

29.01.14

The Executive Director  
Australian Law Reform Commission  
GPO Box 3708  
SYDNEY NSW 2001

Dear Commissioners,

**RE: LEGAL BARRIERS FOR PEOPLE WITH DISABILITIES**

We write to you on behalf of the following women's legal services which collectively form the Coordinating Committee of Women's Legal Services Australia (WLSA) -

- Central Australian Women's Legal Service;
- Top End Women's Legal Service;
- Women's Law Centre WA;
- Women's Legal Centre ACT;
- Women's Legal Service Queensland;
- Women's Legal Service Tasmania;
- Women's Legal Service Victoria; and
- Women's Legal Services NSW.

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 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.

We also have a range of members from like-minded organisations who support and contribute to the work that we do.

WLSA has 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 LGBTIQ<sup>1</sup> communities and women in prison are not further disadvantaged by the system.

**Family and domestic violence and women with disabilities**

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<sup>1</sup> Lesbian, gay, bi-sexual, transgender, intersex and queer.

In this submission we primarily focus on women with disabilities who are subjected to family and domestic violence and/or women who obtain a disability (or additional disability) as a result of ongoing family and domestic violence. In our experience, many of our clients who have suffered ongoing and extensive violence end up obtaining mental health disabilities such as depression and post-traumatic stress disorder.

As the discussion paper itself endorses the definition at 188. - access to justice is access to information, support and opportunities' to enjoy and exercise one's rights in law.

Key issues that arises for people with disabilities are mentioned at 189 as: communication barriers, difficulty accessing necessary supports to participate in the legal system, issues giving instructions and exercising legal capacity for litigation, costs of representation and misconceptions about people with disabilities.

These are all serious concerns for women with disabilities (as with any person with disabilities). The situation is often compounded for women with a disability however, due to family and intimate partner violence. Women with disabilities are more likely to experience family and domestic violence than their non-disabled counterparts; they are particularly vulnerable to family and domestic violence for a range of reasons, including:

- Dependence on others: being reliant on others to provide care and support;
- Economic dependence: increases susceptibility to entering and remaining in violent relationships;
- Education and knowledge: disabled women and girls are regularly deprived of the skills to recognise and address violence;
- Social isolation: is a major contributor to powerlessness;
- Residence: women with disabilities living in institutional or residential settings are particularly vulnerable to violence;
- Communication: limits in communication and language skills may interact with social factors to predispose women with disabilities to violence;
- Lack of services & support: the lack of appropriate, available, accessible and affordable services;
- Nature of disability: such as the inability to physically escape the perpetrator;
- Low self-esteem and lack of assertiveness: many women with disabilities are taught and 'rewarded' for compliance; and
- Criminal justice system: many women are without effective recourse to justice due to legal systems which are permeated by social norms that reinforce gender inequality and disability discrimination.

In addition to the tyrannies faced by all women who are subjected to family and domestic violence, the vulnerability of women with disabilities can create a situation where violence can present itself in particularly harsh iterations. For example, controlling physical support devices like wheelchairs and restricting even basic movement, attempting to engineer a role of guardianship, attempting to separate children or abuse child protection systems through exploiting or misrepresenting a woman's disability, insulting and maligning the person and excluding them from family participation ostensibly due to their disability etc. Women with disabilities also face additional barriers to accessing safety,

security and justice, then do women without disabilities.

It should also be noted that children with disabilities could experience family and domestic violence with a similar increased vulnerability.

### **Women with disabilities and intersecting vulnerabilities**

Because women with disabilities come from diverse backgrounds, it is our experience that women with disabilities will not only face the systemic barriers to accessing justice in relation to their disability, but will also face additional barriers due to compounding vulnerabilities such as identifying as part of another marginalised group (i.e. Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds, women who live in rural and regional or remote communities, LGBTIQ women and women in prison). Some of the increased barriers faced by these particular groups include:

#### **Aboriginal and Torres Strait Islander Women**

Aboriginal or Torres Strait Islander women face the barriers of inter-generational trauma and poor health outcomes associated with colonisation and dispossession of land. Aboriginal or Torres Strait Islander women are 35 times more likely to be hospitalised due to a family violence related assault than non- Aboriginal or Torres Strait Islander women<sup>2</sup>. Aboriginal or Torres Strait Islander people are also overrepresented in the child-protection system and the prison system. Aboriginal or Torres Strait Islander women face unique challenges in family law and other matters due to their large kinship systems (i.e. multiple parties to proceedings, difficulty finding legal assistance due to conflicts of interest, etc). Aboriginal or Torres Strait Islander people also experience challenges in navigating through a system that does not recognise their traditional laws and does not take their cultural needs into account.

#### **Women from culturally and linguistically diverse (CALD) backgrounds**

Women from CALD backgrounds face a range of additional barriers in accessing justice in the 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

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<sup>2</sup> AIHW, 2006

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 profound 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 man<sup>3</sup>, 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.

