Women's Legal Services Australia Submission to Productivity Commission Draft Report on Access to Justice Arrangements

Introduction

Women's Legal Services Australia (WLSA) is a national network of community legal centres specialising in areas of law that disproportionately affect women and children in accessing justice. 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 LGBTIQ[1] communities, young women, older women 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. WLSA also encompasses members who are not specialists CLCs, but who share the vision and values of our network.

We are a network of the National Association of Community Legal Centres (NACLC) which will be providing a response to the Draft Report on Access to Justice Arrangements. We support and endorse NACLC's submission, but we felt we could provide supplementary information specifically in relation to improving access to justice for women. This submission will focus on three key principles necessary for breaking down systemic disadvantage and discrimination against women to ensure equal access to justice for Australian women:

- Increased funding for legal assistance service providers assisting women;
- Reforming policies and laws that hinder access to justice for women and perpetuate gender inequality; and
- Better recognition of women's systemic disadvantage and their legal needs in the provision of legal aid

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

Increased funding for legal assistance service providers assisting women

It is common knowledge that historical power inequities are still prevalent in our patriarchal society today which means women on average are poorer than men, more socially isolated than men, have poorer health outcomes than men, are not able to exercise their rights to the full extent that men can and are disadvantaged in accessing the legal system. These inequalities have profound impacts on women's lives when they intersect with other forms of disadvantage and vulnerability.

Women face continuing disadvantage in seeking to use the legal system to enforce their rights or seek protection from violence. They face financial barriers, lack of access to information about their rights, difficulty accessing legal services due to child minding responsibilities and have difficulty navigating a court system that was made by and dominated by men. There are also particular areas of law in which women's experience is different from men; such as their experience as victims of crime, especially sexual violence and criminal assault within the home, the legal implications of their role as the primary caregiver of children or grandchildren and their experience of discrimination or not having equal opportunities in employment and business.

Because women come from diverse backgrounds, it is our experience that women we see will not only face the systemic barriers to accessing justice in relation to their gender, but will also face multiple additional barriers due to compounding vulnerabilities such as identifying as a 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:

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

Women who have experienced domestic violence and and/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.

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[2]. 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 legal 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

Key issues that arise for people with disabilities are communication barriers, difficulty accessing necessary supports to participate in the legal system, issues giving

[2] AIHW, 2006

instructions and exercising legal capacity for litigation, costs of representation and misconceptions about people with disabilities.

The situation is often compounded for women with a disability who are subjected to family and domestic violence and they are more likely to experience family and domestic violence then their non-disabled counterparts. Women with disabilities are also 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.

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

Some of our members provide legal assistance to women in prison who are a particularly vulnerable group, many of whom have experienced multiple forms of 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[3], 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 many 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.

Women's legal services provide safe spaces for women to access information, advice and assistance, in a supportive environment with a female-oriented perspective, in the areas of law that women and children are most susceptible to. These issues have the potential to contribute substantial economic burdens to society if not addressed. For example, women's legal services provide legal information, referrals, advice and ongoing legal assistance (including court representation) in the areas of family law, child protection, civil laws in relation to protection and compensation from domestic violence and sexual assault (such as restraining orders and compensation for loss and injuries suffered as a result of family and domestic violence and sexual assault),discrimination and other areas of law where women's safety and children's wellbeing is at risk.

We have excellent relationships with other service providers within and outside of the legal system to ensure safe, appropriate and effective referrals for women to achieve the best outcomes for clients. We are experts in working with other community organisations to

[3] Australian Bureau of Statistics, (2010). 4517.0 Prisoners in Australia 2010.

respond to the legal needs of women and have numerous partnerships and projects that enable us to further our reach to assist disadvantaged women in accessing justice. Some examples of our partnerships include:

- Working with women's health organisations to identify women struggling to access justice
- Working with multicultural women's groups to ensure women from culturally and linguistically diverse backgrounds have early access to education and information about their rights
- Working with Corrective Services, inter-prison agencies and other support networks to ensure incarcerated women have access to justice and contact with their children
- Working with courts to provide duty lawyer services to women in need of protection orders or working with family violence support and/or counselling organisations to have joint appointments with clients, provide advice on family violence orders and court proceedings
- Working with organisations who assist parents and grandparents (or mothers and grandmothers) navigating their way through the child protection system, to ensure children are not put at risk of harm
- Working with family relationship centres to ensure women understand their legal rights, obligations and best and worst outcomes when negotiating parenting agreements for their children
- Working with schools to present legal information to young women about relationships, employment, housing, money and dealings with police.
- Working with Aboriginal and Torres Strait Islander organisations to ensure Aboriginal and Torres Strait Islander women have early access to education and information about their rights. We build relationships and trust with these organisations and communities to ensure Aboriginal women feel comfortable accessing and engaging with our services. For example, an Aboriginal and Torres Strait Islander community organisation may help us spread the word about the importance of early access to legal advice in child protection matters, in order to increase the likelihood that the child will live with family members instead of going into 'care'.
- Working with service providers in remote areas (where often there are no other legal services available) to ensure women living in rural, regional and remote Australia have access to legal services
- Working with Alternative Dispute Resolution provider services to resolve matters without the need to attend Court
- Working with support agencies such as those that offer counselling for women and children for example, to provide holistic assistance to clients

We also have very strong partnerships with other providers of legal services as we work together to improve access to justice as the case study below highlights.

