



Women's Legal Services Australia

Alan Raine
Access to Justice Arrangements
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

4.11.13

Dear Mr Raine,

Productivity Commission submission - Access to Justice Arrangements

We would like to thank the Commission for the opportunity to contribute to achieving greater access to justice for those who face disadvantage in the civil justice system.

Please find attached the submission on behalf of Women's Legal Services Australia.

Please do not hesitate to contact me if you require further information or would like to discuss this submission further.

Kind Regards,

Heidi Guldbaek
National Law Reform Coordinator
Women's Legal Services Australia

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Women's Legal Services Australia Submission

Access to Justice Arrangements Australian Productivity Commission

Introduction

Women's Legal Services Australia (WLSA) is a national network of community legal centres specialising in women's legal issues. Members of WLSA regularly provide advice, information, casework and legal education to women and service providers on a range of topics including family law, child protection, domestic violence personal protection orders, reproductive health rights and discrimination matters.

We have a particular interest in the intersection of violence against women and the law and ensuring that disadvantaged women, such as Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women with disabilities, rural women, women from LGBTIQ¹ communities and women in prison are not further disadvantaged by the system.

We provide holistic, high quality and responsive legal services to women from a feminist framework that places the client at the centre of our interactions and responds to them as a 'whole person' rather than just a 'legal problem' that needs a solution. Some of our members have been in existence for over 30 years and we have members in each State and Territory.

Legal processes that promote social justice outcomes are also economical on an ecological level as well as in the long-term. WLSA believes that:

- the correct utilisation of preventative strategies at an early stage,
- understanding and identifying the correct issues in dispute and the drivers of the dispute, particularly in relation to family violence and the underlying dynamics of power and control,
- matching dispute resolution processes to the nature of the dispute,
- increased legal aid funding,
- targeted legal aid decision-making

will result in a more streamlined and efficient system of justice where better decisions are made

When there is unmet legal need and a denial of justice, it has a broad economic cost to both individuals and the community. Unmet legal need can have an impact on and economic cost to:

- individuals involved in the dispute
- the broader legal system including the criminal justice system

¹ Lesbian, gay, bi-sexual, transgender, intersex and queer.

- the public health system
- the prison system
- treatment programs (such as drug and alcohol)
- social work agencies and
- child protection agencies

The impact of unmet legal need can be inter-generational. We have provided the following example of inter-generational cost of unmet legal need experienced by our clients:

A woman cannot access legal aid in a family law dispute where there are serious allegations that her child is being sexually abused by her ex-partner. As a consequence of not having legal representation, the issue is not properly raised and argued before the Family Court. Orders are made for the child to live with the abuser causing individual, ecological and intergenerational harm. The child, who is exposed to this abuse carries this trauma throughout their life, affecting his or her future children's lives as well.

We are members of the National Association of Community Legal Centres (NACLC) who have provided a response to the Issues Paper. We support the NACLC submission but felt the Productivity Commission could benefit from knowledge of our clients' experience, especially those who have experienced domestic violence and the responsiveness of the system to their attempts to achieve safety and justice for themselves and their children.

Overarching issues of concern

In what areas can the Commission most add value in undertaking this inquiry?

Family law, child protection and domestic violence personal protection orders should be a priority

WLSA believes the greatest benefit will be obtained by prioritising the aspects of the civil justice system, being family law, child protection and domestic violence protection orders as these are the systems that women (and children) who have experienced violence, are most likely to find themselves in.

Over half of all marriages in Australia end in divorce and family violence is rife in our community. An effective legal system that enables access to justice to the most disadvantaged in family law, child protection and domestic violence protection orders are essential given the number of Australians who are impacted by these issues.

Decision-making in these three aspects of the civil justice system has a critical impact on the lives of women and children escaping violence. Separation from a violent partner continues to be the most dangerous time for women and children who have lived with violence. Interventions by professionals at these times can be critically important to aid safe decision-making. However, women find their interactions with these three jurisdictions at best confusing, sometimes frustrating and at worst they can be dangerous, as they place almost insurmountable systemic barriers to some women and children being able to achieve safety. The issues include the following:

- Cross-jurisdictional issues for women who move interstate (not uncommon where there is violence),

- 3 - 4 different courts operate in this space and women often have to re-litigate issues separately in each court (Local magistrates court can hear child protection, domestic violence and family law matters in certain circumstances, federal circuit court, family court, specialist children's court)
- 3 completely different pieces of legislation with opposing policy frameworks²,
- Different State legislation in the domestic violence and child protection area,
- Constitutional issues with Federal and State crossover concerning domestic violence and family law matters,
- Legal aid restrictions and different merit and means tests applied for each area of law.

