



WOMEN'S LEGAL SERVICES NSW

Incorporating
Domestic Violence Legal Service
Indigenous Women's Legal Program

4 November 2013

Productivity Commission
PO Box 1428
Canberra City ACT 2601

By email: access.justice@pc.gov.au

Dear Commissioners,

Access to Justice Arrangements

1. Women's Legal Services NSW (WLS NSW) thanks the Productivity Commission for the opportunity to comment on its inquiry into Australia's system of civil dispute resolution.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. We note the reference to women's legal services on p. 32 of the discussion paper and agree that

"Women's legal services have had a longstanding presence in the legal assistance landscape and tend to specialise in issues arising from family breakdown, child protection and violence against women. As in other areas of legal assistance, many run preventative programs and provide education and training. "

4. This submission addresses chiefly the matters on page 33 concerning legal assistance services, as well as the effectiveness of model litigant rules on page 19.
5. We are a member of Women's Legal Services Australia (WLSA), a national network of community legal centres that specialise in women's legal issues. We have contributed to and endorse the WLSA submission to this inquiry.
6. In summary, we recommend:
 - a. Community legal centres undertake important preventative work through legal advice and casework, community legal education and law reform. It is essential



Women's Legal Services NSW PO Box 206 Lidcombe NSW 1825

Administration: (02) 8745 6900 Fax: (02) 9749 4433 Website: www.womenslegalnsw.asn.au

Women's Legal Resources Limited ACN: 002 387 699 ABN: 88 002 387 699

this work continues to be funded.

- b. Legal Aid procedures in circumstances of a conflict of interest should include accepting and assessing legal aid applications and if legal aid is approved, allocating to a legal aid panel solicitor in the client's area.
- c. A specialised domestic violence pathway in legal aid commissions for family law should be developed with domestic violence experts to guide internal decision-making of merit.
- d. In circumstances of family violence, legal aid should not be withdrawn if a party wishes to challenge the findings of a Family Report writer.
- e. Family Report writers should be accredited.
- f. Legal assistance services should be adequately funded and core funding increased.
- g. An integrated and holistic response to domestic and family violence must include domestic and family violence services, a child protection response and family law. Victims of violence must be supported to be protective parents.
- h. Greater investment in holistic, community based models of early intervention in child protection matters.
- i. The passage of the Human Rights and Anti-Discrimination Bill through federal parliament which would significantly improve access to justice.
- j. Fee waivers for all family law matters for disadvantaged litigants.
- k. Model litigation guidelines for the state as a party in civil litigation be strengthened and expanded.

Do legal assistance service providers deliver the right mix of services (in terms of forms of assistance and across the various areas of law)? Do they complement each other or are there areas of overlap? Is the current model of legal assistance service delivery efficient, effective and appropriately focused on specific legal needs?

- 7. WLS NSW provides a range of services that address the needs of individual women, educate women about the law to empower them to assert their rights, and advocate for systemic change to improve the capacity of the legal system to respond to women's legal needs and protect their rights. This strategic service delivery model enables WLS NSW to maximise the effectiveness of our service. Our individual advice and casework not only provides access to justice for individual women, the experience informs our planning for community education activities and resource development, and informs our law reform work with practical examples of the operation of the legal system and what procedural or resource barriers may be inhibiting women's access to justice.
- 8. Due to the scarcity of resources, WLS NSW and other community legal centres and legal aid services are careful not to duplicate services. We work collaboratively in many ways including in developing and delivering community legal education materials, in providing women's domestic violence court advocacy services, and assisting family relationship centres with advice for separating couples making arrangements for their children.

9. We work with pro bono partners on particular projects such as the sexual assault communications privilege and our new working women's legal service. Pro bono firms are also prudent in ensuring their resources are not used to replace a service which is already available from another source.
10. WLS NSW also extends its service delivery capacity by working with volunteers and attracting grants from a range of other public and charitable sources to undertake particular projects. For example we are developing a resource for doctors in general practice to identify family violence and to respond appropriately to a patient who is presenting with family violence issues. This approach has been developed in response to research that shows many disadvantaged people who experience a legal problem do not seek legal advice. However they are more likely to consult a doctor or other health professional. The research report recommends:

*The widespread, routine use of non-legal advisers suggests that a comprehensive view of legal services must extend beyond traditional legal services to include all individuals and organizations routinely used for advice in response to issues that have legal implications. The existing informal network of non-legal professionals used in response to legal issues could be harnessed and used as a more formal gateway into available legal services. For example, non-legal professionals could be used more systematically and effectively to provide appropriate referrals to legal service agencies, and to disseminate basic, up-to-date legal information resources.*¹