Express example of a WLS partnership: *Sexual Assault Communications Privilege*

From February 2009 Women's Legal Services NSW took a lead role in a collaborative project with the Office of the Director of Public Prosecutions, law firms Ashurst (then Blake Dawson), Clayton Utz and Freehills, and the NSW Bar Association to improve the practical application of the sexual assault communications privilege.

The project grew from concern at the lack of legal services for sexual assault victims/survivors seeking to protect the confidentiality of their counselling notes. Without legal representation, the NSW laws limiting the disclosure or use of counselling records were in effect, an empty promise.

Legislation to protect the confidentiality of counselling records has existed in NSW since 1997. However, in 2010, the project resulted in changes to the *Criminal Procedure Act* (NSW) to strengthen the privilege. The 2010 amendments did this by enhancing victims'/survivors' participation in decisions affecting the confidentiality of their counselling and therapeutic records.

The project also resulted in over $4million funding over 4 years to Legal Aid NSW to establish a Sexual Assault Communications Privilege Unit to provide representation to complainants in sexual assault trials to claim the privilege.

This project highlights the importance of identifying systemic problems and working in collaboration to find solutions to improve access to justice.

Source: A. Jillard, J. Loughman, E. MacDonald, 'From Pilot Project to Systemic Reform: Keeping sexual assault victims' counselling records confidential', *Alternative Law Journal*, Vol 37:4, 2012, p254-258.

Many, if not most of the clients we work with have experienced family and domestic violence, have intersecting vulnerabilities and complex legal needs. Despite some of the generalisations made in the Draft Report about the limited provision of casework undertaken by CLCs, women's legal services undertake casework in complex matters for women facing multiple forms of disadvantage, who cannot be empowered to self-represent. With limited funding, we empower women to make informed decisions about legal matters affecting their lives and the lives of their children and are able to achieve real results that not only keep women and children safe, but save society money in the long run from a host of socio-economical strain on the system that follows when the legal needs of women and children are not addressed.

A concern that we have in relation to the Draft Report is the emphasis on quantitative data in measuring efficiency. This focus may miss gaps in data that are required to explore how we can achieve access to justice for women. For example, when assisting a client to apply for a grant of legal aid from a LAC, women's legal services must be vigilant in listing on the application, preferences of private lawyers with track records of achieving just outcomes for women. Otherwise, despite the client being recorded on paper as receiving representation or "access to justice", in terms of real outcomes, this may not be the case.

Because LAC panel lawyers are not provided with any specific training that can shift paradigms of prejudice, they may not be knowledgeable in relation to dealing with social problems such as family and domestic violence , the impacts of colonisation on Aboriginal and

Torres Strait Islander women or parenting from prison and may have misguided views about women who face disadvantage. This lack of training, in conjunction with the limited money received for LAC grants (which restricts the time and effort the panel lawyer can spend with a client), can lead to dangerous outcomes for women with complex needs. For example, a CLC had assisted a women with multiple vulnerabilities with a grant of aid application for the final order hearing (the trial) for her violence restraining order matter. The CLC had worked with the client from an early stage to do safety planning and assessed that an undertaking would not be appropriate in this high risk case. The client was granted legal aid for the final order hearing and appointed a LAC panel lawyer. On the day of the hearing, the lawyer negotiated an undertaking between the parties. The client was left feeling unprotected and reported feeling pressured into signing the Undertaking agreement.

We therefore argue that in addition to better funding women's legal services, LAC panel lawyers also require greater funding and appropriate training to ensure that women are not further disadvantaged in accessing justice and that data collection in relation to grants of legal aid also encompass more nuanced and qualitative data to complement the quantitative stats.

Women's legal services also undertake community legal education strategies designed to increase women's access to the law. Another unfortunate generalisation of the Draft Report was that CLCs do not leverage enough off the LACs by way of information and education and are possibly duplicating services. We do not agree with this view.

Women's legal services work in partnership with LACs, utilising their available resources to better assist our clients in navigating through the justice system. Some LACs provide CLCs with online access to their in-house resources, which CLCs utilise regularly. We rely on Legal Aid information sheets to supply to our clients and develop our own on topics relevant to women but not covered by LAC fact sheets to assist women to navigate through the legal system.

Many CLCs are aware of the importance of sharing resources and drawing on existing knowledge in the sector when it comes to Community Legal Education (CLE) or strategic advocacy. For example, it is both economic and time efficient for CLE workers to collaborate with other CLE providers as well as appropriate social services working in the same sector, in order to produce resources and education programs that are relevant, informative and up to date. Many CLCs derive significant leverage from LACs and other CLCs, ATSILSs and FVPLSs , and engage in cross-sector communication so as to increase the reach of projects and information, to better target overlapping audiences with the provision of services and advocacy, to avoid duplication of projects, and to share tools, resources and insights.

