

RESPONSE TO
DRAFT REPORT

ACCESS TO JUSTICE ARRANGEMENTS

Prepared by Women's Legal Service Victoria for the
Australian Productivity Commission

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INTRODUCTION

We congratulate the Productivity Commission on its Draft Report. The report sets out a range of recommendations to improve access to justice and equality.

This submission specifically addresses recommendations and information requests contained in the Report.

We ask the Commission to consider this response as supplementary to our original submission made in November 2013, which provided a comprehensive overview of:

- The context and nexus between family law and family violence law.
- Unmet legal need for disadvantaged women experiencing relationship breakdown and family violence.
- The consequences of unmet legal need including financial hardship, homelessness, risk of injury and death and diminished emotional, mental and physical well-being.
- Case studies and examples of barriers to accessing justice in the family law system including:
 - the prohibitively expensive cost of private legal representation
 - restrictive and unfair legal aid guidelines
 - unaffordable filing fees including the divorce application fee and
 - complexity in legal issues and jurisdictions.
- Improving access to justice through the creation of a small claims property law tribunal.
- The importance of community legal centres (CLCs) in facilitating access to justice for the most disadvantaged.
- Innovative responses to meet legal need provided by Women's Legal Service Victoria.

As noted in our original submission, our objective is to communicate the experience of the women that we work with. Our client group consists of women from a range of different cultural, ethnic and religious backgrounds. The women we assist are low income earners and have experienced other forms of disadvantage such as physical and mental disability.

Our submission includes case studies, some of which are individual client cases that we have assisted with at our service and some of which are examples of types of cases that we commonly see. All individual client case studies are de-identified and provided with the consent of the client.

WOMEN'S LEGAL SERVICE VICTORIA

Women's Legal Service Victoria (WLSV) is a not for profit organisation that has been providing free legal services to women for over 30 years. We specialise in issues arising from relationship breakdown and violence against women. WLSV provides free and confidential legal information, advice, referral and representation to women in Victoria.

Through our associated service, Family Law Legal Service, WLSV operates a daily duty lawyer service at the Family Law Courts and provides legal advice and representation to participants in VLA Roundtable Dispute Management and clients of the Melbourne Family Relationship Centre.

We initiate and participate in law reform activities, ensuring that clients' experiences are taken into account when legal policy is being developed or when changes are being made to the law.

We deliver legal education, training and professional development to a range of organisations and professional groups.

We also coordinate a volunteer program with over 100 volunteers.

We are funded by the Indigenous Justice and Legal Assistance Division, Attorney General's Department, Canberra and Victoria Legal Aid.

DUTIES ON PARTIES (CHAPTER 12)

Vexatious litigants

In response to information request 12.6 we refer the Commission to our original submission with respect to the handling of vexatious litigant applications.

In our original submission we made a number of suggestions of how a coordinating agency (such as the Attorney General's Department) could manage a register of vexatious litigants and play an important role in providing advice and education to court personnel and members of the judiciary.

A register would be most useful if all court staff, as a matter of practice, searched the register prior to accepting an application filed at court. Often, it is at this initial stage that intervention would be most useful, particularly in minimizing costs to the court and the other party.

We would also recommend legislation to enable courts to make orders with respect to vexatious litigants. Legislation could be framed similar to the new Victoria legislation which provides for a graded system of responses; enabling courts and tribunals to make general, limited and extended litigation restraint orders.

Victims who are the subject of applications by the vexatious litigant are able to apply directly to the relevant court or tribunal. Courts and tribunals will be able to make a limited litigation

restraint order restricting further applications in a particular case, or an extended litigation restraint order preventing the person bringing any further proceedings against a particular party or about a particular subject matter.

SELF REPRESENTED LITIGANTS (CHAPTER 14)

The Commission seeks information under request 14.1 on the most effective and efficient way of assisting self-represented litigants to understand their rights as well as suggestions on addressing the growing complexity of the law.

In our original submission we highlighted the difference between un-represented and self-represented litigants. We continue to use this distinction as we believe it is important to acknowledge that many litigants have no choice in accessing legal representation.

In considering effective assistance to un-represented litigants, it is important to recognize the levels of disadvantage that many of our clients experience. Our clients may have low levels of literacy, have an intellectual disability or cognitive impairment or have limited English reading and writing skills.

For these women, it is important that specialist services and supports are available at court and prior to court to assist them with their family law case. It is important that courts have disability advocates, social workers and culturally specific support workers available to assist.

A comprehensive accessibility audit of the federal court system

We note the draft recommendations 14.1 and 14.2 of the Report. Prior to undertaking these actions, we recommend that there be a comprehensive audit done of courts to identify and map the different parts of the system that contribute to complexity. An audit would provide an understanding and basis to make improvements at a systemic level.