11. As well as working collaboratively with other legal assistance services, we also work holistically with other service providers. Women dealing with domestic violence and family breakdown have clusters of issues to address, both legal and non-legal. By working together with women's health services, community workers and domestic violence advocates we provide access to justice to women who may not have approached a legal service directly.
12. Dealing with legal problems together with the other issues such as housing, debts, child welfare and income support provide a more satisfactory outcome for the individual client and, by dealing with all the issues together, reduce the demand on various services of repeat or extended support requirements.
13. In an analysis of the economic cost benefit of CLCs undertaken in a report prepared for the National Association of Community Legal Centres, it was shown that the benefits of the CLC sector significantly outweigh the cost.² The report focused on the quantification of advices and cases in terms of dollars, but also suggested that a qualitative review of the programs CLCs run in community legal education and law reform would similarly reveal a great net economic benefit.³ The report emphasised the role played by CLCs in fulfilling governmental objectives related to economic efficiency through their information, empowerment and preventative functions, and in avoiding externalities and transaction costs.⁴
14. Research supports the fact that the work undertaken by WLS NSW in assisting clients in domestic violence relationships takes on an important preventative role, in that we are able to assist clients that are at risk of these assaults continuing and escalating. If

¹ C. Coumarelos, Z. Wei & AH Zhou, *Justice made to measure: NSW legal needs survey in disadvantaged areas. Summary report*, Law and Justice Foundation of NSW, Sydney, 2006.

² Judith Stubbs and Associates, *Economic Cost Benefit Analysis of Community Legal Centres* (Report prepared for the National Association of Community Legal Centres Inc.) June 2012.

³ Ibid 24.

⁴ Ibid.

escalation occurs, this not only poses obvious problems for the victim, but also has many associated impacts on the community.⁵ This is particularly evident in the assistance WLS NSW provides to women leaving abusive partners, as separation is the most dangerous point in a domestic violence relationship, and has been linked to an increased risk of femicide.⁶

15. The work of WLS NSW is important not only in our assistance in specific cases, but in the additional preventative work we carry out, which includes community legal education, advice and information services, and law reform. A case study is included below.

Case study 1

WLS NSW has provided community legal education sessions about the protections available to victims of domestic violence under the *Residential Tenancies Act 2010 (NSW)*. The protections allow victims of violence to change the locks in their rental property when there are safety concerns and remove violent co-tenants from the Residential Tenancies Agreement. Educating women about the options available to increase their safety in their home significantly increases the likelihood that some women may be able to remain safely in their homes without the need to flee to a refuge.

Community workers have informed us that they have been able to more effectively advocate for their clients to remain in their own homes.

16. The importance of the preventative work of CLCs is highlighted in the report on the Economic Value of Community Legal Centres.⁷
17. The mix of services we provide are complementary in combating the grave economic and other costs associated with domestic violence matters, for example, which have been identified in an Australian Government funded report as including health costs, second generation costs, administrative and other costs, among others.⁸

How effective and appropriate are the current eligibility criteria for legal aid at targeting service provision? Which Australians are not eligible for legal assistance but also not in a financial position to pursue a legal problem? What course of action do these individuals take after being denied assistance? What options (including private sector involvement) are there for improving their ability to access the legal system?

18. Chronic and longstanding underfunding of legal aid, ATSILS and community legal centres severely restricts access to justice for many people who cannot afford to engage a private legal practitioner.
19. Legal Aid imposes both means and merits tests as well as an availability of funds test in some cases that can become barriers to access to justice. The obligation to provide representation in criminal matters results in less funding being available for civil and family matters for which women have the greater need.

⁵ Liesl Mitchell, *Domestic Violence in Australia – An Overview of the Issues*, Parliamentary Library Information Analysis Advice, Parliament of Australia: Department of Parliamentary Services, 23 November 2011, 22-28.

⁶ Isobelle Barrett Meyering, 'Staying/Leaving: Barriers to Ending Violent Relationships', Australian Domestic and Family Violence Clearinghouse Fact Sheet, July 2012; Dr Lesley Laing, 'Risk Assessment in Domestic Violence', Australian Domestic and Family Violence Clearinghouse Topic Paper, 2004, 7.

⁷ Nicholas Edgerton and Emma Partridge, *The Economic Value of Community Legal Centres* (A report prepared for the Combined Community Legal Centres Group NSW and the National Association of Community Legal Centres) Institute for Sustainable Futures, UTS, February 2006.

⁸ Access Economics Pty Ltd, *The Cost of Domestic Violence to the Australian Economy: Part I* (A report prepared for the Australian Government's Office of the Status of Women, funded by the Australian Government under Partnerships Against Domestic Violence) 2004.