Women's legal services develop community legal education initiatives that are innovative and targeted to women's experiences and needs, where LAC resources simply will not suffice for our client group. Some examples of our innovative projects that empower women to navigate the legal system, access safety and settle disputes, include:

- *Mediation Guide For Women*- a guide to understanding family dispute resolution with a particular emphasis on cases involving family and domestic violence
- *Parenting Plan Workbook*- a workbook for women aimed at assisting with the development of parenting plans and consent orders

- *Women and Family Law*, written by Women's Legal Services NSW (WLS NSW), is in its 10th edition and is included in the NSW State Library Toolkit for distribution to public libraries throughout NSW. Publications included in the Toolkit are selected by specialist law librarians as 'being the most useful and relevant practical guides to the law in NSW'.
- *10 Things YOU need to know when DoCS/FaCS removes your child* – developed in consultation with Aboriginal women in NSW
- *A toolkit for GPs in NSW* - developed to assist doctors in identifying and responding to women and children who have experienced or are experiencing family violence. This resource has been endorsed by the Australian Medical Association (NSW)
- 2 chapters in the NSW Lawyers Practice Manual – on *Victims Support* and *Sexual Assault*
- 4 chapters in the Law Handbook (NSW): *Aboriginal People and the Law*, *Domestic Violence*, *Family Law* and *Sexual Offences*
- 2 Hot Topics published by State Library of NSW on *Domestic Violence* and *Sexual Assault*
- *Domestic Violence Law Practice Guide for NSW* (publication contract with Thompson Reuters for developing a professional practice guide) (upcoming)
- A wordless pamphlet produced by WLS NSW to promote the service to women with low literacy skills, including women from culturally and linguistic diverse backgrounds with low English literacy.
- *Ask Lois*, a secure website created by WLS NSW providing a free legal online information service (LOIS) for community workers in NSW, who are rural and regionally based, and are responding to women with legal needs.
- *Mothers in Prison* guide developed by CAWLS
- Translation of the CAWLS website into eight local Indigenous languages and six international languages. This is a project that reaches out to a specific audience using technology in a way that has yet to be adopted by any other legal service provider in the NT.
- *Girls Gotta Know*, an interactive mobile website app and Australian first, for the delivery of legal information and resources as well as links, contacts and further assistance to young women aged 14 – 24
- WLS Tas legal information booklets "*Legal Health Check Up*" and "*Things You Need To Know for Women Over 50 and Their Families*"
- WLS Tas has developed detailed and concise fact sheets on *common legal problems faced by women*

Empowerment is also a vital part of transforming people's interactions with the justice system. Some clients who face disadvantage are in a position to be empowered by community legal education to assist themselves in better navigating the legal and justice system, which in turn may reduce their level of interaction within it, saving resources down the track. When people are equipped with the tools required to navigate the justice system, they can divert matters from legal services and the court system through early resolution of matters. For example, people who are aware of their legal rights may take action to address a problem at an earlier stage, preventing small matters from becoming cumbersome and expensive matters that require a lot of attention. With education, people may also be able to manage some of their own legal affairs and administration, for example, prepare a will or lodge a small claims application, thus again freeing up resources.

Policy and law reform advocacy is another way in which women's legal services use their expertise to achieve access to justice for women and save governments' money in the long term. Law reform and policy work allows CLCs to effectively give advice to government based on the impact of law or policy on the ground. CLCs are able to draw on the experiences of their clients to feed facts into what is often a political debate, and provide insight in to the impact of the law in action. They are also positioned to be able to identify trends or patterns early on and use this to drive advocacy before that information has reached researchers down the track.

One example of how legal assistance service providers in WA (through the Domestic Violence Legal Workers' Network) advocated to protect women and children from an unfair and unintended consequence of law reform and at the same time save the government money on the duplication of services is in relation to amendments made to the Restraining Orders Act 1997.

Restraining Orders Amendment Act 2011

The *Restraining Orders Amendment Act 2011* came into operation in May 2012, amending the *Restraining Orders Act 1997* as well as consequential amendments to the *Criminal Investigation Act 2006*. The amendments were largely based on a 2008 review of the *Restraining Orders Act 1997*[4] and addressed a number of recommendations from the 2008 report which hadn't yet been implemented.

The main amendments included:

- removing the requirement of consent from 72 hour police orders;
- ensuring all domestic violence offences (including breach of a VRO) are included within the definition of "serious offence" in the *Criminal Investigation Act 2006;*
- prohibiting the consideration of consent as a mitigating factor in VRO breaches;
- prohibiting persons protected from being charged with aiding the breach of an order;
- provisions for the Court to warn the respondent upon the granting of a VRO, that the respondent must not commit unlawful acts; and
- a presumption for imprisonment where a VRO is breached for a third time.

[4] Department of the Attorney General, WA (March, 2008). *A Review of Part 2 Division 3A of the Restraining Orders Act 1997.*

Intentions, intentions

Another intended amendment (as described by the Explanatory Memorandum[5]), was to permit a child or a specified person on the child's behalf to make an application for a violence restraining order (VRO) in either the Magistrates Court or the Children's Court. Previously, only matters where the respondent was a child were dealt with in the Children's Court. However, the amendment as it was drafted, appeared to mean that all scenarios involving children had to be dealt with in the Children's Court.

S25 (3): "An application for a violence restraining order made in person is to be made in the prescribed form to –

(a) if the respondent ***or person seeking to be protected*** is a child, the Children's Court; or
(b) otherwise, the Magistrate's Court."[6]

Submissions to the House

After the Restraining Orders Amendment Bill was tabled in Parliament, the Domestic Violence Legal Workers' Network (the Network) presented submissions to the Attorney-General and other Members of Parliament who would be involved in the debate.