At the same time and on a very personal level women are dealing with their own trauma and that of their children, issues of loss, grief and separation, responding to immediate safety concerns, dealing with practical issues of relocation, going into refuge, setting up a new house, changing schools, patterns, routines because of the violence and mostly receive negative social responses from family, friends and service providers unknowingly operating in a victim-blaming paradigm because they have not been trained or educated in relation to social inequality and privilege.

These issues have been known for some time, are well documented and have been behind the call for “one family, one court”. We are aware of the huge constitutional, political and practical barriers to achieving this. Although this may be an admirable long term goal, changes to one aspect of the system may be more practically achievable. See immediately below where WLSA believe the Commission can add real value and where there could be some practical and long-lasting impacts on Australian society.

Reform of which particular aspects and/or features of the civil dispute resolution system will generate the greatest benefits for the community?

Reform of the family law system should be prioritised

WLSA believes reform of the family law system will generate the greatest benefits to the community and the place where the Commission’s recommendations could add real value. Our rationale for this is:

- The Family Law Act is federal legislation and is of national significance. It is the legal system that most ordinary Australians are more likely than not, to have interact with.
- Family law is the system that women escaping violence turn to, to ensure protection of themselves and their children.

² Women in domestic violence situations are often told by child protection authorities that they need to leave the violent relationship otherwise the children will be taken from them. Despite separation being the most dangerous time for women and children in domestic violence situations they are generally not provided with any support to do this by the child protection authority other than being advised to get a domestic violence order with their children named and to go to the Family Court. Protection of the children therefore becomes the individual woman’s responsibility. When women follow these directions and attempt to get their children named on a domestic violence order they are often advised that they cannot be named without direct physical abuse (despite the legislation not requiring this). Many magistrates are reluctant to make protection orders naming children as they are concerned about giving a party an advantage in family law proceedings. When women turn to the family law system for protection they are generally told they must arrange for the children to have time with the perpetrator, in direct contradiction to the child protection authorities’ previous advice to them that related to their concern about the perpetrator. Child protection authorities also rarely document this advice and it therefore does not become part of the evidence base in any subsequent family law proceedings.

- Child protection agencies direct women to approach the family law system to seek safety, if they are deemed to be a protective parent.
- It is difficult to obtain pro-bono assistance for family law matters as it is not an area of law that is particularly attractive to pro bono lawyers.³
- Implementing change with one government perhaps increases the chances of overall success rather than implementing change across 8 State and Territory jurisdictions as well.

The statistics are clear that violence against women and children in our community is widespread and is a major social issue of concern for government, with 1 in 3 women having experienced violence and 1 in 4 children having witnessed violence in their home (ABS 2006)⁴. Violence against women and children is also associated with significant costs. It has been estimated that family violence costs the Australian economy \$13.6 billion per year.⁵

There is a large cross-over between violence against women and their children and family law. In our experience there are significant problems in the way the system responds to issues of violence. Despite policy rhetoric and the recent changes to the law that prioritise children's safety, the following issues continue exist in family law:

- Allegations of violence and/or abuse can frequently accompany post-separation child-related disputes. "*More than half the parenting cases* that come to the (family) courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health." (AIFS 2006);
- Issues of domestic violence and child abuse are so frequently raised in the family law system that child protection has been referred to as 'the core business' of family law. (Brown 1998) Bailey describes family violence as 'core business' of the Family Court and that allegations of family violence are not an aberration (Bailey 2007);
- The majority of clients presenting to Family Relationship Centres are identified as having some family violence issues. (AGD *Family Law Services Background Paper* 2013);
- Heavier users of the family law system were families where there was family violence, safety concerns, mental health and addiction problems. Parenting arrangements for these families took longer and they were multiple service users. (AIFS 2009)

³ National Pro Bono Resource Centre, *Pro bono legal services in family law and family violence, Understanding the limitations and opportunities* (Final Report) October 2011

⁴ Also see *The National Plan to Reduce Violence against Women and their Children (2009)* for other statistics about the extent of the problem <<http://www.fahcsia.gov.au/our-responsibilities/women/programsservices/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children>>.

⁵ Bronwyn Herbert, 'Domestic violence costs \$13bn a year', ABC (online), 7 March 2011 <<http://www.abc.net.au/news/2011-03-07/domestic-violence-costs-13bn-a-year/57284>>.