Without a comprehensive audit and a set of recommendations, there is some danger that courts will develop strategies to address complexity in an ad hoc way that is not evidence based and will not be properly evaluated. Such approaches could result in significant financial costs to the courts and the Federal Government with no effective and meaningful outcomes for un-represented parties.

It would be useful for an audit to be broad in scope and consider the accessibility and complexity of:

- court applications, information and other forms available at court
- language used by court staff, lawyers and judges
- process and steps required to run a family law case

- court requirements for drafting affidavits, orders and parenting agreements
- rules of evidence.

An audit could have, as one of its measures, the degree to which a person with a disability or from a non-English speaking background understands, engages with and navigates the family law system.

The audit could develop recommendations around systemic improvements which could be implemented through a specialist unit (that sits under the Attorney General's Department) that works with courts to reduce complexity and improve accessibility.

Courts should, as part of their funding and reporting requirements, be required to measure court performance against accessibility and reducing complexity.

Addressing complexity in the law for un-represented litigants

Complexity is a significant issue in the family law jurisdiction. In our original submission, we recommended an alternative family law tribunal process be established for parties who have small property claims (see p.25).

The following case study illustrates the complexity in family law that creates significant difficulty for an unrepresented litigant to navigate the family court system without legal representation. It presents a strong case for an alternative process for small property claims.

Lisa is 45 years old; she has bi-polar disorder. She has been in receipt of a disability pension since she was 18 years old because of her mental illness. Lisa has never been able to gain paid employment and finds it difficult to fill out forms and understand financial documents.

During her 15 year marriage, Lisa's husband, Eric, worked. Eric began drinking heavily when her mental health was deteriorating and was verbally and emotionally abusive to her. Eric controlled all of the finances and did not allow Lisa access to any of their financial information.

Lisa receives only a government pension, has several small utility company debts and struggles to meet her rental payments. In negotiating a property settlement, the only asset of the marriage is her husband's superannuation. Lisa has no superannuation or assets. Lisa wants to access the \$10,000 superannuation she is likely to be entitled to under hardship grounds, to pay for dental work her son desperately needs.

If Lisa were to run her own case to secure a property settlement these are steps she would be required to undertake to secure a \$10,000 superannuation payment:

1. *Collect her own financial documents which detail her income, any assets or debts.*
2. *Provide these to her ex-husband and ask him to provide the same to her so that they can negotiate a settlement*

3. *If there is no response from her ex-husband she must issue proceedings in the Federal Circuit Court. This involves completing three documents: An initiating application which is a nine page form which asks her questions such as: "Have the parties entered into financial agreement or a part VIIIAB Financial Agreement under the Family Law Act 1975 or under any relevant state or territory legislation?"*
4. *She must complete an affidavit which sets out the relevant facts the court needs to know to decide the property issue in dispute. An affidavit must comply with Rules 15.08, 15.09 and 24.01 of the Family Law Rules 2004. Affidavits are subject to many Court rules including Rules 2.02, 4.02, 4.06, 4.09, 4.16, 4.29, 4.30, 5.02, 5.09, 20.06, 21.02(2) and Part 15.2 of the Family Law Rules 2004.*
5. *She must complete a financial statement which is a 12 page document that contains detailed questions about her and her ex-husband's finances.*
6. *These documents must be filed, with two photocopies of each, at the court registry. Lisa will need to present her health care card or pay a \$305 filing fee.*
7. *Once a court date is allocated, a process server must be booked and paid to hand deliver the documents and provide her with an affidavit of service, completed, sworn and witnessed appropriately to prove the documents were served. Affidavit of Service must be filed with the court prior to the court date.*
8. *On the first court date she is required to attend. If her ex-husband does not attend and does not file any documents the judge will "set the matter down for a conciliation conference in 10 months time and a final hearing in 12 months time".*
9. *The next step is to complete a Form 6 or superannuation information kit which requires details of the 'eligible superannuation plan', 'the trustee' and the 'member'. She must send these forms to the superannuation companies with filing fees.*
10. *In order for the Court to make the order and the order to be binding on the super fund it needs to be in a particular form. The Orders must be specific and drafted as follows:*

- a. *That pursuant to section 90MT(4) of the Family Law Act 1975, the base amount allocated to the applicant Lisa out of the interest of the Respondent, Eric, in the XYZ Super Scheme is \$\$ as at the operative time.*
- b. *That pursuant to section 90MT(1)(a) of the Family Law Act 1975 whenever a splittable payment becomes payable in respect of the superannuation interest of Eric (member spouse) in the XYZ Super Scheme:*
- c. *Lisa (non-member spouse) shall be entitled to be paid an amount calculated in accordance with part 6 of the Family Law (Superannuation) Regulations 2001 using the base amount of \$10,000 (provided that such amount shall not exceed the value of the interest) and*