The submissions welcomed and generally supported the amendments, but also provided feedback on broader systemic issues, made specific commentary on proposed amendments and suggested further matters for consideration. In particular, the Network raised concern about amendments to s25(3)(a) which appeared to expressly provide that all children's matters must be dealt with in the Children's Court. The Network's concern was that the proposed amendment would see VRO applicants who wish to also have their children protected under the order, have to apply separately at two different courts, and if contested, have to undergo two separate trials about virtually the same matter, leading to further re-victimisation.

Through the course of the debate in Parliament, it was established that

- in line with the explanatory memorandum, it was indeed not the intention of the Government to make it overly cumbersome for parents to protect their children as well as themselves;
- because s68 (which provides that an individual's VRO may be extended to cover another person as if it were their own) would still be retained, applications for children could be made in either the Magistrates Court or the Children's Court, pursuant to that section; and therefore,
- there was no need to amend the draft legislation[7].

[5] Restraining Orders Amendment Bill 2011 Explanatory Memorandum

[6] S25(3)(a), *Restraining Orders Act 1997*

[7] Extract from Hansard, Tuesday, 30 August 2011. Restraining Orders Amendment Bill 2011, Second Reading p6300d-6314a(p4-6).

Intent vs. Implementation

Although the intent of the legislation was clarified in the debate, when the amendments came into operation, solicitors from the Network reported experiencing discrepancies with the way in which the legislation was being interpreted. One view as a matter of statutory interpretation, was that s68 cannot be used to extend a parent's VRO to cover their children because s25(3) explicitly states that children's applications are to be dealt with by the Children's Court. It then follows that applicants who are parents cannot have their VRO extended to cover the children, and if they wish to have VROs for their children considered they must make a separate application to the Children's Court.

Caught in the cross-fires

The inconsistency as a result of this statutory interpretation was very concerning to the Network, as not only was it difficult to advise clients, it was procedurally unfair, and not the intent of the legislation. Where there are grounds for children to be included on their parent's order, the order should be extended to protect the child(ren). Instead, parents protecting their children are not only having to apply for VROs in two separate courts, but where both applications were objected to by the respondent, two separate hearings were occurring in two separate courts for virtually the same matters.

Solicitors from the Network providing legal assistance are typically from community and government agencies with limited funding and high demand. Requiring VRO matters for children to be conducted in a separate court from their parent's matter was an unnecessary use of limited resources and time of CLCs, Legal Aid, the Courts and other agents in the legal system, and created further barriers to people facing disadvantage. In-fact, in some cases, for a number of reasons, it was too overwhelming for the client to seek separate orders.

Raising the bar

Discrepancies between intent and implementation, although sometimes hard to predict, contribute to the systemic issues that reinforce the pandemic of violence against women in Australia. The key to limiting such discrepancies is to ensure that those who will be affected by the legislation or policy are involved in the development process, *and* that those who are involved in implementation are provided with necessary education and training.

The Network raised this issue, and other law reform issues related to family violence with the Attorney-General, who was able to champion the necessary amendments and later announced an Inquiry into Enhancing Family and Domestic Violence Laws.

It is hoped that a range of amendments will be introduced to address some of the current systemic issues, promote victims safety, uphold perpetrator accountability and encourage a holistic and responsive justice system.

As demonstrated above, law reform and policy work has the ability to provide expert, informed and on the ground insight into government policy and adds rigour to governmental and inter-agency debate regarding introduction of new laws and changes to legal frameworks etc. Law reform and policy work has enormous benefit to society, particularly when it focuses on preventative and early intervention strategies to legal issues and also draws in expertise, research and input from other sectors through external networks and capacity for research

(eg. Information from the realms of social work, community sector, government departments, etc) and also results in more streamlined experiences for people within the justice system.

With regard to the notion that 'Strategic advocacy is an area where there are few incentives for private lawyers to act' (pg 622), it is important that the contribution of legal assistance service providers to policy and law reform work be recognised and protected as a basic attribute or function of a legal assistance service provider. As demonstrated in the case study, legal assistance service providers are often the best placed to provide valuable and early feedback in relation to policy and legislation, in order to increase the efficiency and effectiveness (and therefore savings) of the justice system, yet are often ignored or overlooked.

A substantive proportion of law reform/policy/strategic advocacy is carried out by CLCs, often by lawyers in addition to a high caseload. We submit that earmarked funding for specific law reform/policy positions should be encouraged and continued. We are gravely concerned about the Government's current funding cuts recently announced and the desire to remove policy and law reform activities from the NPA under new negotiations. These moves not only threaten the ability of legal assistance service providers to engage in policy and law reform advocacy, but also threaten front line services.

Women's legal services and other legal assistance providers are not meeting the demand for legal services. A substantial and sustained increase in funding that addresses the core components that CLCs undertake (CLE, Law reform and direct legal services) is required if we as a nation are truly committed to equality and justice before the law.

Reforming policies and laws that hinder access to justice for women and perpetuate gender inequality

In addition to other systemic barriers, laws themselves can prevent women from achieving access to justice. Because our laws are patriarchal in nature, women are often disadvantaged in comparison to men. There are some particular laws disadvantaging women which require urgent reform in order to achieve access to justice for our clients:

Emphasis on shared parenting be removed from the Family Law Act

The presumption of equal shared parental responsibility (ESPR) and emphasis in the Act on shared parenting were not changed by the 2012 family law amendments. The presumption of ESPR is not meant to apply in cases of violence and abuse. However, this does not always work in practice. Why is this the case? It is often difficult to 'prove' violence/ abuse to the satisfaction of the court, because it occurs 'behind closed doors', many victims can be unrepresented in court because of limited legal aid and many matters are settled in mediation, often without legal assistance. The presumption continues to place victims and their children immediately on the 'backfoot' in the court or in mediation, resulting in orders/ agreements that include ESPR or shared parenting provisions that can:

- expose victims of violence and their children to ongoing violence, intimidation and manipulation;
- allow ample opportunities for perpetrators of violence to exert ongoing control and decision-making in the family;

- provide opportunities for the mother's parental authority with the children to be continually undermined; and
- effectively deny many children the therapeutic assistance they require through domestic violence or trauma counselling because the law requires the permission of the perpetrator and this is often refused.

