

Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

By email transmission: legcon.sen@aph.gov.au

6 November 2009

Dear Committee Members,

INQUIRY INTO ACCESS TO JUSTICE

Women's Legal Service Victoria (WLSV), established in 1981, is a statewide not for profit organisation providing free confidential legal information, advice, referral and representation to women in Victoria. WLSV specialises in issues arising from relationship breakdown and violence against women. Our principal areas of work are family law, family violence and victims of crime compensation.

In addition to providing legal services to women, WLSV develops and implements preventative domestic violence programs through education, training and professional development in these areas of law and related areas to non-government and government organisations including; police, lawyers, registrars, barristers, social workers and other community organisations and professional groups.

WLSV also ensures that clients' experiences inform the development of public policy and law by participating in law reform activities including writing submissions and sitting on various stakeholder advisory reference groups.

Our submission has been written to reflect the experiences of our client demographic; women experiencing family violence and/or a relationship breakdown accessing justice in the Family Court, Federal Magistrates' Court and Magistrates' Court in Victoria with a focus on the following terms of reference:

Current systemic gaps

- a. the adequacy of legal aid;
- b. the ability of people to access legal representation;
- c. the adequacy of funding and resource arrangements for community legal centres;

Alternative measures

- d. the measures to reduce length and complexity of litigation and improve efficiency.

CURRENT SYSTEMIC GAPS

Background

Access to justice is fundamental to the rule of law. It is also essential for the enjoyment of basic human rights, social inclusion and the effective functioning of any democracy.

A good justice system must be accessible in all aspects. Accessibility means it must be fair, simple, affordable and easy to understand and navigate. It must also have pathways for early intervention to prevent further disadvantage.

We address the issue of access to justice by first providing the context in which many of our clients come to engage with the justice system. Our clients access our services for family law matters, family violence matters and victims of crime compensation matters. They are primarily low income earners and may have little or no assets therefore they will need legal aid to fund their court cases. Some of them may not meet legal aid's means and/or merit test and our service will have to assist them from our own resources or with the assistance of pro bono barristers.

We have provided some background information about family violence, relationship breakdowns and the nexus between these issues and poverty. This poverty leads to a reliance on legal aid as the sole means to access the justice system. We have therefore included statistical data to show the impact of inadequate legal aid funding and the role that plays in contributing to the current systemic gaps that limit women's ability to access the justice system.

Family Violence

Family Violence affects the emotional, psychological, physical, social and economic well being of women and their families. In the background paper for The National Plan to Reduce Violence against Women and their Children, family violence is recognised as a complex phenomena where the vast majority of cases are perpetrated by males against females. It can include emotional, verbal, social, economic, psychological, spiritual, physical and sexual abuse and is characterised by an ongoing pattern of behaviour aimed at controlling one's partner through fear.¹

¹ The National Plan to Reduce Violence against women and their Children 2009

Relationship Breakdown

Almost half of all marriages will end in divorce. Relationship breakdown is the second most common reason people become homeless.² Women are disproportionately economically worse off after relationships break down, therefore they are likely to rely on social security parenting payments for their livelihood.³ As 83 percent of sole parents in Australia are women, the inadequacy of parenting payments disproportionately affects women the most.⁴ The overall income of those reliant on social security is close, but often below the poverty line estimates.⁵ Women have accrued less superannuation than men because they take more time out of the paid labour force due to their carer role and when they return, they are more likely to have casual or part time jobs.⁶ Women also tend to be in jobs that have traditionally lower rates of pay.⁷ This lack of equitable economic opportunity, economic independence and/or economic literacy significantly increases the likelihood of women being not just poorer but poor when the relationship breaks down.

Below are some statistics in relation to family violence and relationship breakdown and their nexus to the poverty status of women.