20. In its 2004 report, the Law Council of Australia included a history of public funding for legal aid that evidences the fact that reductions in and restrictions on legal aid funding disadvantages women with cases in family law, domestic violence, and child protection matters.⁹
21. Funding community legal centres such as women's legal services is necessary to meet this shortfall, especially as legal aid cannot represent both parties to a family law matter and in cases involving domestic violence is likely to be representing the male perpetrator on associated criminal charges and therefore be unable to represent the woman as well.
22. Although grants of aid are available for private legal practitioners in cases of conflict of interest, in practice there are relatively few private legal practitioners willing to undertake family law matters, and in particular matters involving domestic violence, on legal aid rates. Such cases are complex, require many hours of contact with the client, and are also subject to oversight by the grants division of legal aid which may cap or terminate the grant at a future stage of the proceedings. This leaves the solicitor with the dilemma of proceeding without remuneration or leaving the client to represent herself for the remainder of the matter.
23. Another issue is that where conflict of interest arises, there is a lack of understanding within the community that both parties may apply for legal aid. The additional step of the client having to locate a private solicitor who will agree to act on a legal aid grant can be a barrier to access to justice. Clients should be able to choose between locating a private solicitor who will represent them on a legal aid grant, or submitting a legal aid application to legal aid which once approved will be allocated to one of the legal aid panel solicitors in the client's area.
24. Victims of domestic violence can be deemed ineligible for legal aid due to the orders they seek (for example, sole parental responsibility and no time for the other party, despite the family violence amendments to the *Family Law Act*) or they may just exceed the merit test but not have the financial resources to pay for representation by a private legal practitioner.
25. We are also concerned that women are often pressured to settle in accordance with the recommendations of Family Reports as legal aid is generally withdrawn should a party wish to challenge the findings. This is an issue that Women's Legal Services Australia (WLSA) has raised. As WLSA argues, it is particularly concerning that even if there are aspects of the Family Report that should and could be challenged, many of our clients do not have the capacity or are too scared to self-represent if legal aid is withdrawn.
26. In circumstances of family violence, legal aid should not be withdrawn should a party wish to challenge the findings of a Family Report writer. Additionally, there is a need for accreditation of Family Report writers.
27. We refer to WLSA's submission and support the 'development of a specialised domestic violence funding pathway in Legal Aid Commissions for family law that is developed with domestic violence experts to guide internal decision-making of merit and that grants officers within legal aid whom are not legally qualified, not be able to make decisions about the legal merit of a case.'

⁹ Law Council of Australia (LCA), *Erosion of Legal Representation in the Australian Justice System* (A Research Project and Report, LCA, Australian Institute of Judicial Administration, National Legal Aid, and Aboriginal and Torres Strait Islander Legal Services) February 2004, 22-23.

28. There have been several occasions when we have assisted clients in family law matters who have been victims of domestic violence to appeal to the legal aid review committee about their refusal of legal aid. See, for example, case study 2 below. These appeals have generally been successful.
29. We submit that had there been a specialised domestic violence pathway in legal aid, it would have been unlikely for legal aid to be refused in the first instance, thus the time legal assistance services spend on challenging such decisions could be spent on other matters.

Case study 2

Sarah* was married to Michael* for ten years. They had one child Jasmine*, aged 9. Michael was violent during the marriage and Sarah and Jasmine often had to stay with Sarah's mum to ensure they were safe. The Police were often called and during the marriage they took out three ADVOs for Sarah's protection.

After separation Michael applied for Orders that Jasmine lives with him. Sarah never wanted Jasmine to live with Michael but she was overwhelmed by court and felt like her lawyers were not listening to her. She signed Consent Orders that Jasmine live with Michael and spend every second weekend with her.

A year later FaCS removed Jasmine from Michael's care because his work colleague found child pornography on Michael's computer at work. Michael was charged with child pornography offences and Jasmine was put into Sarah's full time care. Michael's bail conditions stated that he was not to have any contact with persons less than 18 years.

Sarah applies for legal aid to have the Parenting Orders varied to state that Jasmine lives with her. Legal Aid refuses Sarah's application on the basis that the matter does not meet their availability of public funds test. Sarah approaches a solicitor from a community legal centre that helps Sarah draft an appeal of Legal Aid's decision. The lawyer spent considerable time preparing the appeal and is successful.

* Not their real names.

30. We also note that pro bono assistance in family law matters is unlikely to be available. As highlighted in the recent report of the National Pro Bono Resource Centre on pro bono legal services in family law and family violence, 'obtaining pro bono legal assistance in family law matters is very difficult, with many pro bono providers and referral schemes simply not accepting applications for pro bono assistance in family law.'¹⁰
31. Women who cannot access legal assistance in these circumstances are at greater risk of becoming a victim of violence, homelessness and unemployment. Children exposed to domestic violence also suffer disruptions to schooling and development. These consequences will place greater burdens on publicly funded services in the future. Increased funding to community legal centres is essential to avoid greater future expense.
32. In their Report on Legal Aid and Access to Justice, the Senate Legal and Constitutional References Committee found that 'the community legal centre sector is a crucial part of providing access to justice for all Australians' and raised grave concerns around the extreme pressure and lack of funding and resources which community legal centres face.¹¹ Thus, the Committee called for an urgent increase in funding to community legal centres.¹²

¹⁰ National Pro Bono Resource Centre (NPBRC), *Pro Bono Legal Services in Family Law and Family Violence: Understanding the Limitations and Opportunities* (Final Report – Executive Summary, NPBRC) October 2013.