Each family and individual child in each family is unique and has different needs. This is especially true for children who have experienced violence and abuse. Parenting arrangements should be *in the best interests of each child*, worked out on a case-by-case basis. The safety and wellbeing of families is too important to not take the time to judge each case on its own merits, especially when family violence and abuse are involved.

Vulnerable witness protection introduced in family law

The extent of family violence in the family law system is significant. 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 spouse 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 are unrepresented, from directly 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. It is only fair and just that vulnerable witnesses in family law also be protected.

Recommendation 11.9

Practice directions in all courts should provide clear guidance about the factors that that should be taken into account when considering whether:

- a single joint expert or court appointed expert would be appropriate in a particular case
- to use on concurrent evidence, and if so, how the procedure is to be conducted

  Submission:

  We note the majority of matters before the Family Court of Australia, Federal Circuit Court of Australia and Family Court of WA involve allegations of family violence or child abuse and it is therefore important and appropriate that practice directions or standards for family assessments and reporting should reflect this common scenario. We are concerned that without such guidance, we will continue to see women and children subjected to family violence and further victimised and traumatised by the family law system.

  We support the concept of practice directions or guidelines regarding family report writers, particularly ones that consider or address family violence by:

- Requiring specific and adequate mandatory training in family and domestic violence to ensure family report writers are able to accurately assess families
- Linking in with the Family Violence Best Practice Principles. For example; in what circumstances will report writers identify that an expert family violence report (as recommended in the FVBPP) is required, and make such a recommendation.
- Provision of specific and adequate mandatory training (perhaps utilising the work of Allan Wade[8], Jackson Katz[9] and David Mandel[10]) that ensures that family report writers are able to write reports that do not use language that obscures violence, mitigates perpetrator responsibility and blames/pathologises the victim
- Prescribing standard risk assessments and/or a common interpretive framework to ensure reporting standards are uniform
- Guidelines that have been developed in consultation with a broad range of domestic and family violence specialists, reflect standards and practices that promote trauma-informed and response-based practices, and protect victims from further trauma and victimisation

WLSA additionally advocates for the accreditation of family report writers in family law proceedings, including clinical experience in working with victims of family violence, an effective mechanism for complaints, and standards that have been developed through broad consultation with specialists and reflect the widely accepted social science understandings of family violence and trauma.

We also believe that specialised legal assistance guidelines are required regarding family violence in family law, training is required for family law judiciary (including the impact of violence, inter-relationship between violence against women and violence against children, and lethality indicators) and funding for specialised family violence reports is required.

WLSA members have expertise in family law and family violence. We regularly hear how victims of violence feel they are not listened to by family report writers and feel further traumatised and humiliated by the family assessment process because the questions asked are often insensitive and focus on poor parenting practices without looking at the overall context. Victims of violence often feel that anything they do that suggests they are struggling to be a parent which they identify during the assessment and connect to their experience of ongoing effects of violence is characterised as a parenting capacity issue without considering the context and understanding the nature and dynamics of family violence.

[8] http://responsebasedpractice.com/

[9] http://www.jacksonkatz.com/

[10] http://endingviolence.com/

We also have many clients who have faced severe family and domestic violence and unfortunately were subjected to secondary trauma/victimisation through the family law system- particularly by family report writers who have not been trained to an adequate standard, failed to understand what family and domestic violence is on a fundamental level and how it impacts on families, and wrote reports that obscured or mutualised the violence, blamed the victim and mitigated perpetrator responsibility. Further, these reports fail to specifically link the impact of family violence on children and hold perpetrators of violence accountable as parents.

Better recognition of women's systemic disadvantage and their legal needs in the provision of legal aid

We advocate for better recognition of the systemic disadvantages experienced by women in navigating a justice system that is inherently gender-biased The legal needs of women need to be better identified and prioritised in the granting of legal aid and the funding of women's legal services.

Recommendation 21.1
Commonwealth and state and territory government legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters to ensure that demand for criminal assistance does not affect the availability of funding for civil matters.

Submission:
We strongly support the recommendation that funding for civil law matters be determined and managed separately for funding for criminal law matters. It is vital that funds for civil law matters and services be earmarked in recognition of the need to resolve these matters in as timely and efficient manner as criminal matters.

The stress and far reaching implications of unresolved civil matters cannot be underestimated. For example, a woman experiencing relationship breakdown may have ongoing insecurity about parenting arrangements for her children, or the status of her property or finances. Beyond the immediate issues of financial stress and the impact of court proceedings on mental and emotional wellbeing, civil legal problems can have implications for a woman's ability to make decisions in regard to her employment, her housing or her ability to travel and may even compromise her safety if left unresolved.