Gender bias in legal aid

Issues of injustice are exacerbated by gender bias in legal aid. Access to legal aid is of critical importance to our clients. Without legal aid women simply do not have any chance of obtaining access to justice.

Gender bias in legal aid relates to the historic redistribution of public funding away from legal issues of most concern to women and the current decision-making practices within Legal Aid Commissions that discriminate against the issues of concern to women (especially those who seek aid for family law matters and who have experienced violence).

There is a gender disparity in Australia about who receives a grant of legal aid. The gender bias in grants of legal aid was initially identified as a public issue of concern by one of our member services, Victorian Women's Legal Service in the early 1990s. An issues paper published in 1994 by the Legal Aid and Family Services (LAFS) branch of the Attorney-General's department, *Gender Bias in Litigation Legal Aid*,⁶ formally recognised the issue when it found that women do not receive as much legal aid funding for litigation as men do. In 1992/3, 63% of national legal aid expenditure on litigation assistance was paid on behalf of men. LAFS found that "a female applicant has less chance of getting legal aid than a male applicant"⁷.

Unfortunately, it does not seem that much has changed, except that there has been a proportionate decrease in the overall per capita availability of legal aid. In the Non-Government Organisations (NGO) CEDAW report in July 2009 it was reported that community legal centres experienced an 18% reduction in funds in real terms from 1998 to 2008⁸. It went on to report that many marginalised women reported they did not have access to timely and appropriate legal information, advice, casework and court representation. Many experienced intersectional discrimination in attempting to obtain justice. This disadvantage may well have been extenuated because of the current crisis in obtaining legal assistance identified by ACOSS.⁹

Additionally, the CEDAW report confirms the ongoing existence of gender bias in legal aid and that although legal aid funding may seem to be gender neutral, gender inequities exist.¹⁰

In the seminal work of Graycar and Morgan, the gendered impact of the High Court decision of *Dietrich and R (1992) 177 CLR 292* in 1992 in relation to the overall impact on legal aid funding in Australia was considered in particular in relation to the limited funding for civil claims for harm done. The article discusses the skew towards funding criminal representation (an issue that mainly impacts on men) that resulted after the Dietrich decision and away from family law and civil matters, such as discrimination and personal injuries damages claims for past abuse (issues that mainly impact on women). Graycar and Morgan concluded almost two decades ago:

⁶ Regina Graycar and Jenny Morgan (1995) *Disabling Citizenship: Civil Death for Women in the 1990's* 17 Adel LR 49-76 at p. 52

⁷ Ibid p.53

⁸ We recognise the recent increase in funding to community legal centres in 2013 however, this increase was not across the board and many community legal centres continue to struggle to meet demand.

⁹ Australian Community Sector Survey (2012) ACOSS National Report, paper 191 where Legal service providers were identified as the second highest service type to report difficulties in meeting demand.

¹⁰ See paragraphs 80.4 and 80.5 NGO Cedaw Report July 2009 at http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/YWCA_Australia46.pdf (page 93-94).

*“...But the barriers of the type we have described above operate as **a latter day form of civil death** in that they prevent women from invoking the legal system to redress the harms they have suffered. In that sense, they create considerable obstacles to women’s full enjoyment of citizenship, an essential aspect of which is access to the justice system.”¹¹*

“A double whammy - an overall decrease in the proportion of family law legal aid funding available to women?”

There are no publically available statistics that WLSA is aware of that prove this, however it is possible that women’s access to family law legal aid resources has been further limited as family law has embraced ideas of “shared parenting” and promoted the increased participation of fathers in their families post separation. Although these laws may reflect the increased participation of fathers over the last 20 or so years in the lives of their children, unfortunately these shared parenting laws “spoke” to violent men and increased the likelihood of them receiving an increase in time with their children. As a result, in family law, arguably an area of law where women should receive the majority of funding because of their caring role and because of issues of domestic violence, there may well have been an overall decrease in the proportion of the legal aid funding available to women as the legal standing of men (including violent men) has improved under the changes to the law that have taken place, especially in 1995 and 2006.

Women’s Legal Services are making difficult decisions about client assistance

On the ground, Women’s Legal Services around Australia are making tough decisions about legal assistance for disadvantaged clients who do not qualify for legal aid. These decisions consider the extent of the assistance we will provide and to whom. *Who is the most vulnerable and disadvantaged?*

Those of our members who run night time drop in sessions are turning clients away and are unable to answer the demand on our client telephone advice lines¹². The cases we are dealing with involving issues of extreme domestic violence perpetrated by their ex-partner involving for example, women who have been subjected to strangulation, stabbing, rape and threats to kill. The cases can also involve direct abuse of children, including sexual abuse. These cases are not being legally aided. The questions we grapple with in our case management meetings are “who is in the *most danger of being harmed?* Who is in the *most need* of our assistance in providing legal protection?”