- d. There be a corresponding reduction in the superannuation interest of the (member spouse) to whom the splittable payment would have been made but for these orders.
- e. That paragraph 2 has effect from the operative time.
- f. That the operative time is seven business days after service of a certified copy of the Final Orders on the Trustee of the MLC XYZ Super Scheme.
- g. That the Trustee of XYZ do all such things and sign all such documents as may be necessary so that Trustee of XYZ in accordance with the obligations set out under the Family Law Act 1975 and the Family Law (Superannuation) Regulations 2001 can calculate the entitlement of and make payment to Lisa in accordance with the orders.
- h. That Lisa will cause the Trustee of XYZ to be served with a certified signed copy of these Orders and Regulation 72 notice.
- i. That from the making of these orders and until the operative date Eric is hereby restrained from drawing upon or encumbering any of the superannuation entitlements he may have with XYZ or from giving any direction to the Trustee which may have the effect of defeating, diminishing or otherwise reducing the entitlements of Lisa under these orders.

11. *As Eric has not provided any financial documentation, subpoenas must be issued for the hearing.*

12. *One the day of the hearing, Lisa must attend and present arguments regarding "contribution" in her marriage, articulate hardship and access to superannuation.*

Unbundling legal services for un-represented litigants

We recommend that prior to creating opportunities for unbundling legal services, the Government consider commissioning research to map the most effective ways in which legal services can be unbundled. It is important that there be an evidence base that supports one off legal assistance to unrepresented parties. The following questions are important in creating an evidence base:

- Do unbundled legal services provide a better outcome for a party?
- To what extent, if any, is the outcome improved?
- At one point(s) in a case is it most effective to assist a party through one off assistance?
- What forms of legal assistance are most effective in securing a good outcome?

COURTS AND TRIBUNAL FEES (CHAPTER 14)

We support an automatic exemption of court filing fees for parties in possession of a Commonwealth concession or health card or in receipt of a government pension or allowance.

We also support a structured system of partial fee relief. We would recommend the system be based on the following criteria:

- *partial* receipt of a government pension or allowance or
- the net financial position of a person once income and living expenses are taken into account.

A graded system of fees could then be set according to the net financial position of a person. This is the best indicator of whether a person can afford to pay a filing fee. We submit that a person's assets is not as useful determinant of financial hardship in considering the affordability of paying filing fees. Assets are not necessarily a good indicator of a person's day to day financial position.

Most courts and tribunals currently have a financial hardship form which asks for this information from a person seeking a fee waiver. This form could be adapted for a partial fee relief structure. It would minimise any additional administrative processes.

REFORMING THE LEGAL ASSISTANCE LANDSCAPE

Legal education

The Commission's report provides an overview of the legal assistance sector and its different functions.

As noted in the report the CLC sectors play a critical role in early intervention through legal information and education. CLC's not only educate individuals but other service providers and government agencies who work closely with disadvantaged communities. Critically, building the capacity of services and agencies provides them with the skills to identify legal issues and provide appropriate referrals and information (in a sense providing "legal health checks" through the knowledge gained as part of the training).

WLSV's legal education program designs and delivers specialised training programs based on an organisation's specific objectives and requirements. In the past 4 years, over 6,000 people have attended WLSV's education, training and professional development sessions. Some of our clients include:

- Centre of Excellence in Child & Family Welfare
- Deakin University

- Department of Human Services
- Department of Justice
- Eastern Domestic Violence Outreach Service
- Federation of Community Legal Centres
- Islamic Women’s Welfare Council of Victoria
- MOVE Improving Maternal and Child Health Nurse Care for Vulnerable Mothers
- The Jewish Women’s Taskforce Against Family Violence
- La Trobe University
- RMIT University
- Law Institute of Victoria
- Men’s Referral Service
- MOSAIC Mothers’ Advocates in the Community (La Trobe University)
- North Yarra Community Health
- Public Interest Law Clearing House

Evaluation

There is a growing trend amongst CLCs towards developing and implementing evaluation frameworks to measure the impact and effectiveness of CLC work, in terms of service delivery, legal education and strategic advocacy.

WLSV has introduced an outcomes based measurement framework for the organisation. We have developed our “theory of change”, which articulates how each of our programs (client services, legal education and policy), and our organisation as a whole, contributes to creating positive outcomes for women and the children in their care. These are outcomes at the individual level, at the level of the legal system and at the societal level.

We have also developed monitoring and evaluation frameworks that will enable us to measure how well we have succeeded in creating those intended outcomes for women and their children. The information we glean from monitoring and evaluating the outcomes of our work will be used to refine our services over time to make sure that we are responding to changing legal needs in the most effective way possible.

