequate oversight of the medical care of intersex children, even during judicial review,<sup>91</sup> and demonstrates the limits of the decision in *Marion's Case* to regulate medically unnecessary intersex procedures and (by extension) sterilisation procedures.

Community Legal Centres NSW believes that the inconsistency of judicial practice demonstrated in cases like these requires the implementation of a structured legislative solution that clarifies acceptable practices and accords with international standards.

## RECOMMENDATIONS

23. The federal government should prohibit medically unnecessary procedures on intersex children until they are old enough or mature enough to make an informed decision for themselves.
24. The federal government should prohibit the sterilisation of children, except where there is a serious threat to life or health, and the sterilisation of adults with a disability in the absence of their fully informed and free consent.

<sup>87</sup> Skye O'Dwyer, 'Treatment of Intersex Children as a Special Medical Procedure' (2017) 24 *Journal of Law and Medicine* 870, 882.

<sup>88</sup> Human Rights Law Centre, Submission No 54 to Issues Paper 48, ALRC Family Law System Review (May 2018) 11; Skye O'Dwyer, 'Treatment of Intersex Children as a Special Medical Procedure' (2017) 24 *Journal of Law and Medicine* 870, 880.

<sup>89</sup> *Re: Carla (Medical procedure)* [2016] FamCA 7, [20] (Forrest J).

<sup>90</sup> *Re: Carla (Medical procedure)* [2016] FamCA 7, [16]-[17] (Forrest J); Human Rights Law Centre, Submission No 54 to Issues Paper 48, ALRC Family Law System Review (May 2018) 12; Skye O'Dwyer, 'Treatment of Intersex Children as a Special Medical Procedure' (2017) 24 *Journal of Law and Medicine* 870, 880.

<sup>91</sup> Human Rights Law Centre, Submission No 54 to Issues Paper 48, ALRC Family Law System Review (May 2018) 11; Inner City Legal Centre, Submission No 124 to Issues Paper 48, ALRC Family Law System Review (2018) 11; Skye O'Dwyer, 'Treatment of Intersex Children as a Special Medical Procedure' (2017) 24 *Journal of Law and Medicine* 870, 880.

25. National guidelines should be enacted, in consultation with medical experts, people with disability, intersex people, and their peak bodies, to ensure a human rights-based approach is taken in decision-making for any medical treatment relating to sterilisation of children with disability or relating to intersex medical procedures.
26. Medically necessary sterilisation and intersex procedures should be authorised by the Family Court.

## MORE INFORMATION

Thank you for taking the time to consider our submission.

If you have questions or need further input, please contact our Senior Policy Officer, Emily Hamilton, via [emily.hamilton@clcnsw.org.au](mailto:emily.hamilton@clcnsw.org.au) or (02) 9212 7333.

Yours faithfully,



Tim Leach

Executive Director

Community Legal Centres NSW