As community legal centres we all operate our services on limited resources. At the same time, we are all ever-aware of the critical importance of our decision-making, because the consequences can be so grave for a woman, a child, a family if we get it wrong.

Adequate and proper resourcing of legal aid for family law is an important start. WLSA does not advocate available resources being re-distributed away from criminal law to achieve this as this would have detrimental impacts in other parts of society. A significant injection of new funding is

¹¹ Ibid p.76.

¹² Women’s Legal Service in Brisbane estimates that approximately 300 calls to its telephone advice line go unanswered each week and approximately 10 women are turned away each week from its volunteer legal advice night time sessions.

essential to achieving access to justice. Legal assistance, including legal representation in the courts is an essential component in women and children achieving safety after separation.

We have also recommended for some time 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.

Now some particular questions referred to in the Issues Paper will be considered.

5. Is unmet need concentrated among particular groups?

Women who have experienced trauma including domestic violence and/or childhood abuse

Women who have experienced domestic violence and an/or child abuse including childhood sexual abuse are particularly disadvantaged systemically in accessing justice. The unmet need is further exacerbated if women identify as part of marginalised groups such as Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women with disabilities and women who live in rural and regional or remote communities.

These groups *may* be high users of service provision in the community or alternatively, are so disadvantaged they do not understand their legal rights, how to access them or even that they have a right to seek redress. The problem of identifying unmet need is therefore more complex than simply determining the heaviest users of the legal system, although this is one aspect that should be considered.

Lack of access to equitable property settlements

One example of unmet need is for women is in relation to property assistance in family law. Although on the surface, perhaps un-related to issues of family violence, free or low-cost assistance with property settlement is a huge gap in legal service provision in Australia. Women experiencing family and domestic violence who also face other forms of disadvantage such as a disability or being CALD or Aboriginal women with cultural and linguistic differences are particularly affected by this yawning gap.

Women in these situations are often forced to stay in relationships with violent men because they either appear to be "too rich" on paper (but realistically have no access to their funds), or are in debt only situations and cannot obtain legal assistance. Not having property orders that offer some financial independence operates to keep these women in violent situations and prevents them from achieving access to justice.

Women from culturally and linguistically diverse (CALD) backgrounds

Women from CALD backgrounds face a range of additional barriers in accessing justice in the civil justice system. Women from CALD backgrounds do not all have the same needs and it is important to consider how different women from different backgrounds experience disadvantage.

There are a range of factors that will contribute to CALD women's experience of the justice system including:

- a. Migration status - women who are on temporary visas (including tourist, bridging and spousal visas) are particularly vulnerable when experiencing family violence and relationship breakdown. They are often isolated, without family support and entirely reliant on their abusive partner. They may be fearful of leaving a violent relationship because of the consequences for their migration status. Accessing legal advice and navigating the complexities of an unfamiliar court system are some challenges that they face.
- b. Knowledge of family law, family violence law and child protection – women often come from countries where their systems of law are vastly different to the Australian justice system. For example, family law disputes in India include return of a woman’s dowry under specific Indian legislation. Without timely access to legal information and advice that is in a form that is understood by women, women are unable to effectively access justice.
- c. Access to interpreters – it is surprising how often women are unable to access appropriate interpreters in the legal system. The availability of interpreters is an ongoing issue at court, and in some instances the same interpreter must interpret for both parties (which we consider to be a conflict of interest). Women who require interpreters of specific dialects or come from a small community where the interpreter is known face even greater barriers.

Women with disabilities

In some instances the legal system has limited capacity to provide practical assistance as the law is only effective if current level of social support are strengthened.

For example, if a woman with a profound disability is suffering domestic violence from her spouse but her spouse is her carer, obtaining a domestic violence protection order might not assist her because she will have no one to provide ongoing personal care. She may be unable to leave because she can’t physically call the police, she has communication difficulties, there is no refuge that is disability accessible or can provide the level of care provided and there are real concerns about her ability to obtain suitable long-term accommodation.

Women in prison

Many of our members provide legal assistance to women in prison who are a particularly vulnerable group, many of whom have experienced multiple disadvantage including sometimes shocking childhood trauma, neglect and abuse. Depending on the openness of prison authorities it can be difficult to access the group adequately and there are always issues of funding to be able to do this. For women in prison especially where they have been the primary carers to their children, access to their children through family law and child protection processes is critically important and can help with their stability and recidivist rates on release.