Impact of family violence on health and well being

- Violence is the leading cause of death, disability and premature death for women aged between 15 and 44 years.⁸
- 33% of women have experienced physical violence at some stage in their life since the age of 15.⁹
- 20% of homicides are intimate partner homicides.¹⁰
- There is a high occurrence of adult partner violence and child abuse of about 30% – 60%.¹¹
- Older women experience violence and abuse at a rate that 2.5 times that of older men.¹²
- almost 25% of children in Australia have witnessed violence against their mother or step-mother.¹³

² Australian Institute of Health and Welfare (AIHW) Homeless people in SAAP: SAAP national Data Collection annual report, SAAP NDCA report series 12, Canberra 2008

³ Smyth, Bruce and Weston, Ruth (2000) "Financial Living Standards after Divorce; A recent snapshot" research paper No 23, December 2000; Australian Family Institute of Family Studies: Melbourne

⁴ Women in Australia 2009, Office for Women at <http://www.fahcsia.gov.au/sa/women/pubs/general/womeninaustralia/2009>

⁵ ibid

⁶ ibid

⁷ ibid

⁸ VicHealth (2004), The health costs of violence; Measuring the burden of disease caused by intimate partner violence: A summary of findings; Victorian Government.

⁹ The National Plan to Reduce Violence against Women and their Children, 2009

¹⁰ ibid

¹¹ ibid

¹² ibid

¹³ ibid

Economic cost of violence

- 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 the victims.¹⁴
- Without appropriate action the estimated cost of violence towards women and their children to the Australian economy will be \$15.6 billion by 2021 – 2022.¹⁵

The nexus between family violence, relationship breakdown and financial difficulty

- Over 50% of children's matters being dealt with in the Family Court jurisdiction involve family violence and/or child abuse allegations.¹⁶
- Family violence is the main cause of women being homeless¹⁷ and relationship breakdown and financial difficulty were the other main reasons women became homeless.¹⁸
- Of all specialist homelessness services provided, 22% were provided to single parents headed by a woman and 1% was provided to a single parent headed by a man.¹⁹
- After a relationship breaks down, women, both older and younger, are more likely to be financially disadvantaged than men.²⁰
- There is a nexus between family violence, relationship breakdown and financial difficulty.²¹

A. THE ADEQUACY OF LEGAL AID FUNDING

In our experience with clients, the current legal aid funding arrangements do not provide for sufficient access to justice for women. Legal Aid's funding agreements require an application of a means test. This means test is not generous, and many people who are not well-off by community standards do not qualify. In most cases a person needs to be dependent on a social security benefit. Ownership of anything more than a basic older car and some equity in the home can mean a person will not be eligible for a grant of legal aid.

¹⁴ The National Plan to Reduce Violence against Women and their Children, 2009

¹⁵ *ibid*

¹⁶ Brown T, Sheehan R, Frederico M, Hewitt L, Resolving Family Violence to Children: the evaluation of Project Magellan (2001), Monash University

¹⁷ Female SAAP clients and children escaping domestic and family violence 2003-04, (Canberra: Australian Institute of Health and Welfare, Bulletin Issue 30, September 2005); page 1

¹⁸ Which Way Home? A New Approach to Homelessness (The Green Paper 2008); page 20

¹⁹ The Road Home: A National Approach to Reducing Homelessness (The White Paper 2008); page 5

²⁰ Smyth, Bruce and Weston, Ruth (2000) "Financial Living Standards after Divorce; A recent snapshot" research paper No 23, December 2000; Australian Family Institute of Family Studies: Melbourne

²¹ Women in Australia 2009, Office for Women at <http://www.fahcsia.gov.au/sa/women/pubs/general/womeninaustralia/2009>

There is no nationally consistent formula for means-testing, and an inequitable distribution of funds between the states means that it is harder to obtain legal aid for a family law matter in Victoria than anywhere else in Australia.²²

A tightening of the means test was part of the measures introduced by Victoria Legal Aid in 2008 to regularise their finances and this has meant that many disadvantaged people now no longer qualify for legal aid.²³

In a recent Media release, the Victorian Deputy Premier and Attorney-General Rob Hulls, has said,

“Inadequate Commonwealth funding has already seen Victoria Legal Aid introduce guideline changes in family law matters, resulting in a significant decrease in assistance for families experiencing conflict. Vulnerable children in families experiencing high levels of conflict are at risk of being exposed to further family violence because federal legal assistance directed to them has been reduced by 30 per cent in the past 18 months. In the past financial year, 736 fewer grants were allocated to assist children in high risk situations through the independent children’s lawyer program. This is equivalent to a 50 per cent decrease in services to at-risk children. It is unfortunate that it appears children in high-conflict family situations have paid the price for the Commonwealth’s declining share of legal aid funding. Not being able to resolve family law matters creates situations where women and children become at risk of harm.”²⁴

He further adds that “since 2002, Victoria has consistently received by far the lowest legal aid funding per capita of any state or territory from the Commonwealth,” he said.²⁵

For reasons we shall expand on below, we believe there is inadequate legal aid funding especially in the areas of family law and the unintended consequence of cuts to family law funding is a gender disparity in accessing justice. The disparity becomes apparent when the overall legal aid funding guidelines are looked at.