Strengthening networks and collaboration

Community legal centres are also uniquely placed to develop partnerships and collaborate with other organisations and sectors. WLSV has focused on growing networks and strengthening partnerships in order to respond better to legal need. This includes

- working closely with the Federation of Community Legal Centres and with senior practitioners in other CLCs to build the capacity of family violence lawyers in the sector.

- growing Skype Outreach project to include nine partners family violence and health agencies around Victoria, bringing this unique and flexible inter-disciplinary model to more women experiencing family violence
- participating in the Family Law Pathways Network to link with and contribute to a collaborative, multidisciplinary response to issues arising in family law
- establishing a new relationship with the Financial and Consumer Rights Council, the peak body for financial counsellors in Victoria to establish a project developing greater collaboration between lawyers and financial counsellors
- strengthening our relationship with Court Network, whose volunteers provide personal support, non-legal information and referral to people in contact with the justice system.

Strategic advocacy

We support the Commission's view that strategic advocacy is an important component of the work of CLCs and the recommendation that funding for CLCs include a component for strategic advocacy.

CLCs have an insight into the experience of disadvantaged individuals and the barriers in the legal system. clients' experiences of the justice and related systems give us invaluable first-hand information to assist policy makers with decisions about changing (or indeed, not changing) the law and related policies.

The vast majority of the information we provide to governments and other policy makers is provided at their direct request. All of it is based on our first-hand experience working with clients. It is information that public servants and political advisers simply could not access without our assistance.

Funding for family law matters

The Commission recommends at 21.1 a separate demarcation of funding for civil law matters.

We would support a separate stream of funding each for family law and other civil law matters. Funding should be allocated according to demand, in particular data provided by LCAs and CLCs.

As noted in our original submission family law is a significant area of legal need and early intervention can be of great benefit in resolving disputes and creating cost efficiencies. Victoria Legal Aid identified in its 2008/2009 Annual Report that:

“Of the 88,732 information calls received by [VLA's] phone advice line this year, the top two queries related to children's living arrangements and settlement of property after divorce. Left unresolved, or without someone to help, these factors are known triggers for violence and intimidation.”

We also recommend an increase in funding to family law and other areas of civil law commensurate with the demand for these services.

Eligibility tests for legal assistance

We support the Commission's recommendation 21.2 that high level eligibility tests for legal assistance services reflect priority groups and take into account the factors the Commission has identified.

It is important that priority groups are identified based on data around vulnerability and disadvantage.

We consider the current reporting requirements of CLSIS for CLCs to be wholly inadequate in capturing the complex factors that are required to be taken into account in determining eligibility for assistance. Should CLCs be required to report on a broader range of criteria to meet funding requirements, it is essential that a better data collection system be developed and implemented.

We also recommend that the eligibility criteria be drafted as broad principles that provide a framework within which different service providers – including generalist and specialist CLCs can operate. There must be sufficient flexibility for CLCs to be able to determine their own nuances around identifying clients who are most in need of their assistance, particularly given the diverse needs of different clients groups.

At WLSV, a recent review of our case-work guidelines has resulted in an approach that considers not only "disadvantage" but also "impact". In determining "disadvantage", it is weighted on issues such as homelessness, disability and other vulnerabilities and how they intersect with each. In considering "impact" we consider the personal impact to the client in obtaining legal assistance but also the broader systemic impact of taking on the case. For example, a strategic case may create new case law that benefits other individuals in the legal system. It is important that funding criteria does not limit the ability of CLCs to make these assessments.

With respect to draft recommendation 21.3 we consider that aligning the eligibility test of CLCs with Victoria Legal Aid will create an underclass of disadvantaged people who cannot access legal aid and who cannot access a CLC.

One of the primary functions of CLCs is to assist disadvantaged individuals who would not otherwise be able to access legal aid. As noted in our original submission, legal aid guidelines are complex and preclude a range of disadvantaged people from accessing legal assistance. It is these significant gaps that CLCs fill on a daily basis.

Competitive tendering

With respect to recommendation 21.4 and information request 21.3 we would not support a competitive tendering process for funding. We have concerns that such a process would erode access to justice by imposing a blunt framework to determine how funding is allocated. CLC's

that are small but important because they exist as the only specialist service available or cover a large region of disadvantage may not be successful in a competitive tendering process because they simply do not have the resources to be part of a tender process.

It is more appropriate to consider how CLCs can work collaboratively with Victoria Legal Aid and the Federal Government to determine funding allocation. Such a process may give rise to opportunities for CLCs to create partnerships and improve alignment of areas of law and services with areas of geographical need. However this must be done in a collaborative and consultative manner rather than by pitting CLCs against each other in competitive tendering process.

CONCLUSION

We wish you well in finalizing your recommendations. We look forward to contributing further through the public inquiry process.

If you have any questions, please do not hesitate to contact Pasanna Mutha-Merennege