Additionally, we also note that gender-bias in society is not only linked to legal aid provisions, but also evident in sentencing for a range of related and specific reasons including perceptions of gender roles and norms, access to legal assistance, pervasive female poverty, etc.

Although women commit fewer and less-violent offences than men do, they are 4 times less likely to receive a community based order than a man¹³, despite often being the primary caregiver of any children. This has ecological ramifications on the individual, her children and family as well as society at large. For example, women spend an average of two months in prison. In this time, her house can be taken, her children are put into care, she can lose her job, etc. This is quite a cost to our various systems for a two month jail period for typically non-violent offences.

It is our experience that most of our clients in prison did not have access to legal assistance at the time of sentencing and, in our opinion, would not be in prison or would have received reduced sentencing if they had access to legal assistance.

Consequences of unmet legal need

For women experiencing family violence and relationship breakdown, the consequences of unmet legal need can be profound.

The consequences of a failure to access justice for women and their children include:

- financial hardship and poverty
- homelessness
- heightened risk of violence and/or death
- diminished emotional, mental and physical well-being

The consequences of unmet legal need are heightened when women experience specific forms of disadvantage (such as, for example, disability, background or locality). When a person experiences a form disadvantage, they can encounter additional barriers to accessing justice and additional consequences of unmet legal need.

Risk of future family violence and/or death

The most significant consequence of unmet legal need for women and their children, who experience family violence and relationship breakdown, is the future risk to their safety.

Women are more likely than not to remain in a violent relationship if they are unable to access justice through the civil justice system. Interventions in family law can assist women to become financially stable and avoid homelessness. However where women are unaware of such interventions or cannot access them, then the fear of financial hardship and homelessness more often than not compel women to remain with a violent partner. Impact of family violence on health and well being.

We have outlined above some of the impact of family violence on the health and well-being of women and their children. The economic costs to the Australian economy are also substantial. According to the Access Economics report, the cost of violence against women in 2002 – 2003 was estimated at \$8.1 billion. \$3.5 billion was attributable to pain, suffering and premature mortality of

¹³ Australian Bureau of Statistics, (2010). 4517.0 Prisoners in Australia 2010.

the victims. Without appropriate action, the estimated cost of violence towards women and their children to the Australian economy will be \$15.6 billion by 2021 – 2022.

Financial hardship and poverty

Family violence and the breakdown of a relationship are key social determinants of financial hardship and poverty for women and their children in Australia.

We have highlighted above the different forms of unmet legal need for women in the areas of family law. When legal need is met, it can facilitate good outcomes in family law including:

- equitable property settlements
- access to spousal maintenance and
- appropriate child support payments.

The statistics and research outlined below illustrate the significant and disproportionate impact that family violence and relationship breakdown can have on women and their children.

Financial impact of relationship breakdown

A 2009 study by the Australian Institute of Family Studies found that at least 60% of separated women experienced some form of financial hardship – such as going without food or being unable to pay bills, in the first year after divorce. Four years after divorce, women were still significantly worse off than divorced men and women who had never divorced .

According to the Australian Bureau of Statistics, women continue to be the primary carer in single parent families, accounting for 83% of single parent families. It is these women who are most vulnerable to experiencing financial hardship and poverty (ABS 2011).

Financial impact of family violence

It was also found that women who report spousal violence are more likely than women who report no violence to have received a minority share of assets at the end of a relationship.

Economic abuse is a key element in the dynamics and nature of family violence. A recent Australian study into family violence found that 80% of victims surveyed had experienced financial abuse . Economic abuse limits women’s ability to “acquire, use and maintain” economic resources and can lead to women and their children experiencing financial hardship and poverty (Adams et al 2008).

Women’s economic recovery from relationship breakdown and family violence is constrained by a range of factors including:

- debt incurred during a marriage (such as mortgages and credit cards)
- reduced earning capacity due to having a greater role in caring for children after separation
- lack of adequate child support and
- increased household expenses (such as transport, food, school fees) which must be covered on a sole income or Centrelink benefit.

Homelessness

Unmet legal need for women experiencing family violence and relationship breakdown can lead to housing insecurity and homelessness.

This can occur in the following ways:

- women leave the family home after a family violence incident and are unable to return
- women are unable to negotiate positive outcomes in property settlements leading to financial insecurity and loss of their home
- women are not linked in with housing providers when they access courts and lawyers.