On the surface because women are left poorer after a relationship breaks down, it would appear that women would receive more legal aid assistance than men. However while women may receive more legal assistance for family law matters than men, it is due to their already disproportionately low financial status after separation. In other words more men are likely to be able to fund their own legal cases in family law than women. In spite of this overall more men receive more legal aid than women because criminal law matters are much better funded than family law matters and men are main recipients of criminal law funding.

In the 2008/2009 financial year, the Victorian Legal Aid (VLA) annual report shows that of the 41,946 grants of legal assistance, 14,031 (33 per cent) were to women and 67% were

²² Victoria Legal Aid Annual report 2008/2009, page 16

²³ *ibid*

²⁴ Media Release from the Attorney General and Deputy Premier of Victoria, 5 November 2009

²⁵ Media Release from the Attorney General and Deputy Premier of Victoria, 5 November 2009

to men.²⁶ Women received 62 per cent of all grants of legal assistance in the family law matters and 58 per cent of grants in civil law matters and 18% of criminal law matters.²⁷ For men the figure was about 82% in criminal law matters, 37% in family law matters and 42% in civil law matters.

Of the 88,732 information calls received by legal aid phone advice lines 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.²⁸

Most calls to VLA language lines involved questions about family law and their options relating to family violence.²⁹ In spite of this need for legal assistance with family law and family violence matters, there was a 6% increase in criminal law funding, a 0.8% decrease in civil law funding and a huge 15% decrease in family law funding. In the past 18 months family funding has been reduced by 30%.³⁰ This has only increased the pressure on our service without additional funding to meet this increased need.

While family law matters have a cap of \$12,000, most criminal law matters do not have a cap as such or have caps at almost 5 times the rate of family law matters. Indictable offences are generally capped at 60 days and beyond that fees are negotiated with the solicitor so that a client is not left without a solicitor. For a family law matter, the client will have to fend for themselves once they reach their cap.

There is a historical context to the prioritising of funding for criminal law matters above other legal matters at legal aid.

In the decision of *Dietrich v R* (1992) 177 CLR 292, the High Court held that a person accused of a serious crime has a right to fair trial and if the judge forms the view that a fair trial is unlikely to result if the accused cannot afford legal representation then a stay of proceedings must be ordered. Section 306A of the *Victorian Crimes Act 1958* grants a court the power to order Victoria Legal Aid to provide legal representation if the court believes that without it, the accused will not receive a fair trial.

This has the effect of granting criminal matters a special position. Victoria Legal Aid will therefore grant legal aid more often for a criminal matter than for a family law or civil matter as the statistics in their annual reports show.

Looking at the overall funding and context, the discrepancy is a gendered one. In our view and based on the experiences of our clients, the potential consequences of family law proceedings can be as serious as criminal law matters, especially when you are

²⁶ Victoria Legal Aid Annual report 2008/2009, page 16

²⁷ *Ibid*, page 20

²⁸ *Ibid*, page 10

²⁹ *Ibid*, page 18

³⁰ *ibid*

considering the high risks of poverty, homelessness, family violence and risks to children that are usually part of that equation.

The main points from these findings are as follows:

- a. Men receive legal aid at over twice the rate of women.
- b. Criminal law matters are the best funded legal matters within legal aid with an increase of 6% in a year of strict budget cuts to legal aid.
- c. Family law was the most significantly cut aspect to legal aid grants with a 15% decrease in funding.
- d. More grants of aid are available in criminal law matters than family law matters and because women access legal aid primarily for family law matters, they are disproportionately more affected by cuts to legal aid. This is because cuts to legal aid usually involve cuts to family law which has a flow on effect to women's ability to access justice.

B. THE ABILITY OF PEOPLE TO ACCESS LEGAL REPRESENTATION

While poverty is a significant barrier in a woman accessing the legal system, there are a number of other factors that impact a woman's ability to access the justice system such as:

1. Family Life

- The demanding role of being a single parent and/or the primary carer of parents, children and other family members;

2. Cultural and Linguistic Barriers

- Being a non-English speaker;
- Being from a culturally and linguistically diverse (CALD) background;

3. Social exclusion factors

- Being poor;
- Being disabled;
- Being homeless;
- Being a racial or ethnic minority;
- Being a victim of family violence; and
- Being a refugee, asylum seeker or new migrant.

