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Community Services & Health Industry Skills Council
PO Box H61
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Dear Sir/Madam,

RE: Family Dispute Resolution qualification review

Introduction

The Community Services and Health Industry Skills Council (CS&HISC) is currently conducting a review of all client services and related qualifications, which includes the Graduate Diploma of Family Dispute Resolution, and is undertaking public consultations via its web portal inviting “all interested members of the public... (to) provide feedback on current drafts of qualifications, units and skill sets in their areas of expertise.”

As the web portal does not appear to allow for the uploading of documents or facilitate comments which are generally applicable to the description of the qualifications and to the core units, and what is proposed will affect our capacity to provide services, we are sending this letter to you and to our funder, the Commonwealth Attorney-General’s Department. We have however provided information from this letter via the portal against the free text box in the Graduate Diploma in Family Dispute Resolution. We thank you for the opportunity to communicate our concerns.

Summary of concerns

The current draft qualifications raise a number of areas of concern for us. These are summarised as:

- quality of practice
- accommodating the range of experience amongst FDRPs
- protecting vulnerable clients
- legal liability issues, and
- adequate resourcing.

If implemented as currently drafted the qualifications would significantly and adversely affect our capacity to provide services to disadvantaged people. Some background and detail about our concerns are set out below.

About National Legal Aid and legal aid commissions

National Legal Aid (NLA) represents the Directors of the eight state and territory legal aid commissions (commissions) in Australia.

NLA aims to ensure that the protection or assertion of the legal rights and interests of people are not prejudiced by reason of their inability to:

- obtain access to independent legal advice;
- afford the appropriate cost of legal representation;
- obtain access to the federal and state and territory legal systems; or
- obtain adequate information about access to the law and the legal system.

The commissions are independent statutory authorities established under respective state or territory enabling legislation. They are funded by Commonwealth and state or territory governments to provide legal assistance to disadvantaged people.

The family law matters which present to legal aid commissions often involve serious and complex issues in relation to the safety and well-being of the parties and their children.

All commissions have established Family Dispute Resolution (FDR) programs which use legally assisted models of FDR. The FDR practitioners (FDRPs) we engage will be either from our in-house legal aid commission panel, or from external private practitioner panels. Total panel membership is currently approximately 278 FDRPs. Members are either, or both, lawyers and social scientists.

Subject to suitability, all applications for aid in family law matters which are approved¹ will first be the subject of a grant of legal assistance for legally assisted FDR, with a view to early resolution. If a grant of legal assistance is made, matters are screened for a range of issues including family violence, substance abuse, etc. A grant of legal assistance for litigation may be made in those cases where settlement cannot be achieved.

Commissions also receive referrals from the courts for “late litigation” FDR in matters which are already before the family law courts. Commissions are also responsible for Independent Children’s Lawyers (ICLs) in those family law matters

¹ Eligibility tests include means, merit, matter type and competing priorities with limited funds.

where the Court makes an Order for an ICL and requests the legal aid commission to make an appointment. ICLs may be participants in such FDR.

Costs of current training

The cost of training around the country currently varies widely, with the costs of training from some providers up to \$10,000 per person. In addition to the cost of training, a factor for many people who might otherwise be minded to undertake the training will be time out of the office, resulting in loss of, or potentially no income.

In addition, there are many places where no face to face training is regularly available, for example in the Northern Territory. Travel for training can be very expensive and no doubt is a disincentive to private practitioners in undertaking the training.

In relation to the issue of cost generally, NLA is particularly concerned about an ageing workforce, and supply of FDRPs for service provision into the future.

It is suggested that in developing any new qualifications, the issue of the cost of the training needs to be borne in mind. We already have experience of suitably and highly qualified people not taking up the training because of cost, and our inability to cover those costs.

Property

National Legal Aid remains of the previously expressed view that FDR in family property law should only be undertaken by legal practitioners and those legal practitioners should have the appropriate skill sets. NLA supports a stream-lined, cost effective process for the accreditation of those FDRPs.

In our view, the draft does not address concerns regarding the limited skills of some people training to become an FDRP in order to assist parties in the distribution of property interests post separation. The proposed addition to the current FDRP training of a component of property and child support is insufficiently defined.

For example, of the 6 core competencies, of 10 to be undertaken to complete the FDRP requirement, only one contains any reference to financial arrangements as between parties and then the knowledge component in this area is a small part of the overall unit.

Facilitate dispute resolution in the family law context

8.4 Identify and explain legal obligations of agreements reached with regard to knowledge evidence of:

specific legislative frameworks that apply to family dispute resolution, including:

- *provisions for children and property in the Family Law Act, Child Support (Assessment) Act*

handling of property issues within the dispute resolution process, including:

- *limitations of dispute resolution*
- *types of information that may be included in a summary agreement about property matters*
- *information considered valid by a court.*

It is suggested that this is not adequate for a person who is to mediate property matters or for an FDRP to meet their obligations to identify and explain the legal obligations of any agreements reached. The proposal does little to identify the particular knowledge of legislation, procedure, and case law required to understand the components necessary for just and equitable financial settlements.