If women are unable to access timely and specialist legal advice, they are not aware of what options they have to secure good outcomes in family law and ways in which they may be able to remain in their home safely.

Similarly if they are unable to access the civil justice system due to the costs of running a family law property claim, they are unlikely to obtain an equitable property settlement that may assist in preventing homelessness and housing insecurity.

Marginalisation, disability and unemployment can further compound women's exposure to housing insecurity and homelessness.

The Government's White Paper on homelessness, *The Road Home: A National Approach to Reducing Homelessness* identified family violence as a major driver of homelessness and the single biggest reason for people seeking homelessness assistance.

The White Paper also identified relationship breakdown as the second most common reason people seek assistance from specialist homelessness services.

Though over 40% of people experiencing homelessness are women, women's experiences of homelessness and strategies to meet their specific housing needs are not always part of the mainstream policy debate.

Self-represented litigants

We prefer to refer to these clients as unrepresented litigants, as our clients do not *choose* to self-represent but are unable to obtain legal aid and are therefore forced to represent themselves.

For many of our members, their core business is providing legal assistance to unrepresented women, many of whom are victims of violence in family law proceedings.

These are not just relationship breakdown disputes or tit-for-tat arguments but involve significant issues of child welfare concern. Otherwise, women would simply not put themselves through such a horrific experience as representing themselves against their own abuser.

Why women are unrepresented

Disadvantaged women may find themselves in the unenviable position of having to navigate the complex family law system by themselves for a range of reasons including:

- Prohibitively expensive costs of private legal representation and barristers fees.
- Inability to access legal aid due to a small income or low value assets,
- Stringent legal aid guidelines that affect the availability of legal aid for trial¹⁴
- A determination by legal aid that there is no ‘substantial issue in dispute’
- The limited ability of CLCs to assist due to limited resources.

Lack of representation gives rise to risk to children

Women who are traumatised may be unable to effectively represent themselves, nor in any civilised society should they be made to be. Often the only advocate for the child’s safety is their mother. Because of the nature of violence, it often occurs without independent verification or evidence and the mother’s account of the violence can be the *only* evidence of the violence. Although independent children’s lawyers are sometimes appointed in family law matters, they do not advocate on behalf of the mother about the violence she experienced as they do not see it as part of their job, some believe it would impact on their independence and some just do not view domestic violence as child abuse, despite the definition within the Family Law Act. Therefore, the appointment of independent children’s lawyers where there has been domestic violence does not necessarily ensure child safety. Women require their own legal advocates to give the best chance for decisions to be made in the best interests of children.

Poor legal outcomes lead to poor financial outcomes

Women who are unrepresented at trial are more likely to have poor outcomes from the civil justice system. Family law disputes where there has been past family violence are characterised by a significant power imbalance. In some instances, family court proceedings are used by an abuser to continue to control and dominate their ex-partner.

Women may be unduly pressured by their ex-partner or their ex-partner’s legal representative to agree to terms that are inequitable and put children at risk. The lack of vulnerable witness protections at trial place undue pressure on women to settle prior to trial so that they are not faced with the frightening prospect of being directly cross-examined by their abuse ex-partner at trial.

Impact on the mental health of women

A trend that some of our services have observed over the last few years is the detrimental impact on the mental health of women who are litigating their own matters. Often these cases can drag out for years with multiple court appearances. Issues of violence and safety that the woman has tried to get the court to take seriously become minimised and/or lost and the ultimate irony is that she can become what the perpetrator always said she was “a woman with a psychiatric condition who can’t look after her children”.

6. Avenues for improving access to civil justice

¹⁴ For example in Victoria, legal aid guidelines changes that came into effect this year provide that if one party to a proceeding is unrepresented, then the other party will lose their legal aid funding for trial. This had the perverse outcome that where both parties are legally aided, both parties will lose their legal aid for trial. Very limited exceptions to this guideline apply.

The Commission should consider whether having three courts that operate in family law is the most efficient use of limited resources. At the moment Australia has the local State courts that have jurisdiction in limited circumstances but are important in rural areas, the Federal Circuit Court and the Family Court. In Western Australia, they have an additional court being their own State Family Court. Each court has their own administration, own chief justice and court rules¹⁵.

There could perhaps be some merit in exploring whether there should be more family law magistrates specialists appointed to the State local courts as a means to increase access to justice, especially in rural and regional areas. At the moment, where the parties do not agree on the orders (consent orders) the local magistrates court only have jurisdiction to make orders in cases of urgency otherwise they have to transfer the matter to the family law courts, either the Family Court or the Federal Circuit Court. Family law is a specialist area and WLSA advocates for the need of specialist magistrates to make these decisions.