¹¹ Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004) xx.

¹² Ibid.

33. The 2009 *Non-Government Organisations CEDAW NGO Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) noted 'community legal centres experienced an 18% reduction in funds in real terms from 1998 to 2008.'¹³ We submit it is essential that CLC funding, at a minimum, returns to 1998 levels in real terms.
34. The recent review by the NSW Attorney General into the delivery of legal assistance services to the NSW community recommended that 'the NSW Government should advocate for increased funding for NSW legal assistance services....'¹⁴
35. Properly resourcing legal assistance services has also been recognised as a requirement of Australia's fulfilment of its obligations under international human rights law.
36. In her recent report as Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul examines 'the possibilities of providing legal aid to individuals who come into contact with the law but cannot afford the costs of legal advice, counsel and representation.'¹⁵ In the report, Knaul recognises legal aid as 'a right in itself and an essential precondition for the exercise and enjoyment of a number of human rights',¹⁶ the aim of which is 'to contribute to the elimination of obstacles and barriers that impair or restrict access to justice....'¹⁷ Knaul outlines the obligations of States in regards to legal aid, with international human rights law allotting the primary responsibility to States to adopt all appropriate measures for achieving the full realisation of the right to legal aid, including the provision of appropriate funding.¹⁸
37. In her report, Special Rapporteur Knaul specifically highlights the need for public policy and special measures to be developed in order to eliminate obstacles to access to justice, which particularly affect women, children and groups with special needs.¹⁹ Knaul notes that 'legal services designed to meet the particular needs of women [are] still rare, particularly for women living in poverty' and called on States to 'improve access to legal aid for women.'²⁰
38. The Special Rapporteur also refers to the jurisprudence of human rights treaty bodies that supports that the beneficiaries of legal aid include 'any person whose rights or freedoms have been violated as a result of an act, or a failure to act, perpetrated by a state actor'.²¹ The *Declaration on the Elimination of all forms of violence against women* and *General Recommendation No 19* made by the Committee on the Elimination of Discrimination against women make it clear that state parties have a responsibility for 'private acts, including domestic violence, if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'.²² This is yet another reason highlighting the imperative to ensure adequate and sustainable legal aid funding for family law matters.

¹³ *Non-Government Organisations CEDAW NGO Report on the Implementation of the Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), July 2009 at para 80.4.

¹⁴ Department of Attorney General and Justice, *Review of the Delivery of Legal Assistance Services to the NSW Community* (Report, NSW Government) June 2012, 5.

¹⁵ Gabriela Knaul, *Report of the Special Rapporteur on the Independence of Judges and Lawyers*, UN Doc A/HRC/23/43 (15 March 2013) 1.

¹⁶ *Ibid* para 20.

¹⁷ *Ibid* para 87.

¹⁸ *Ibid* paras 43-45, 73-74.

¹⁹ *Ibid* paras 81-82.

²⁰ *Ibid* para 83.

²¹ *Ibid* para 35.

²² Committee on the Elimination of Discrimination Against Women, *General Recommendation No 19: Violence against women*, UN Doc A/47/38 (1992), para 9.

How well do legal assistance services assist those with complex needs? What is the evidence on the relative merits and success of targeted strategies to increase access to justice for particular groups? What are the costs and benefits of these strategies?

Groups with Particular Needs

Women and Family Law

39. In the Senate Committee Report on Legal Aid and Access to Justice, released in June 2004, the Committee, in considering groups with particular needs, heard evidence that existing legal arrangements 'do not provide sufficient or uniform access to justice for women, particularly in relation to family law.'²³ The fact that many women have limited financial resources, particularly in cases of family breakdown, was found to present a major barrier to women's ability to access the legal system.²⁴ The Committee found that this was aggravated by the more restrictive criteria that must be met in legal aid for family matters, such as the need to first engage in dispute resolution even when domestic violence has been alleged.²⁵
40. In response to this evidence, the Committee found that 'more funding is urgently needed for family law matters', and recommended a review of legal aid service provision to ensure that the particular needs of women are addressed.²⁶ They also highlighted cases involving domestic violence or child abuse as especially requiring attention.²⁷
41. In December 2009, the Family Relationship Centres Legal Assistance Partnerships Program, funded by the Attorney-General's Department, commenced. This program enabled Family Relationships Centres (FRCs) to partner with legal service organisations to provide services to clients of FRCs to resolve parenting issues through lawyer assisted family dispute resolution, rather than through the courts.
42. WLS NSW has worked in partnership with Blacktown and Penrith FRCs to provide these services. In matters involving domestic violence, a risk assessment takes place with the client to determine the appropriateness of mediation. While some matters are assessed as inappropriate for mediation and so a s60I certificate is issued, many matters are assessed as appropriate if they involve lawyer-assisted family dispute resolution (FDR), that is, where both parties are legally represented.
43. By resolving matters through lawyer assisted FDR in a manner that ensures victims of violence are safe, this provides costs savings by avoiding protracted court proceedings. See, for example, the case study below. While court proceedings may be the only appropriate avenue in some matters, especially where there is serious violence, we also note court proceedings can be very stressful and require parties to take time off work, thus if this is not required, there are additional cost savings.