4. Geographic factors

- Living in a remote, regional and/or rural community

A number of our clients experience a number of these factors that act prevent them accessing justice.

For example a woman and her children fleeing from family violence may end up poor and homeless and seeking refuge in a shelter. She will usually have to start from scratch, acquiring all of the essentials of a new home (furniture, food and clothing). In addition, there are large initial outlays necessary to secure private rental if public housing is not available.³¹

The psychological and financial strain of separation can be enormous especially for women. This is coupled with the fact that children usually live with their mother after separation and that mothers typically have a lower earning capacity than fathers.³² If family violence is a factor then she will be struggling with being a victim of crime.³³

A woman in this situation may then be facing the added burden of one or several court cases. She may find herself in several jurisdictions at the same time or in very close succession:

- dealing with child support matters in the Federal Magistrates Court;
- dealing with property and children's matters in the Family Court if the matter is complex;
- dealing with family violence intervention/protection orders in the Magistrates' Court; and
- sometimes dealing with child protection issues in the Children's Court.

This does not take into account the hurdles a woman has to jump if she has any of the other barriers mentioned above, for example, if she is a woman from a non-English speaking background. Unfortunately in many cases a woman in that situation will not get legal aid for an interpreter to complete a legal aid application.

C. THE ADEQUACY OF FUNDING AND RESOURCE ARRANGEMENTS FOR COMMUNITY LEGAL CENTRES

Due to the low funding cap in family law matters by legal aid, a number of private law firms no longer take on legal aid family law matters and when they do, they are often referred to the more junior, less experienced practitioners as a more cost effective way to run family law cases.³⁴

This low cap therefore acts as a disincentive to private law firms and more senior practitioners handling family law matters which are often the most complex, messiest and most emotionally fraught matters for clients.³⁵

³¹ *ibid*

³² Smyth, Bruce and Weston, Ruth (2000) "Financial Living Standards after Divorce; A recent snapshot" research paper No 23, December 2000; Australian Family Institute of Family Studies: Melbourne

³³ *ibid*

³⁴ Women's Legal Service Victoria's Submission to the Inquiry into Legal Aid and Access to Justice 2003

³⁵ *ibid*

One of the most significant flow-on effects of private practitioners not taking on legal aid matters is that the same or an increased number of clients are being assisted by fewer law firms and the community sector. Due to the underlying social justice ethos of community legal centres, they take on the legal aid clients as well as matters where there is no other legal representation available. Often there are little or no resources available to assist such clients, if the centres do not get pro bono assistance. Where clients are turned away, they may self-represent. This once led to the horrendous situation of a woman self representing against two barristers in a final hearing that lasted 23 days in the Family Court.

In other instances, an individual may exceed their legal aid cap before their proceedings are finalised. They are sometimes dropped by their lawyers in the middle proceedings, or they may self represent, or borrow excessively to continue the proceedings or withdraw altogether. This is a highly unsatisfactory, especially self representation by clients with limited English language skills who may have other factors present that can act as a barrier to them accessing justice. It is especially undesirable in matters where there is family violence and/or sexual assault and the litigant faces the risk and trauma of being cross-examined by the abusive partner.

In a number of these cases the women sign inappropriate and unworkable consent orders, which they would not have signed if they had legal representation. They will also generally attempt to return to the family law system to get those orders amended or revoked. The long term financial impact to the clients or legal aid may have been avoided if adequate legal representation was available in the first instance.

The community legal sector is much more poorly funded than legal aid and yet the community sector not only takes on legal aid clients but acts in cases where legal aid is not available. The extremely poor funding of the community legal sector means that where clients cannot access legal aid, they will be turned back if a community legal centre cannot access alternative funds to take their matter on.

For instance, since the cuts by Victoria Legal Aid in February 2008, the number of clients attending our clinic have almost tripled and as a result our casework increased. The cuts by legal aid have meant a reduction in funding for family law matters. This has excluded a significant number of clients who have a range of family law matters. For example a woman who is seeking legal aid for her children's matters and property matters will not get funding even though the property may only be debts or chattels. She will be forced to drop her property matters which puts her in a desperate situation as she may have creditors at her door. This has been particularly heightened since the global financial crisis.