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<sup>3</sup> Australian Bureau of Statistics, (2010). 4517.0 Prisoners in Australia 2010.

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. Furthermore, if women do not already have mental health issues upon remand or sentencing, they overwhelmingly develop mental health issues while being incarcerated.

#### **Additional barriers to accessing justice**

In addition to compounding barriers the legal system presents for women with disabilities experiencing family and domestic violence, there are also specific areas of laws that disadvantage women who are already vulnerable. Namely, Family law, child protection and domestic violence personal protection orders. It is our experience that 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 frameworks<sup>4</sup>,
- 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.

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<sup>4</sup> 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.

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 are even further compounded for women with disabilities.

#### **The need for vulnerable witness protection in family law**

A specific issue in relation to family law that is of grave concern to us is the need for legislated vulnerable witness protection. As previously indicated, the extent of family violence in the family law system is significant. The Australian Institute of Family Studies (AIFS), in their study, *Allegations of family violence and child abuse in family law children's proceedings (2007)*, identified that over half of the family law files they examined contained allegations of family violence. It is also well recognised that some violent and controlling perpetrators will use litigation against their former spouses as a way to continue to control and/or punish them after separation.

There are currently no specific provisions in family law that prevent perpetrators of violence, who act for themselves without a lawyer, from cross-examining the victim of violence. Similar legal protections exist in State law in criminal jurisdictions for sexual offences and in domestic violence legislation.

Being cross-examined by their own abuser has devastating emotional and psychological consequences on victims of violence, particularly when they are already suffering from a disability as a result of the violence. Legislation requiring notice of such representation so that a witness might take advantage of special witness measures should be enacted. These provision could be made explicit in the Family Law Act or Evidence Act.

#### ***Recommendation:***

*That legislative protections against vulnerable witnesses being cross-examined by their abusers, be introduced.*

We also submit that vulnerable witnesses (in general) in the Family Courts require access to legislative protections available in other courts such as providing evidence via video, etc. Although these might be able to be argued for by barristers in specific instances, without legislation, the applications are ad hoc and are not at the front of mind. Policies and procedures may be well and good but lawyers (who are in the court) really only take note of issues that are in legislation.

#### ***Recommendation:***

*That legislative protections for vulnerable witnesses such as providing evidence via video link, having a screen, etc, be introduced.*

An obligation upon any system is to protect against systems abuse by its most vulnerable. It doesn't make sense that a court - such as the Family Court that deals with so many vulnerable clients doesn't have legislative safeguards.

We are concerned of the emotional impact on women with ptsd and being cross-examined by their abuser can push them over into more serious and long-term psychiatric issues.

We are concerned without these safeguards that the pressure is too much and vulnerable clients give up and give in rather than go through with a trial - especially without legal aid.

**The need for increased legal aid for women with disabilities and other vulnerabilities**

This brings us to our most pressing issue, which is the lack of legal resources available to vulnerable women and children experiencing family and domestic violence. Women's legal services around the country are forced on a daily basis to make tough decisions on who they can provide assistance to. Put simply, there is not enough supply to meet the urgent demand.

***Recommendations:***

*Increase legal aid funding, create positions/programs in legal aid, court services and admin tribunals that help people with disability navigate representation and court process.*

*Provide increased funding to specialist legal services assisting women with disabilities and other vulnerabilities to access justice.*

Another matter of significant concern to WLSA in relation to family law is the nation-wide gap in the provision of free or low cost assistance for property matters. Although on the surface, perhaps unrelated 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 and/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.

***Recommendation:***

*That the funding for legal aid in relation to property settlement (family law) for vulnerable women experiencing family and domestic violence be increased and the National Commonwealth Legal Aid Guidelines reflect this as a priority.*

**The need for sufficient and ongoing training for professionals**

WLSA submits that better training at all levels – from those working within the legal apparatus to family and domestic violence support services – with regards to the issue of legal capacity, the de-bunking of stigmas related to capacity and disability, differences between supported and substituted decision making, and to the particular vulnerabilities of women with disabilities, is required. Best practice guidelines and bench books explicating scenarios where legal capacity can be assumed by an other would be useful. In our view, it is essential that decision-makers understand the dynamics, complexities and implications of family and domestic violence on vulnerable women, and appropriate training and education is provided to ensure appropriate responses and access to justice for women in these situations.

***Recommendation:***

*That the Commonwealth Government invest in professional development mechanisms for the public, private and community sectors that address dynamics, complexities and intersectionalities of working with vulnerable groups.*

**The need to include and consult people with disabilities in relation to issues and processes affecting their lives**

We also submit that the voice of people with disabilities should be heard and considered in relation to processes affecting their lives.

**Recommendation:**

*That stakeholder groups consisting of a range of specialist service providers to provide regular feedback regarding Commonwealth legislation and processes that may be adversely affecting people with disabilities, be established*

We thank you for this opportunity to contribute to the Inquiry and welcome you to contact us with any further questions or queries you may have in relation to the information we have provided you with.

Kind Regards,

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