



26 May 2014

Dr Warren Mundy
Presiding Commissioner
Productivity Commission
Locked Bag 2 Collins St East
Melbourne VIC 8003

By email: access.justice@pc.gov.au

Dear Dr Mundy,

Access to Justice Arrangements: Draft Report

1. Women's Legal Services NSW (WLS NSW) thanks the Productivity Commission for the opportunity to comment on its Draft report on Access to Justice Arrangements.
2. WLS NSW is a community legal centre that aims to achieve access to justice and a just legal system for women in NSW. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
3. In summary, we recommend:
 - 3.1 A single entry point for legal assistance and referral;
 - 3.2 Legal education about the full range of dispute resolution options should include family law and the impact of domestic/family violence, discrimination and sexual assault on women and children;
 - 3.3 A more transparent and accountable process in the allocation of public purposes funding;
 - 3.4 Representation, even in relatively informal settings, be available for vulnerable and disadvantaged litigants;
 - 3.5 Family Report Writers who provide evidence in family law proceedings must be accredited. They must have clinical experience in working with victims of

domestic/family violence and be bound by standards and an effective mechanism for complaints;

- 3.6 In circumstances of domestic/family violence, legal aid should not be withdrawn should a party wish to challenge the findings of a Family Report Writer;
- 3.7 The development of a specialised domestic/family violence funding pathway in Legal Aid Commissions for family law that is developed with domestic/family violence experts to guide internal decision-making of merit;
- 3.8 Exemptions for court fees in matters concerning the personal safety of women and children or other public benefits;
- 3.9 Fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants;
- 3.10 Automatic fee relief should be granted to clients of legal aid commissions (LACs), community legal centres (CLCs) and pro bono schemes;
- 3.11 An increase to the total pool of legal assistance services funding to better meet the legal needs of disadvantaged people which would then see an increase to funding of civil matters;
- 3.12 The eligibility test for legal assistance services reflect priority groups as set out in the Partnership Agreement on Legal Assistance Services;
- 3.13 Eligibility for legal assistance by a CLC should not be the same as that for a legal aid commission;
- 3.14 Funding not be allocated by way of a competitive tender;
- 3.15 If competitive tender is to be used for allocation of funding the terms of tender need to include the benefit of local experience based on localised or grassroots community development and community engagement and capacity to attract volunteer contributions;
- 3.16 The Legal Australia-Wide (LAW) Survey, or similar survey, be conducted on a regular basis at least every 5 years;
- 3.17 Advocacy and law reform should be a core activity of LACs and CLCs;
- 3.18 The location of a state-wide specialist service such as WLS NSW should not be restricted to a physical presence in an area of postcode disadvantage;
- 3.19 Safety for women and children attempting to leave violent relationships should be a priority for service provision and should not be curtailed by eligibility constraints;
- 3.20 Better procedures to ensure a legal practitioner who is providing assistance to a party but not on the record for the whole proceedings can access the court files;
- 3.21 Amend the *Family Law Act* to provide a victim of domestic/family violence protection from being cross-examined by an alleged perpetrator of violence.

Productivity Commission draft recommendations and requests for information

4. Our responses to selected findings, recommendations and information requests follow. Please note that any item omitted is neither implicitly supported, nor rejected.

Draft Recommendation 5.1: Single entry point information and referral services

5. We support this recommendation. Our experience with LawAccess in NSW is that we receive appropriate referrals and can deal with urgent matters, while reducing the burden on WLS NSW of providing our own telephone advice triage service.

Draft Recommendation 7.1: Legal education

6. Incorporating the full range of dispute resolution options should include family law and the impact of domestic/family violence, discrimination and sexual assault on women and children.

Information request 7.4: How should money from public purposes funds be most efficiently used?

7. In NSW the lack of publicly available assessment criteria, application processes and timelines for decision-making has been particularly difficult for Community Legal Centres (CLCs), although we have benefited from these funds from time to time. A more transparent and accountable process is required.

Information request 8.1: Requirements to undertake alternative dispute resolution in a wider variety of family law contexts

8. In principle, we support an extension of alternative dispute resolution (ADR) in financial matters, particularly where there is a small pool of assets or only debts. However, we submit it is important there be screening for domestic/family violence in any such matters and there is an option for legally assisted ADR.