There is also a significant intersection between civil and criminal matters and many CLC clients present with issues that entail matters in the areas of both civil and criminal law. For example, a woman experiencing domestic violence from her ex-partner may be required to give evidence in criminal proceedings against her partner, while at the same time be negotiating parenting arrangements over their children in a family law matter, or navigating a tenancy issue if she is facing eviction or homelessness.

The inability of women to "enjoy full citizenship" is indicative of the social exclusion

experienced by many women. Given that a key outcome identified in the NPA is to target legal assistance and services at people experiencing or at risk of social exclusion, adequate and proper resourcing of family law, child protection and civil matters such as discrimination is an obvious requirement for overcoming this issue. We therefore submit that any increase in legal aid funding prioritise areas of concern to women, being family law, child protection, domestic violence protection orders, discrimination and civil claims for harm suffered in order to meet the social inclusion outcomes of the NPA. WLSA does not advocate available resources being re-distributed away from criminal law proceedings to achieve this. A significant injection of new funding is essential to achieve the key objective of targeting people experiencing or at risk of social exclusion. At present community legal centres are in the position of making tough decisions about legal assistance for disadvantaged clients who do not qualify for legal aid or assistance from Aboriginal Legal Services.

Recommendation 21.2

The Commonwealth and state and territory governments should ensure that the eligibility test for legal assistance services reflect priority groups as set out in the National Partnership Agreement on Legal Assistance Services and take into account: the circumstances of the applicant; the impact of the legal problem on the applicants life (including their liberty, personal safety, health and ability to meet the basic needs of life); the prospect of success and the appropriateness of spending limited public legal aid funds.

Submission:

We are generally supportive of this recommendation as it closely aligned with how women's legal services make assessments to provide ongoing assistance to clients. We indeed target our services at women who face disadvantage; usually having intersecting vulnerabilities which provide for further barriers to accessing justice for legal problems which see women at risk of family and domestic violence or children at risk of harm.

For many disadvantaged people, meeting strict eligibility criteria (such as required by LACs) in itself becomes a barrier to accessing justice. For example, a woman escaping domestic violence may not be able to produce evidence of her identity, bank account statements, or be able to articulate the merits of her case sufficiently to obtain a grant of legal aid without assistance. Indeed a large part of the advice and minor assistance provided by various women's legal services involves assisting with legal aid applications and or appealing rejections.

We additionally submit that women who are subjected to family and domestic violence must be expressly included as a priority group in the in the NPA and there must also be a specific grant funding pathway for women who have experienced family and domestic violence. We submit such a pathway would improve efficiencies in assessing legal aid applications. Currently, women's legal services spend a considerable amount of time appealing legal aid decisions where there has been a refusal to grant aid. Often after our advocacy, women are successful in their grant application. However, this is an unnecessarily time-intensive process which could be avoided if there is a specific grant funding pathway for women who have experienced domestic and family violence.

An issue within the legal aid guidelines that Women's Legal Services have raised as an issue of concern for over a decade is the need to establish a "substantial dispute" when a woman has experienced domestic violence. The issue is of particular concern in a context of violence, when women may have concerns about negotiating safe 'spends time with' arrangements for their children with a father who perpetrates violence, or feel concerned about the agreements they may have already negotiated. It is not uncommon for women in domestic violence situations to feel guilty, bullied, exploited, or manipulated into arrangements for their children that are unsafe or expose themselves or their children to ongoing violence. The need for formal 'live with' orders that clearly set out arrangements for children is an issue of safety for many women and children who experience violence.

> *"In practice, the guideline often works against women seeking to formalise their residence arrangements and establish a clear regime for contact. These women may be domestic violence survivors and want the safety of a residence order before providing contact, but this is not interpreted through the guidelines as a 'dispute about a substantial issue'. If the inability to obtain a residence order makes them reluctant to provide contact to the children's father, they may find themselves in a situation where he becomes eligible for legal aid because he can claim he is not having contact with his children."*[11]

In NSW, for example, a grant of legal aid is not available in parenting matters which are proceeding to litigation where a dispute is limited to the amount of time a child spends with a parent unless Legal Aid is satisfied that the applicant or child is "at significant disadvantage." In making a decision about significant disadvantage, Legal Aid will consider the following criteria:

1. There are allegations of abuse or family violence

[11] Rendell, K, Rathus, Z. and Lynch, for the Abuse Free Contact Group (2002) *An Unacceptable Risk: A Report on Child Contact Arrangements Where There Is Violence in the Family* (rev.ed), Brisbane, Women's Legal Service, at p.70.

2. The applicant has an intellectual, psychiatric, physical disability or serious medical problem

3. The applicant has been denied any relationship with his or her child / children for a period of at least 3 months but not exceeding 3 years

4. There are allegations that the child / children are at risk of harm

5. The applicant has a language or literacy problem which impacts on his / her capacity to self-represent; or

6. The child / children are Aboriginal or Torres Strait Islander

It is open to interpretation that point 1 could be applied to a person seeking a grant of aid, who is alleged to be the perpetrator of violence or abuse rather than the person seeking to protect a child. Further, point 3 can be used to the advantage of violent men who are not seeing their children because the mother holds concerns about their safety because of violence or abuse.

Legal Aid policies such as those highlighted, which cause or promote a gender bias are at complete odds with the National Priorities in the current NPA.