²³ Senate Legal and Constitutional References Committee, Parliament of Australia, *Legal Aid and Access to Justice* (2004) xvi.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid xvi–xvii.

Case study 3

Maria* and Anthony* have 3 children. During their relationship, Anthony was violent towards Maria. When they separated a few years ago, the children lived with Maria and spent time with Anthony. Recently, Maria and her new partner relocated several hours away from Sydney.

Maria wanted the children to live with her, but she was worried that without Anthony's consent to the relocation, he would initiate lengthy legal proceedings.

The parents agreed to participate in a Legally Assisted FDR. At the end of the first session, the parents could not reach an agreement about the relocation and where the children should live. Both parents therefore agreed to Child Inclusive Practice (CIP). The CIP practitioner spoke to both parents individually and then met with the children. The parents attended a second FDR session where they heard the CIP practitioner's feedback, including the impact of the violence on the children. The involvement of the CIP in their matter greatly assisted the parents at their third FDR session in reaching an agreement about what was going to be in the children's best interests, including ensuring their safety.

Maria and Anthony agreed that the children would live with Maria in the new year – giving everyone time to transition to these new arrangements. They also agreed to share the costs of return airfares and to return to FDR in 12 months time to review the arrangements.

* Not their real names. Maria's story is based on the stories of several clients.

Aboriginal and Torres Strait Islander Women

44. The Senate Committee also found an urgent need for increased legal services to Aboriginal and Torres Strait Islander women, as '[t]hey remain chronically disadvantaged in terms of advice as to their legal rights, access to legal services and the high levels of violence which many of them experience within their communities.'²⁸ While noting that funding had been given to Aboriginal and Torres Strait Islander women's legal services and a number of Family Violence Prevention Unit programs had been established, the Committee stressed the need for much more to be done to improve Indigenous women's access to justice.²⁹ The Committee highlighted the fact that when conflict of interest cases arise in local legal services, it is often the female victims of violence who are not assisted, and the subsequent need for this to be remedied.³⁰
45. WLS NSW has a specialist Aboriginal Women's Legal Program (IWLP), which delivers a culturally appropriate legal service to Aboriginal women in NSW. We provide an Aboriginal legal advice line, participate in law reform and policy work, community legal education programs and conferences that are topical and relevant for Aboriginal women. An Aboriginal Women's Consultation Network guides the IWLP to ensure that we are delivering a culturally appropriate service.
46. This service is crucial to meeting the complex needs of Aboriginal and Torres Strait Islander women, whose ability to access the legal system without professional and ongoing holistic support is limited. Aboriginal and Torres Strait Islander women have often had violence inflicted on them by more than one perpetrator, as children and adults. They may be suffering the effects of trans-generational traumas and disenfranchised grief. They are particularly vulnerable and generally have moderate to severe post-traumatic stress and associated psychological conditions of varying degrees (eg. depression, severe anxiety). Aboriginal and Torres Strait Islander women are also disadvantaged by generally having low literacy levels and through the significant social, economic, geographic and cultural disadvantages they face. Many Aboriginal and Torres Strait Islander women have other family members experiencing similar disadvantage, as well as also being victims of sexual assault and/or family violence.

²⁸ Ibid xvii.

²⁹ Ibid.

³⁰ Ibid.

The cost effectiveness of early intervention

47. As detailed in the *National Plan to Reduce Violence Against Women and their Children 2010–2022*, (*National Plan*) the cost of domestic violence, not only to victims on a personal and economical scale, but also to the broader community in economic and social costs, is enormous.³¹ Relying on a study conducted in 2009, commissioned by the Commonwealth Government, domestic and family violence and sexual assault perpetrated against women costs Australia \$13.6 billion each year, with the figure likely to rise to \$15.6 billion by 2021 if no measures are taken.³² These figures are repeated in the report of the Australian Department of Parliamentary Services, adding that \$9.9 billion of this figure will be caused by domestic violence.³³
48. An integrated, co-ordinated and holistic response to domestic and family violence must include domestic and family violence services, a child protection response and family law.
49. If a mother is unable to leave a violent relationship within a suggested and often arbitrary timeframe, she will often be viewed as failing to act protectively. It is therefore the mother who is unfairly seen as responsible for dealing with the consequences of violence in a child protection context.³⁴ This view fails to recognise that when a woman leaves a relationship, it is one of the most dangerous times of the relationship and requires planning and support.
50. In addressing the intersection of domestic and family violence and a child protection response with family law, the focus should be on the victim(s) (generally the woman and children) who should be treated with dignity and respect. Victims of violence should be supported to be a protective parent. The early intervention strategy should include early intervention services to work with women who have experienced family violence to strengthen their protective parenting capacities; and to also be willing to support her to seek protective orders in the family law courts rather than be subject to care proceedings.
51. The case study below highlights what can happen when there isn't such an integrated response.