This is irrespective of the fact that the client's also had children's matters as well and that the property pools were very small (debts, chattels or very little equity in the family home). As a result not only are we getting the same clients but we are also seeing the low and middle income client who has little or no assets who has now been excluded by legal aid.

ALTERNATIVE MEASURES

WLSV recognises that a range of possible measures can be adopted to reduce the length and complexity of litigation as well as improve efficiency. We also note that not all measures for improving access to justice involve lawyers or the courts. However due to the primary nature of our engagement with clients and the content of our submission, we have chosen to focus on measures to create a more equitable access to justice within a legal service provision framework.

In summary WLSV recommends the following alternative measures below.

Compulsory legal representation for certain family law matters

The Family Law Act can include a similar clause to the Victorian *Crimes Act 1958* and the Victorian *Family Violence Protection Act 2008* sections 71 and 72. Both of these sections in the respective Acts compel the court to order Victoria Legal Aid (VLA) to provide legal representation in certain situations. The Victorian FVPA further prohibits a respondent in a family violence matters from directly cross-examining the witness/victim. VLA is compelled to provide legal representation for the respondent for the cross-examination. That way a self represented litigants in family law matters with serious allegations relating to safety of the family will get legal representation.

Alternative pathways for family violence matters

We note that with Magellan list cases where allegations of sexual abuse are raised, some of the legal aid guidelines have been altered so that parents receive legal aid to pay for a child representative irrespective of the parent's financial position. We propose a similar more flexible approach where family violence allegations are raised.

Increase to the family cap and expansion of the family law guidelines

We recommend an increase to the family law funding cap of Victoria Legal Aid. This will create an incentive for more private and senior practitioners to take on family law matters. This will also have a flow on effect for community legal centres as the work load will hopefully be more evenly spread. There also has to be increased funding to expand the family law criteria. Legal Aid should be able to assist clients with all their family law matters such as contravention applications, travel applications, spousal maintenance applications, guaranteed child representation funding in complex matters, property applications and injunction applications for sole occupancy of the home.

Increased funding for Community Legal Centres

Since the February 2008 legal aid cuts to family law, our client numbers have increased significantly. For example our weekly drop in legal clinic has increased from an average of 8 clients to an average of well over 20 clients. In spite of this our funding has stagnated. Our staff has been required extremely long hours and for the first time in our services history we have had to create a waiting list. This is not sustainable.

In addition, our client numbers have increased, given the growing awareness through various 'violence against women' campaigns and growing community confidence in women seeking justice to address their family violence matters.

Access to Justice for women and their children escaping family violence is a crucial part of fulfilling the Commonwealth Government's objectives in response to the National Plan to Reduce Violence against Women and their Children. A 2001 study has found that over 50% of all children's matters litigated in the family court involve family violence.³⁶ It is clear that family violence is gender specific. Therefore given that a significant number of matters in the family court will involve women and their children escaping family violence, it is imperative that specialist women's legal services are adequately funded to effectively meet these women's needs.

Conclusion

Given the high cost of legal services and the continuing need for legal representation in dealing with family law disputes, legal assistance therefore remains a crucial aspect of access to justice. There are significant savings that result from supporting measures to address legal problems early and prevent them from escalating and creating higher costs on the individual and community. Due to the inequitable access to justice for women and the disparity in grants of aid to women, specialist women's legal services must be sufficiently funded to redress this imbalance to ensure women have an equitable access to justice.

This submission was prepared by Zione Walker-Nthenda with the assistance of Eila Pourasgheri on behalf of the Women's Legal Service Victoria for consideration by the Senate Legal and Constitutional Committee, Parliament House, Australia.

We would be happy to provide further comments in relation the above issues raised. Kindly contact me at our service on (03) 9642 0877. We wish you all the best in finalising your report.

Yours faithfully,

Zione Walker-Nthenda
Law Reform & Policy Lawyer
Women's Legal Service Victoria
3/43 Hardware Lane
Melbourne VIC 3000

Phone: 03 9642 0877 Fax: 03 9642 0232

Email: Zione.Walker-Nthenda@clc.net.au

³⁶ Brown T, Sheehan R, Frederico M, Hewitt L, Resolving Family Violence to Children: the evaluation of Project Magellan (2001), Monash University