7. Preventing issues from evolving into bigger problems

The cost effectiveness of early intervention

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.¹⁶ 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.¹⁷ 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.¹⁸

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.

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.¹⁹ 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.

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

¹⁵ The local magistrates courts follow the Family Court rules when making family law decisions.

¹⁶ 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.

¹⁷ Ibid 18.

¹⁸ 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.

¹⁹ L Radford and M Hester, *Mothering through domestic violence*, Jessica Kingsley Publishers, London, 2006, 143.

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 court rather than be subject to care proceedings.

The case study below highlights what can happen when there isn't such an integrated response.

Case study

Tracey²⁰ 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.

We support holistic community based models of early intervention in child protection matters that include social worker/support services, parent advocates and early intervention legal services to support parents and children.

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.²¹ 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.

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.²² Such intensive, therapeutic programs need to be provided universally across the state and to be resourced appropriately.

In addition to the economic savings, we submit that prioritising family preservation as the primary permanency response is important because generally it is in the best interests of children to remain

²⁰ Not client's real name.

²¹ Newpin brochure at: <http://www.burnside.org.au/content/NEWPIN%20Internet.pdf> accessed on 30 October 2013.

²² 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.

with their family.

Women's Legal Services around Australia play an important role in preventing family law issues from evolving into bigger problems. They do so by providing access to timely and free legal information and advice through drop in clinics, duty lawyer services and telephone advice lines. Women's Legal Services are unique in being able to provide specialist legal assistance to women in a feminist framework. This enables women to disclose incidences of family violence and sexual assault in a safe and supportive environment. It also empowers women to make decision in legal proceedings to ensure that they secure positive outcomes that benefit their social and economic well-being and that of their children.

8. Effective matching of disputes and processes

Family Dispute Resolution (FDR) can be an effective and efficient way of resolving disputes in family law. However, FDR is sometimes used inappropriately where there has been family violence and there are significant power imbalances between the parties for a variety of complex reasons including:-

- Family Disputes Resolution Practitioners (FDRPs) may not appropriately screen for or pick up on issues of violence and power imbalances;
- Some FDRPs believe their processes sufficiently take into account power imbalances and they have the skills to manage an appropriate and safe outcome;
- Women *may* hide the issues of violence as they want to proceed with FDR preferring it to litigation and want to limit their chances of being exempted;
- Women *may* not disclose as they are unaware themselves that they are victims of violence;
- FDRPs proceed with FDR because the clients want to proceed and FDR may be the only option as the clients are not eligible for legal aid, can't afford litigation and don't want to litigate.
- If a matter has been exempted by an FDRP a court can ignore this exemption certificate and refer the clients back to FDR, thus promoting the concept of FDRPs always attempting FDR no matter what the situation.

If clients enter into inappropriate or unsafe arrangements (consent orders) it can be very difficult to change these orders at a later date, without a significant change in circumstances. Therefore, clients can be stuck with inappropriate or unsafe orders, be unable to have the legal standing to apply for a variation (without a significant change in circumstances) and are left to comply with the existing regime. Alternatively, they might not comply with the orders and end up in contempt proceedings in the family courts for failing to comply with the orders which is a quasi-criminal proceedings with penalties and other incriminations attached.

Real choice about participation in FDR is required and legal aid funding for a court application in the alternative

For FDR to operate effectively, it must be part of a system where there are real choices for women who have experienced domestic violence, so if the parties fail to reach agreement or it is unsafe or otherwise fails, that in the alternative the legal system is truly accessible to them as an alternative decision-making pathway. For many of our clients this means that they can be assured before

entering FDR that legal aid will more than likely be available to support them in a court application if this is required.

This is a similar situation for legal aid conferences which are FDR processes conducted by legal aid with lawyers, as long as the merit and means test are satisfied. In many ways the conference is the default funding option, even in circumstances where it is clearly inappropriate. For example, a child has been abducted by another parent. Clients can also feel railroaded into agreements they feel are unsafe because they have been told there will be no funding for the matter to go to court.

The funding of legally assisted FDR in FDR services

In some States the FDR services have established and allow legally assisted FDR. This is not in all States and the proper funding of these models and the encouragement to establish such a service would offer some vulnerable clients more choice and protection when conducting FDR.