Draft Recommendation 10.1: Restrictions on the use of legal representation in tribunals

9. We are concerned that any restrictions on legal representation in tribunals will place vulnerable and disadvantaged litigants at risk of bullying and re-victimisation and may lead to unfair and unjust outcomes. Legal representation should not be excluded from any jurisdiction.
10. Restrictions on access to representation (such as grants of legal aid not being available early in family or employment proceedings) will result in inequitable outcomes for the individuals.
11. It will also likely lengthen the time taken within the tribunal for the matter to be resolved.
12. A cost reduction in one area of the system (legal representation) may increase costs in another (the tribunal or other forum).

Draft Recommendation 11.9: Practice directions to provide clear guidance about factors to consider in appointing a single joint expert or court appointed expert

13. We support this recommendation in principle and make further comments regarding the use of Family Report Writers in family law matters.
14. A number of concerns were raised in the recent Australian Institute of Family Studies (AIFS) *Independent Children's Lawyer Study Final Report (ICL Study Report)* regarding the focus given to some issues in Family Reports at the expense of giving adequate focus to the presence of domestic/family violence; the weight given to these reports; and the seeming lack of critical analysis of such reports resulting in the reports often going untested.
15. A judicial officer who participated in the recent AIFS Independent Children's Lawyer Study noted, for example, the 'over focus on the need to preserve child/parent relationship, sometimes at the risk of minimising other issues of concern.'¹ The judicial officer notes this as a 'failing with some report writers, which is then carried on by the ICL'.
16. Similarly, a non-ICL Lawyer commented 'Too often the ICL takes the easy way out and follows the recommendations of the family report writer, whereas it should be a further, more sustained, independent assessment. I have rarely seen a matter where the ICL has disagreed with the family report writer.'²
17. Another comment: 'It concerns me that it is the family consultant's report that carries so much weight in children's matters [when they] often only spend a few hours with a family'.³
18. We note that untested Family Reports are often relied upon:
 - by the ICL in coming to their decision; and
 - by legal aid in determining legal aid funding decisions.
19. We are concerned that women who have been victims of domestic/family violence are often pressured to settle in accordance with the recommendations of Family Reports as legal aid is generally withdrawn should a party wish to challenge the findings. This is a concern that Women's Legal Services Australia (WLSA), the national network of community legal centres specialising in women's legal issues, raised in its earlier submission to this inquiry.
20. As WLSA argues, it is particularly troubling that even if there are aspects of the Family Report that should and could be challenged, many of our clients do not have the capacity or are too scared to self-represent if legal aid is withdrawn.
21. In situations of domestic/family violence, we believe access to justice and a fair hearing is jeopardised where legal aid is withdrawn simply because a parent seeks to pursue an application for orders which are different from those recommended by a Family Report Writer. In such circumstances it is important that the evidence is tested.

¹ AIFS, *Independent Children's Lawyer Study*, 2013 at 134.

² Ibid at 130

³ Ibid at 130.

22. In circumstances of domestic/family violence, we therefore recommend legal aid should not be withdrawn should a party wish to challenge the findings of a Family Report Writer.
23. We also recommend Family Report Writers who provide evidence in family law proceedings must be accredited. They must have clinical experience in working with victims of family violence and be bound by standards and have an effective mechanism for complaints.
24. We refer to WLSA's earlier submission to the Productivity Commission and support the development of a specialised domestic/family violence funding pathway in Legal Aid Commissions for family law that is developed with domestic/family violence experts to guide internal decision-making of merit.
25. There have been several occasions when we have assisted clients in family law matters who have been victims of domestic/family violence to appeal to the legal aid review committee about their refusal of legal aid. See, for example, the case study below. These appeals have generally been successful. Further examples can be provided upon request.
26. We submit that had there been a specialised domestic/family violence pathway in legal aid, it would have been unlikely for legal aid to be refused in the first instance, thus the time legal assistance services spend on challenging such decisions could be spent on other matters.

Case study

Sarah was married to Michael* for ten years. They had one child Jasmine*, aged 9. Michael was violent during the marriage and Sarah and Jasmine often had to stay with Sarah's mum to ensure they were safe. The Police were often called and during the marriage they took out three Apprehended Domestic Violence Orders for Sarah's protection.*

After separation Michael applied for Orders that Jasmine lives with him. Sarah never wanted Jasmine to live with Michael but she was overwhelmed by court and felt like her lawyers were not listening to her. She signed Consent Orders that Jasmine live with Michael and spend every second weekend with her.