Case study 4

Tracey* was violently assaulted by her ex-partner and had serious and obvious injuries. The children were not present when the assault occurred. She escaped from him and went to the police station. The police took Tracey's statement and then informed the Department of Community Services that she had been involved in domestic violence.

The Department removed Tracey's children that day. Tracey had not had any dealings with the Department prior to this notification by the police.

* Not client's real name.

³¹ The National Council to Reduce Violence Against Women and their Children, *Safe and Free from Violence: National Plan to Reduce Violence Against Women and their Children 2010-2022 - Progress Report to the Council of Australian Governments 2010-2012*, 2013.

³² Ibid 18.

³³ Liesl Mitchell, 'Domestic Violence in Australia – An Overview of the Issues', Parliamentary Library Information Analysis Advice, Parliament of Australia: Department of Parliamentary Services, 23 November 2011, 28.

³⁴ L Radford and M Hester, *Mothering through domestic violence*, Jessica Kingsley Publishers, London, 2006, 143.

52. In relation to early intervention in child protection, we support holistic community based models that include social worker/support services, parent advocates and early intervention legal services to support parents and children.
53. We note, for example, the Newpin program conducted by Uniting Care Burnside in NSW which provides an intensive, therapeutic program for parents and children who have potential or actual child protection issues. Newpin works from a 'strengths based' framework and includes a trained parent for support where one is available. Newpin is able to assist 20-25 families at any one time, with the optimal time for a parent being a part of the Newpin service being 18-24 months. UnitingCare estimates the cost for a family to attend Newpin is \$10,500 per annum and the outcomes are positive.³⁵ This program is currently offered at Bidwell, Doonside and St Mary's for mothers and their children and at Bidwell for fathers and their children. Demand exceeds capacity.
54. We would anticipate the costs of out of home care (OOHC) would be higher than the cost of this early intervention, particularly in light of the links between OOHC, homelessness and the criminal justice system.³⁶ Such intensive, therapeutic programs need to be provided universally across the state and to be resourced appropriately.
55. In addition to the economic savings, we submit that prioritising family preservation as the primary response is important because generally it is in the best interests of children to remain with their family.

Simplicity and usability

56. The federal government's consolidation of anti-discrimination laws project was intended to provide clearer, more consistent anti-discrimination legislation that would 'make it easier for both individuals and business to understand rights and obligations under the legislation.'³⁷ This was to occur by consolidating federal anti-discrimination laws into a single Act.
57. The Human Rights and Anti-Discrimination Bill (Exposure Draft) (HRAD Bill) included a simpler definition of discrimination. It also proposed that each party would cover their own costs, thus bringing anti-discrimination law into line with the Fair Work jurisdiction.
58. To improve access to justice, the HRAD Bill also proposed sharing the burden of proving discrimination. Currently, the burden falls entirely to the person making the complaint to show that they have been unlawfully discriminated against. The HRAD Bill proposed that the person making the complaint should show that the conduct took place and provide some evidence it happened for an unlawful reason. It would then fall to the person or organisation said to be doing the discriminating to show the conduct was not unlawful. We submit this sharing of burden is fairer and makes sense as the respondent is the one holding the evidence that their conduct was not unlawful.

³⁵ Newpin brochure at: <http://www.burnside.org.au/content/NEWPIN%20Internet.pdf> accessed on 30 October 2013.

³⁶ Children and young people at risk of social exclusion: links between homelessness, child protection and juvenile justice. Data linkage series no. 13. Cat. no. CSI 13, Australian Institute of Health and Welfare, Canberra, 2012.

³⁷ Attorney-General's Department, *Consolidation of Anti-Discrimination Laws Discussion Paper*, September 2011.

59. The Senate Legal and Constitutional Affairs Committee recommended the inclusion of domestic violence as a protected attribute in the HRAD Bill.³⁸ This is consistent with Australia's human rights obligations as well as the *National Plan* which aims to engage all in the community to address violence against women and advance gender equality.³⁹ It would also serve an important educative function, moving domestic violence out of the private sphere into the public sphere and could play a role in preventing domestic violence, arguably providing cost savings in the long-term.
60. Anti-discrimination laws have traditionally been used to address stigma and challenge barriers posed to equal participation in public life.⁴⁰
61. The passage of the Human Rights and Anti-Discrimination Bill through federal parliament would significantly improve access to justice.