Number of hours of supervised practice – cost, opportunities, means for future FDRPs and availability of service providers

It is accepted that the proposal to increase the number of supervised hours of practice prior to accreditation and registration aims to improve quality through practical application of the skills learned.

The draft purports however to increase the necessary hours of supervised practice from 10 to 100. We do not believe that this is practical or affordable. The options for graduates to obtain the 10 hours supervised practice currently necessary are already significantly limited.

Commissions receive numerous requests to assist FDRP graduates to achieve the 10 hours of supervised practice, however commissions often only have the resources to assist in-house staff in this regard. It is suggested that the proposed additional requirements would impact adversely on service providers, and on the availability of services to people. Costs to service providers would be increased if they had to assist new graduates to meet the proposed onerous requirement, and the FDRP responsible for supervision would not be available to take on other work.

It is also likely that the increased impost would result in fewer opportunities for FDRP graduates to gain the supervised practice as required and consequently there would be fewer FDRPs available to mediate family law disputes. Some commissions currently have difficulty sourcing sufficient FDRPs with necessary experience to meet demand. This proposal if implemented would exacerbate the difficulty, particularly in remote and regional areas.

It is suggested that there could be other options, such as prior to persons being able to practice as FDRPs in their own right they must be attached to a recognised agency (governmental, private or semi-private) for a minimum hourly equivalent.

The training systems presently providing this training are required to assess students against certain defined criteria. These are numerous, complex and open to individual interpretation. It may be that to streamline these would enhance the system.

One size fits all training

It is suggested that the proposed training does not take in to account the disparate skills and experience of practitioners undertaking this training.

In relation to the current training, we have received feedback from the legally qualified participants who undertake work for us, that trainers have informed them that their knowledge is extensive, industry specific, and that their expertise has supported training.

Lawyers with family law knowledge including family property law and with litigation experience undertaking the FDRP training have a greater depth of understanding of the requirements imposed by Courts and the relevant factors to be considered, and are more capable of resolving all associated family law matters than practitioners with limited contextual knowledge. A practitioner undertaking this course without any knowledge or experience in representing parties in child and financial issues before a Court would be ill prepared to mediate such matters given the content of the proposed course.

Commission FDRPs have significant practical experience in dealing with separated families with complex needs as they are in practice as a lawyer for many years prior to competing their FDRP training. This extensive practical experience is not considered by the proposed FDRP training.

It is suggested that consideration could be given to a two tier system of FDRP training based on the practical experience and skills held by the individual practitioner and which takes into account their prior knowledge and experience in the family law context to determine the number of core units to be completed.

This proposal would significantly reduce the costs to commissions and other service providers in having staff with significant experience undertake FDRP training in relation to skills, knowledge and experience that they already possess.

Lawyer assisted model – should be included

There are fundamental differences in the skill sets required to mediate a family dispute matter within a lawyer assisted process as compared to a party only process. Most community based mediation services do not include a lawyer assisted component due to the type of clients accessing those services and their less complex needs.

Where a matter contains complexities requiring legal advice and assistance, these are ordinarily excluded from community based services as inappropriate for their mediation service. These are exactly the types of matters which commissions then are required to assist with an early intervention process. Where there are serious allegations of abuse, language barriers and other complications, lawyers assist the process through the provision of advice in the context of best interests, support to vulnerable clients and offer a buffer through preparing any agreement into a form capable of being filed in a court of competent jurisdictions and of being enforceable.

Lawyer assisted models are ideally created for commission clients who have multilayered and complex needs. These clients are excluded from a large proportion of community based services. A number of FDRPs who do not have any practical experience in Courts or with litigation often experience problems in dealing with clients represented by a lawyer, often struggle with the role of the lawyers within the mediation process, which in turn fails to utilise a resource available to vulnerable clients to assist in settlement of parenting disputes.

As mentioned above, the family law courts will also refer matters to commissions for litigation intervention FDR where proceedings are already on foot and FDR is attempted by the parties (and their lawyers) in an attempt to reach an agreement prior to a final hearing or court proceedings. This adds another level of complexity in terms of knowing what is required for the matter to proceed to mediation. For example there may be an Independent Children's Lawyer appointed or recent family or psychiatric reports.

Consideration should be given to including in the FDRP training, training in the lawyer assisted model of mediation. A course unit on the lawyer assisted model should specifically reference litigation intervention matters.

Conclusion

We thank you for the opportunity to make this submission. Please do not hesitate to contact us if you require any further information.

Yours sincerely,



Gabrielle Canny
Chair

cc. Commonwealth Attorney-General's Department