A year later FaCS removed Jasmine from Michael's care because his work colleague found child pornography on Michael's computer at work. Michael was charged with child pornography offences and Jasmine was put into Sarah's full time care. Michael's bail conditions stated that he was not to have any contact with persons less than 18 years.

Sarah applied for legal aid to have the Parenting Orders varied to state that Jasmine live with her. Legal Aid refused Sarah's application on the basis that the matter did not meet their availability of public funds test. Sarah approached a solicitor at our service for help with an appeal of Legal Aid's decision. The lawyer spent considerable time preparing the appeal and was ultimately successful in obtaining a grant of aid for Sarah.

** Not their real names.*

Draft Recommendation 13.6: Protective costs orders

27. We agree that courts should grant protective costs orders. However, such orders should not be limited only to matters of public interest against government.

Draft recommendation 16.1: Court and Tribunal fees

28. We agree with the proposed exemptions for court fees in matters concerning the personal safety of women and children or other public benefits.
29. We support the proposal that fee waivers and reductions should be used to address accessibility issues for financially disadvantaged litigants.

Draft Recommendation 16.4: Eligibility for waiver, reduction and postponement of court fees

30. We agree with the proposal that automatic fee relief should be granted to clients of legal aid commissions (LACs), community legal centres (CLCs) and pro bono schemes.

Draft Recommendation 21.1: Legal assistance funding for civil law matters should be determined and managed separately from the funding for criminal law matters

31. The proposed separation of criminal and civil law funding (p. 632) would be of assistance to disadvantaged litigants such as women in family law matters only if additional funding was made available to increase the total pool of legal aid funding.

Draft Recommendation 21.2: Eligibility should reflect priority groups as set out in the National Partnership Agreement on legal assistance services...

32. We agree with this recommendation. However the comments that follow concerning consistent eligibility criteria (p. 644) should be approached with caution.

Draft Recommendation 21.3: ...align eligibility criteria for civil law cases for LACs and CLCs...

33. WLS NSW does not support the proposal that eligibility for assistance by a CLC should be the same as that for Legal Aid.
34. For many disadvantaged people, meeting eligibility criteria in itself becomes a barrier to access to justice. A woman escaping domestic/family violence for example 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.
35. A substantial part of the advice and casework provided by WLS NSW involves assisting with legal aid applications and/or appealing rejections as discussed above.
36. Legal aid merits testing has been criticised for being too conservative or for reifying the status quo in court cases. There is a risk in the context of domestic/family violence that this may have led to gender bias and sustained the failure of the family courts to adequately consider the experience of domestic/family violence victims because arguments in support of domestic/family violence victims have not been put before the courts due, for example, to the withdrawal of a legal aid grant where a mother seeks

orders contrary to those recommended in a Family Report, as outlined above.

37. We propose an amendment to legal aid policy such that there is a specialised domestic/family violence funding pathway in Legal Aid Commissions for family law that is developed with domestic/family violence experts to guide internal decision-making of merit.
38. We also note the merits testing of legal aid is generally based in the context of court proceedings whereas some of the assistance we provide may be for non-legal and/or non-litigation approaches or to provide advocacy or assistance using the law in other ways, for example by following up with police to press charges in the case of a breach of an apprehended violence order (AVO) or apply for an AVO.
39. This 'pre-court' or 'out-of-court' legal work means that the model of legal aid merits testing (ie. weighing the prospects of success of a clients' case in court against the state of the existing law) may not be appropriate.
40. We also submit the work it would take to fully assess a person's finances before helping them would be better used helping the person.
41. Furthermore, properly assessing finances may place a person at risk, for example, a women in a controlling relationship where there is financial abuse may not be able to access her financial information or may have difficulty demonstrating her financial position.
42. Additionally, we are concerned for women who may just exceed the means test of legal aid, but do not have the resources to pursue litigation themselves. This is particularly concerning where the woman has or is experiencing violence.

Draft Recommendation 21.4: ...discontinue the Community Legal Services Program funding model and distribute funds as per LACs...

43. Whichever model is used, the total funds available must be increased to better meet the legal needs of disadvantaged people. Unless additional resources are provided, the transaction costs involved in changing to a new model and associated increased demand for data collection would not be justified as this would detract from resources currently available for direct service delivery.

Information request 21.3: How should CLC funds be distributed... competitive tendering.