CFDR as a further option

Another option worth considering is the Coordinated Family Dispute Resolution (CFDR) model which was a model of safe FDR developed by the Women's Legal Service in Brisbane for families where there was family violence. It was piloted in 5 sites around Australia and evaluated by AIFS²³. Its features included specialist risk assessment and both parties being provided with counselling support and legal advice and representation by community legal centres and legal aid. It was a ground-breaking model that was the first of its kind in the world. It provided a gap in service delivery for clients who required specialised assistance to try to reach agreement and would otherwise be exempted out of FDR. The previous government decided not to roll the pilot out because of financial reasons. The clear need for such a model has not gone away.

CFDR assisted the matching of clients to the right dispute resolution process

A CFDR also had potentially wider benefits in matching parties to the right dispute resolution process. A domestic violence risk assessment undertaken by a domestic violence professional was fed into a case management meeting of professionals who would collectively determine whether it was safe to proceed with CFDR or to refer the client to court. If the matter was referred to court, the CFDR FDR service provider would provide the clients with a letter advising of their involvement in the CFDR process so that legal aid and the court was aware of this and so that a court application could be made without referral back to FDR being made or referral into a legal aid conference, where there were less safety supports than CFDR. The fact that the clients had been referred into CFDR should have been an alert to both legal aid and the courts that the case involved significant issues of violence and safety. The better option would require legislative change so that the FDR provider could have provided the clients with a CFDR exemption certificate pursuant to the Family Law Act (S. 60I). The letter option was a practical solution²⁴. WLSA strongly advocates for collaborative, coordinated and transparent approaches to family law issues where there is family violence.

²³<http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Documents/CFDR%20Evaluation%20Final%20Report%20December%202012.PDF>

²⁴ The Women's Legal Service in Brisbane is able to provide further information about this model for your consideration.

11. Improving the accessibility of courts

Court Processes

The Commission might consider the overall approach of case management in the family courts and whether allocating resources earlier in a matter might assist with the ability to make better decisions earlier on and possibly assist in settlement rates as the matters track through the system. Basically it is a consideration of “front-ending” the system. This would possibly require further resources as the courts are under funding pressures but it might also require a re-allocation of existing resources.

To make the best decisions, courts require the best evidence. WLSA has recently raised concern formally with the Attorney-general about the lack of domestic violence expertise in the psycho-social family reports that are key pieces of evidence the court relies on to make decisions in the best interests of children. These reports are extremely persuasive in relation to court decisions and in terms of legal aid funding but currently in Australia, surprisingly there is no system of accreditation for becoming a report writer. As a result, it is our experience that these reports can be inconsistent in terms of their approach to issues of domestic violence, sometimes missing it altogether, at other times trivialising or minimising its impacts on women and children. For our clients the affects can be devastating as it can mean that their legal aid funding is stopped and they are left with the choice of fighting on by representing themselves against their own abuser in the court or giving in to his demands regarding the children or in terms of the recommendations made by the family report writer. Unfortunately, for some women who have experienced violence the “choice” of being unrepresented is no real “choice”.

14. Better measurement of performance and cost drivers

WLSA supports better statistical gathering on issues involving domestic violence, including in the family law system. Better data and analysis can assist better policy development and supports the drafting of better laws. At the moment we understand it is quite difficult obtaining information on the amount of violence in the system, although this may be improving. The Commission might be able to provide value in assisting family law agencies, including the courts to capture the right data in better ways.

In our experience, the drivers of many disputes in family law are not merely emotional reactions to the breakdown of a relationships but the power and control dynamics of domestic violence as perpetrators of violence seek to exert ongoing control over their family through their children. Consistently women report to domestic violence and women’s services that he was “charming” to the other people by a tyrant and bully to his family at home. Violent men can be determined and driven in their quest to “win” at all cost. See our previous discussion about the court needing the best evidence to make the best decisions and the call for the accreditation of family report writers who provide evidence of the psyche-social background of the family to the court to assist decision-making and who can miss or minimise violence.

The impact of living with violence we believe can be minimised by the court and other decision-makers in the family law system, including lawyers. The extent of violent men’s ability to manipulate and play the system can also be misunderstood and too often we see them being given the ‘benefit of the doubt’ in family law decisions. For example, a period of supervised time can be changed to

unsupervised as there have been 'no incidents' during the period of supervision. Or orders are made for equal shared parental responsibility where there is violence and this requires the parties to communicate and agree on long-term issues concerning the children. Such orders in our opinion do not sufficiently take into account the dynamics of violence and sets up the parties for ongoing disputation and litigation. This not only has an emotional impact of women and children but an economic impact on society as matters are re-litigated and women and children seek support from government funded support services, counselling agencies and community legal centres.