Court fees

62. Court fees can be a barrier to accessing justice.
63. We welcome the abolishing of the flat (court) fees for disadvantaged litigants in family law matters, which were introduced in 2011, and the re-instating of fee waivers for such litigants. We refer to comments we made in the National Association of Community Legal Centre's submission to the Attorney-General's Department about the barriers the \$60-\$80 fees would impose on disadvantaged litigants, including victims of domestic violence seeking to access justice who may sacrifice safety due to the cost of an initiating application.⁴¹
64. Our concern, however, relates to the ongoing divorce application fee and decree of nullity of marriage application fee (divorce/nullity application fees) (albeit those at reduced rates). We submit that to ensure improved access to justice to the family law system, the divorce/nullity application fees should also be waived for those suffering financial disadvantage.
65. We are concerned by the significant increase in the divorce application fees. From 1 January 2013, the divorce application fee for disadvantaged litigants increased to \$265 for those who previously paid \$60.
66. This represents almost the entire weekly Newstart allowance and over 80% of the weekly single parent payment. We believe that unless fee waivers apply to divorce applications, the increased fee will mean that the choice to apply for a divorce will not be an option for many of our clients. The prohibitive cost will disproportionately affect women who have primary responsibility for the care of children and who are also reliant on social security benefits and will limit their access to the justice system in a way that does not impact on those who are not reliant on social security benefits.
67. We raise similar concerns about the reduced fee for decree of nullity of marriage, which is \$375.

³⁸ The Senate Legal and Constitutional Affairs Committee, *Report on the Exposure Draft of the Human Rights and Anti-Discrimination Bill 2012* (2013), recommendation 3.

³⁹ *National Plan*, Strategies 1.1 and 1.3

⁴⁰ Tashina Orchiston and Belinda Smith, 'Empowering Victims of Family Violence: Could Anti-Discrimination Laws Play a Role?' *Australian Review of Public Affairs*, March 2012.

⁴¹ National Association of Community Legal Centre, *Submission to Attorney-General's Department of federal court fees*, July 2011 accessed on 30 October 2013 at: http://www.womenslegalnsw.asn.au/downloads/law-reform/2011NACLC_AGD_FederalCourtFees.pdf

68. The increase means we are very limited in the number of clients we can assist in making a divorce/nullity application without an upfront payment of the fee. In addition to the flat fee, many clients struggle to pay other fees associated with divorce, including obtaining a copy of a marriage certificate, translation of marriage certificate, affidavit of translator, or the cost of a newspaper advertisement for substituted service. These additional (and often mandatory) costs for clients suffering financial disadvantage further illustrate the importance of a fee waiver for divorce/nullity application fees.
69. The fee of \$800 for a divorce or \$305 for an initiating application in a family law matter is also high and can be out of the reach of those who, while not eligible for a fee waiver or reduced fees, have insufficient financial resources to file such an application.
70. The financial hardship faced by women is particularly exacerbated following a marital breakdown. Despite some changes in recent times, as an overall trend the husband remains the primary breadwinner in many relationships. Therefore, when a relationship breaks down, women's financial hardship so often increases. This is particularly the case for women who are unable to work in paid employment due to childcare obligations. The effect of the increased divorce/nullity application fees is therefore exacerbated by the increased financial hardship faced by many women following separation.
71. Women who have encountered domestic violence in their relationship experience a substantial level of financial strain following separation, which causes the impact of the increased divorce/nullity fees to be heightened. The Australian Domestic & Family Violence Clearing House published research in 2011 that examined the impact of domestic violence on women's economic wellbeing and the intersection of this with recovery overall. Their report entitled *Seeking Security: promoting women's economic wellbeing following domestic violence* concludes that 'for women experiencing domestic violence, financial security goes to the heart of not only their freedom from abuse, but also their recovery and capacity to regain control over their lives, now and in the future'.⁴² The increased divorce/nullity application fees, therefore, represents an additional obstacle for these women who are already financial disadvantaged and are attempting to regain control over their lives and futures.
72. Divorce or decree of nullity of marriage can be particularly important for women who have experienced family violence when trying to end the violence. It can bring finality, and positively impact on health and emotional well-being and plays an important role in the healing and empowering process. It may also be required for safety reasons. Notably, there is no other way to obtain a divorce or decree of nullity of marriage under Australian law except through the court process. Given the importance of divorce for women who have experienced violence and the deleterious effect on of the proposed fee increase for divorce on women, we recommend fee waivers for financial hardship be extended to all family law matters including applications for divorce/decreed of nullity of marriage.
73. On 29 January 2013, we received a letter from then Attorney-General, the Honourable Nicola Roxon, advising us that the changes to court fees are part of wider reforms to ensure greater accessibility and timely resolution of disputes. The letter provided a policy justification for why the divorce application fee was not waived in the same manner as other family court fees and provided that the 'two-third reduced fee in divorce matters accounts for the nature of divorce applications, in that they have specific longer term timelines and applicants can therefore make allowance for the need to pay the fee'. Ms Roxon also advised that if a case is urgent, an applicant could apply for a deferral of the

⁴² Rochelle Braaf & Isobelle Barrett Meyering, *Seeking Security: promoting women's economic wellbeing following domestic violence*, Australian Domestic & Family Violence Clearing House, Sydney, 2011 at 3(5).

divorce fee to allow the matter to proceed prior to payment.