44. WLS NSW does not support the proposal that funding be allocated by way of a competitive tender (p.659).
45. In general, competitive tendering undermines collaborative service delivery practices and in an environment of scarce resources we should encourage sharing rather than competing to get more impact from taxpayer investment.
46. If competitive tender is to be used for allocation of funding the terms of tender need to include the benefit of local experience based on localised or grassroots community development and community engagement and capacity to attract volunteer contributions.

47. A competitive tender that pitches CLCs against LACs would be inequitable as LACs have significant back office resources to commit to such a process which CLCs lack.

Information request 22.1: ...the most appropriate model for engagement between government and Indigenous-specific legal assistance services. Practical examples...

48. WLS NSW Indigenous Women's Legal Program (IWLP) combines culturally appropriate service delivery, employment of Indigenous staff and a state-wide program of outreach to regional, rural and remote communities with the expertise and resources of the general service to maximise the effectiveness of a relatively small commonwealth grant.
49. This program is successful because Aboriginal workers are constantly building relationships and engaging with the Aboriginal community through community development principles.
50. An Aboriginal Women's Consultation Network guides the IWLP. It meets every quarter over 2 days to ensure we deliver a culturally appropriate service. The members include regional community representatives and the IWLP staff. This network liaises with the WLS NSW Board.

Draft Recommendation 24.3: ...the LAW Survey... be undertaken on a regular basis...

51. We agree with this recommendation.

Chapter 21: Reforming the legal assistance landscape - other comments

52. Here we provide some comments on issues referred to in this chapter that are not subject to specific recommendations.

Information, education, and minor advice

53. WLS NSW provides early intervention / preventative services by way of advice and referral, through telephone and outreach services, as well as by print and on-line information.
54. This is not a duplicate of services provided by the LAC.
55. Often our specific and targeted audience has not identified or qualified for a LAC service, but is dealing with the problem of domestic/family violence and/or family breakdown, at a stage significantly prior to dealing with the legal system. And, we hope with our assistance, many of our callers will be able to resolve issues without resort to formal legal solutions.
56. The specialisation of our solicitors in domestic and family violence means they can offer a holistic response – in some instances helping a client with housing issues due to domestic/family violence, helping the same client with a victims support claim, as well as providing assistance regarding family law and/or a care and protection matter.
57. We support the model of LawAccess NSW with whom we have a very efficient and productive working relationship. This reduces the need for WLS NSW to provide intake

and triage resources. Although our advertised public access hours are limited, LawAccess is able to offer a comprehensive intake service that expedites access to our expert staff in appropriate cases at all hours of the working day.

58. As a specialist state-wide service, we do not duplicate information and resources provided by LAC. We distribute their resources when appropriate, collaborate for production and dissemination of resources when suitable (eg the legal literacy in prisons project) and produce and share our own expertise where there is no other on offer eg Women and Family Law.

59. Other unique publications and resources include:

- 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 – one on Victims Support and the other on 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);
- Ten Things You need to know when DoCS/FaCS removes your child – developed in consultation with Aboriginal women in NSW;
- A wordless pamphlet to promote our service to women with low literacy skills, including women from culturally and linguistic diverse backgrounds with low English literacy; and
- Ask Lois, a secure website 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.

More intensive services

60. WLS NSW provides lawyer-assisted dispute resolution and also engages in significant litigation. While the observations (that CLCs do not take on litigation p. 619) may be true overall, or of general community legal centres, WLS NSW takes on those matters which are the most difficult, of the highest intensity, those that are most unlikely to qualify for legal aid, with clients who have the most complex of needs and our service puts in the most intense work on behalf of the most disadvantaged clients. We therefore regard ourselves as the best experts in our field and the most likely to get the greatest benefit for the work that we do because we will challenge the authorities with the deepest pockets on behalf of the least capable and aim to achieve a result that will have the greatest benefit by changing government and institutional responses to the vulnerable people entrusted to their care.

61. We agree with the proposition that this also reduces the burden on court resources of dealing with self-represented litigants. (p.620)

Strategic advocacy and law reform

- 62. By drawing on our casework, community engagement and professional expertise we are well enabled to respond to the multitude of requests for input into many government and agency requests for law and policy reform initiatives. This work should be recognised and resourced.
- 63. We agree with the Productivity Commission that advocacy should be a core activity of LACs and CLCs (p.625).

Is the balance right in terms of areas of law?