An article by Hunter and De Simone that draws on a study of applications for, and refusals of legal aid for family law, domestic violence and anti-discrimination matters by socially excluded women in Queensland, found that 70% of the family law applications were refused on the basis of the Commonwealth guidelines. The most frequently used guidelines were those which stated that aid would not be granted when there was 'no substantial dispute' or 'no substantial dispute about residence'[12]

Case Study
A woman was pregnant with her second child when separated and had been subject to domestic violence in the relationship. The father was facing criminal charges in another State. He brought an action in that State for return of the child (under 2 years) despite the mother and child always having lived out of that particular State. Legal Aid was sought for children and property and initially refused because she didn't know the value of his business. It was subsequently refused because of 'no substantial dispute' – notwithstanding she was unrepresented in the Federal Magistrates Court. The client was required to represent herself within two weeks of giving birth. The family and psychiatric reports both came back strongly in the mother's favour; however, aid was refused because the LAC assessed that the father did not have a strong case because of those reports – even though a trial date had been set.

The Hunter and De Simone article goes on further to say that "*the guidelines and*

[12] Hunter, Rosemary and De Simone Tracey (2009) Women, Legal Aid and Social Inclusion, Australian Journal of Social Issues Vol 44 No. 4 Summer edition at p. 388

merit test were clearly open to interpretation, they could be used flexibly to deal with budgetary fluctuations, or what was colloquially known as 'turning the tap on and off'…..the 'benefit/ detriment clause' and especially the 'substantial dispute' clause would be interpreted strictly if money was tight and more generously if they were tracking under budget. The result of this practice was the creation of systemic inconsistencies and inequities in grants decision-making between grants offices over time".[13]

This is consistent with WLSA's experience, although there may be State variations about the relative difficulty in obtaining legal aid for women.

Case Study
A woman was refused LAC funding in circumstances when the father had been charged (but charges subsequently dropped) with Indecent Dealing in relation to the four year old step-child. He was now seeking time with the biological child of their relationship. At the Interim Hearing an Order was made for 'no time', and ICL appointed, and the matter transferred to the Family Court. A service assisted the woman with her court paper work for the interim hearing and with her legal aid appeal. She was subsequently successful in her appeal for funding.

We would query why, on the facts presented this woman had to go through an appeal process to obtain legal aid and have to appear unrepresented in an interim court hearing, when her case so clearly had merit. This again highlights the need for a specialised domestic/family violence funding pathway in legal aid commissions for family law.

Case Study
A service assisted a self-represented woman from a culturally and linguistically diverse (CALD) background to prepare her affidavit for her final trial in the Family Court (Magellan list[14]). The parties have been before the Court for 5 years and the issues were highly complex. The 6 year old child has been having supervised visits with her father at a Contact Centre for 6 months. The woman was refused Legal Aid funding, despite a history of

[13] Ibid p. 389

[14] The Magellan program was developed to deal with Family Court cases involving serious allegations of physical and sexual child abuse. As these cases involve the most vulnerable children, the Family Court has implemented this fast-track program in all of its registries. Magellan involves:

- rigorous judicial management including the imposition of strict timeframes
- an early 'front loading' of resources such as the appointment of an independent children's lawyer
- requesting information from the relevant state or territory welfare authority early in the trial process, and
- close liaison on case management between external information providers and a small team of judges, registrars and family consultants. For more information, see: http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/about/Media/Fact_Sheets/FCOA_mc_Magellan_program

emotional abuse, isolation, financial & verbal abuse (including repeated death threats to herself and her mother). The child had also made disclosures of sexual abuse and was engaging in disturbing behavioural changes (bed wetting, sexualised behaviours, nightmares, anxiety).

The father was originally seeking equal time with the child, (suggesting both a month-about basis and elsewhere in his material, a year-about basis), but more recently had changed his application and was seeking for the child to live with him and have supervised time with the mother.

At one time during the proceedings in court, the mother suspended the child's time with the father because of the disclosures of sexual abuse that were being made. At the contravention hearing the court found that the mother had a reasonable excuse for contravening the previous orders and suspended the previous orders, replacing them with supervised spends time with orders.

The State Child Protection agency did not make a finding of substantiated abuse. However, one Child Protection agency report stated that "although it has not been proven who is responsible for the sexual abuse, the father is strongly suspected to be the perpetrator as the symptoms and associated sexualised behaviours have occurred following the father's contact with the child."

The child did not make any disclosures to the Police and the Family Report writer had implied that the mother was over-anxious and obstructive. She was waiting on a legal aid decision, but in the meantime court deadlines required her to use the Service's help to prepare her affidavit of evidence in chief. There is no guarantee that she will be given legal aid funding; she may be required to represent herself against her own abuser and possibly the abuser of her child.

Our everyday social discourse perpetuates gender inequality and victim blaming:

- "Why doesn't she just leave?" instead of "Why does he perpetrate violence against his partner?"
- "Why does she keep going back?" instead of "What is he doing to coerce and manipulate her?"

Unless we are specifically trained, it is hard to shift our victim-blaming discourse to one that understands the many reasons why women are forced to stay in contact with violent and abusive men. It is difficult to realise that a mother may be forced to stay with a perpetrator of violence because if she is with him she can ensure the kids are safe. Besides leaving being the most dangerous time for women and children, she knows that if orders are made that require her children to have unsupervised visits, their safety and wellbeing will be at risk.