74. While the potential to defer payment is a positive mechanism in the regulation, we think that it does not fully address the issue in the sense that the Applicant is still required to pay the fee; albeit that such payment becomes a debt rather than a payable fee. In addition, the regulation is silent on when the Court will exercise its discretion with respect to accepting deferred payment.
75. There is considerable administrative burden on legal assistance service providers as a consequence, displacing the burden of service delivery and providing inefficiencies in the system. For the reasons set out above, we submit that a waiver should apply to all Family Court fees for people experiencing financial hardship. While we understand that because of timelines a person getting divorced has a longer period to raise the funds we do not think that this justifies the amount payable.

Improving the accessibility of courts

How effective are model litigant rules and other existing legislative conduct obligations? Should existing obligations to encourage co-operation be strengthened or expanded?

76. Solicitors at WLS NSW have many years of experience acting for plaintiffs in litigation against the state of NSW in several different civil litigation cases. This experience has caused us to be very disappointed in the extent to which the state, with deep pockets, carries out litigation despite the model litigation guidelines.
77. We acknowledge that defendants are entitled to strenuously defend cases against them. This is particularly the case when the state needs to meet the resources of a corporate litigant who in addition to having deep pockets also benefits from claiming legal costs as a tax deduction. However in our experience the model litigant rules are not effective in moderating the impact of what appear to be unlimited resources against an individual. In our experience examples include: a reluctance to take opportunities for procedural efficiencies; every point in interlocutory matters is taken no matter how technical or tedious; a reluctance to agree to mediation at an early opportunity; and an ability to brief senior and / or multiple counsel. Cases can then be drawn out over many years which can have the effect of wearing down plaintiffs both emotionally and financially and taking considerable court time.
78. We support a review of existing obligations so that co-operation is strengthened and expanded in order to provide a more level playing field. Our comments are not intended to include commercial cases where the state is litigating against corporate plaintiffs or defendants with equally deep pockets.

How difficult is it for legal aid services to attract and retain appropriately qualified lawyers as core staff? How well does the 'mixed' service delivery model work for the successful delivery of legal aid services? To what extent are the fees paid to private lawyers/law firms to undertake legal aid work sufficient to attract adequately qualified lawyers/law firms? What other approaches (such as the use of vouchers) could be more effective?

79. The lack of adequate funding makes attracting and retaining appropriately qualified and experienced staff challenging. At WLS NSW we are unable to match the salaries paid to solicitors employed by Legal Aid NSW. Unless the core funding for services such as WLS NSW increases we will be forced to make positions redundant and cut service delivery in order to offer competitive salaries.

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80. Similarly, we note that the National Association of Community Legal Centres, Community Legal Centres NSW and other Community Legal Centre Associations have commissioned Mercer to undertake a benchmarking review which highlights a significant discrepancy in salaries between staff based on the NSW SACS Award Base Salary compared to Crown Employees Administrative and Clerical Officers Award (NSW), Crown Employees Legal Officers Award and Australian Public Services salary.⁴³
81. As addressed above, private legal practitioners are often reluctant to take on legally aided work, suggesting that the rates paid are not adequate.
82. For disadvantaged clients, provision of vouchers would be unlikely to address access to justice. As discussed above, experiencing more than one legal problems and associated non-legal problems simultaneously would negatively impact on that individual's capacity to identify a legal need, locate and apply for the appropriate voucher, source and select a legal service provider.
83. If legal service providers were not funded on an ongoing basis but relied on the one voucher at a time coming through the door it is unlikely that they would be sustainable.
84. The kind of expertise offered by community legal centres such as WLS NSW comes from specific study, research and experience dealing with very vulnerable clients. This expertise could not be expected from generalist private practitioners who would come across such work relatively seldom.
85. Experiences of voucher systems being used to increase access to legal aid overseas suggests that this system is unlikely to be effective. The vouchers given for assistance on legal matters are 'fixed fee', which means that lawyers are reluctant to accept them for matters that are complex in nature, particularly with vulnerable clients.⁴⁴

Yours faithfully,
Women's Legal Services NSW

Helen Campbell
Executive Officer

⁴³ Mercer, *Benchmarking Review*, Joint Project of Community legal Centres Associations July 2012

⁴⁴ James Farrell, 'Coupon Justice' Won't Address Legal Aid Crisis The Conversation, 23 October 2013, accessed on 30 October 2013 at: <http://theconversation.com/coupon-justice-wont-address-legal-aid-crisis-19080>