The misunderstandings about violence and especially those matters that also involve child sexual abuse can lead to decision-makers making judgmental and uninformed decisions. This misunderstanding and judgmental attitude towards mothers- a

symptom of rampant gender inequality, the world-over, includes how legal aid guidelines are applied in a way that often precludes some vulnerable groups such as women in domestic violence situations from obtaining legal aid and therefore achieving the objectives of the NPA.

WLSA acts for and advises many women who are victims of family violence and/or have concerns about their children's safety, who experience financial hardship but who are unable to obtain legal aid at all or *adequate* legal aid to properly conduct their family law matters. The legal needs of Aboriginal and Torres Strait Islander women also requires special consideration. WLSA believes that there should be a specific legal aid pathway in family law, for those who have experienced family violence, with its own set of guidelines that take into account the complex dynamics of violence and abuse. We believe that these guidelines should be developed with professionals who have specific expertise in domestic violence and should also provide clear criteria for the funding of specialised family violence reports (which is consistent with the *Family Courts Family Violence Best Practice Principles*) to support decision-making by courts around issues of violence.

The development of a specific legal aid pathway for women in family law matters who have experienced domestic violence would reflect the 2012 changes to the *Family Law Act* which prioritise the safety of children and provides a more detailed and specific definition of family violence, which includes stalking, financial abuse, property damage, witnessing abuse and abuse of pets.

Recommendation 21.5

The Commonwealth and the state and territory governments should renegotiate the National Partnership Agreement on Legal Assistance Services (following the current one expiring) and seek agreement on national core priorities, priority clients, and aligned eligibility tests across legal assistance providers.

Submission:

We are supportive of this recommendation in principle, except in relation to aligned eligibility criteria as we do not believe that eligibility for assistance from a CLC should be the same as that for Legal Aid.

As discussed in our response to Recommendation 21.5, we maintain that priority areas for women needing legal aid continue to be family law, domestic violence protection orders, compensation from domestic violence and sexual assault injuries, child protection and care matters and discrimination.

An overarching concern of ours is that women, or at least women in domestic violence situations, are not expressly identified as a priority group. Although they are encompassed in other expressions of disadvantage contained within the NPA, unless they are specifically named as a priority group, they will continue to face gender bias in accessing legal aid. Such a result would be almost incredulous to WLSA, at a time when the high levels of violence against women in the community is now well accepted by the government, and is being specifically addressed, through many of its legislative and policy initiatives including the National Plan to

Reduce Violence Against Women and Children. The National Plan includes a Strategy 5.1 to improve access to justice for women and their children. Under this strategy some key strategies identified include:

- increasing the funding for legal assistance programs, including for services to assist victims of domestic violence;
- enhancing of the family law system's response to family violence.

Logically, access to adequate legal aid and legal assistance service provision to women to obtain safe outcomes, including safe family law arrangements that do not expose themselves or their children to ongoing violence and abuse would be a way of satisfying this strategy.

As discussed previously, eligibility criteria that is profoundly narrow, operates as a barrier to accessing justice. Rather than imposing common eligibility criteria across legal assistance service providers, which has a range of difficulties (particularly given the distinctions between service provision and the gap-filling role CLCs play), a better approach would be to develop some high-level eligibility principles which could guide but not bind in the assessment of eligibility.

Aligned eligibility principles across service providers in conjunction with a specific DV pathway for women applying for grants of aid from LACs, will see greater justice for our clients as it will promote consistency, accountability and equity for women accessing justice.

We therefore submit that women, or at least, women in domestic or family violence situations be included as a priority group under the NPA. This is consistent with current government policy concerning violence against women, including strategies identified in the National Plan to Reduce Violence Against Women and their Children. We further submit that the areas of law concerning women outlined above be considered priorities and that a comprehensive, yet flexible framework for addressing eligibility criteria (such as aligned principles) be developed in consultation with legal assistance service providers and other crucial stakeholders.

Recommendation 24.1

All governments should work together and with the legal services sector as a whole to develop and implement reforms to collect and report data (the detail of which is outlined in this report).

To maximise the usefulness of legal services data sets, reform in the collection and reporting of data should be implemented through:

• adopting common definitions, measures and collection protocols

• linking databases and investing in de-identification of new data sets

• developing, where practicable, outcomes based data standards as a better measure of service effectiveness.

Research findings on the legal services sector, including evaluations undertaken by government departments, should be made public and released in a timely manner.

Submission:

We support this recommendation as we believe better data and analysis can assist better policy development and supports the drafting of better laws. We submit that as indicated, this work must be consultative with legal assistance service providers to ensure that the purpose of such reforms in data collection are achieved.

We are particularly concerned about publicly available gender disaggregated data. Presently there is no overall national standardised approach to gathering and reporting statistics by Legal Aid Commissions (LAC) in Australia. This poses a significant problem in relation to public accountability, research and policy development at a national level, as there is no consistent approach to data collection or reporting on gender issues and some LACs do not even report on it at all.

Although some LACs may report on the breakdown of gender between criminal, family and civil law, they do not do a further breakdown within family law grant applications themselves. If they do report, the commissions seem to report on overall statistics of grants approved but there is no way of determining the extent of the assistance that is provided. We believe it is important to know this information and terms of accountability, evaluation and policy development.

We therefore argue that the LACs should also report on a gender breakdown between legal advices, legal aid conferences; other limited assistance provided and court applications (which should be further broken down between the various stages of trial, as each new trial stage requires a separate legal aid grant or extension.