- 64. The predominant need to provide representation for persons charged with crimes has put demands on LACs that has detracted from their capacity to provide for civil matters.
- 65. For women escaping domestic/family violence, their right and the right of their children to live free from violence has taken second place to the rights of those accused of perpetrating the violence who have committed offences against them.
- 66. We support allocation of separate funding for civil matters which address the needs of women who are dealing with domestic/family violence, sexual assault, and discrimination in the workplace.

Are legal assistance services in the right location? (p.634)

- 67. The location of a state-wide specialist service such as WLS NSW should not be restricted to a physical presence in an area of postcode disadvantage. We offer services online and by telephone and contact our clients in a range of outreach locations accessible to disadvantaged women.
- 68. Our outreach services include visits to remote Aboriginal communities that would not otherwise meet eligibility tests for assistance but rank among the most disadvantaged Socio-Economic Indexes for Areas (SEIFA).

Are we targeting the right people?

- 69. The focus of WLS NSW is on the most disadvantaged women. While women in general face disadvantage in dealing with the legal system, the evidence also shows that disadvantage concentrates with vulnerability to multiple legal problems (p.629) and where consequences of family breakdown include issues about children.
- 70. Safety for women and children attempting to leave violent relationships should be a priority for service provision and should not be curtailed by eligibility constraints.
- 71. WLS NSW prioritises Aboriginal and Torres Strait Islander women, women from CALD backgrounds, and women with disabilities. We also reach out to women in regional, rural and remote communities, older women, and young women as well as women in prison. We do not duplicate the work of any other agency.

Other issues

Self-represented litigants

72. We are concerned by the high number of people who are unrepresented in family law proceedings because they are ineligible for legal aid.
73. The Chief Justice of the Family Court of Australia has expressed concerns about the increase in unrepresented litigants in family law proceedings, viewing this as a serious barrier to access to justice, resulting in adjournments and major backlogs; cases being poorly presented as parties do not have the capacity to bring evidence; and loss of faith in the legal system.⁴
74. We note the discussion in the draft Productivity Commission report about unbundled services, including assisting clients in the preparation of court documents.
75. Where clients are not eligible for a grant of legal aid and cannot afford to engage a private solicitor, WLS NSW helps self-represented litigants prepare documents in family law proceedings. An important part of this process includes access to the court file including subpoenaed material. However, in our experience a written authority from the client to the practitioner is not sufficient authority to access the court file including subpoenaed material. Access will only be granted to a practitioner on the record.
76. The administrative procedures under r.24.13(1)(c) *Family Law Rules* and r.2.08 *Federal Circuit Court Rules* are available but seem designed for those other than a legal practitioner on a party's instruction (but not actually on the record for the whole proceedings).
77. We acknowledge that safeguards are required given the sensitive nature of family law proceedings, including client safety issues.
78. However, it is very difficult to fully advise a client and/or assist a client to prepare her evidence for an upcoming hearing without the benefit of viewing the court file. Better procedures are required to ensure a legal practitioner who is providing assistance to a party but not on the record for the whole proceedings can access the court files.

Vulnerable witness protection

79. There are currently no specific provisions in family law that prevent self-represented litigants from cross-examining a victim of violence.
80. We are concerned that the absence of any protections in the *Family Law Act* mean that perpetrators of family violence can directly cross-examine the victim of violence and this has the effect of continuing the violence through a court sanctioned process.
81. In the context of family violence Chief Justice Bryant comments:

You have a party who's not only going to be cross-examined by their former partner about, perhaps, violence of which they're the victim, but they have to run their case and they have to cross-examine

⁴ 'Family Court Chief Justice laments system failures', *The World Today*, 17 March 2014, <http://www.abc.net.au/worldtoday/content/2014/s3964685.htm>

*their partner. And for many people that's impossible and it leads to settlements.*⁵

82. First-hand accounts from victims of intimate partner violence who were subjected to cross-examination by the perpetrator highlight the impact of this experience:

*[It was] absolutely terrifying. Your mind just shuts down and I start shaking and I can barely speak....they're allowing the violence to continue in the court system.*⁶

*It actually stripped me, I felt like I was standing there and he just had all of his power back. And even though his questions may not have seemed to have been that bad to other people, he knew which questions to ask, he knew how to press the buttons of trauma for me. At the end of the day I walked out of there not sure whether I could actually face the court the next day, and I literally wanted to just throw myself in front of the first bus.*⁷

83. Cross-examination by an alleged abuser has a devastating impact on the victim of violence and can lead to some choosing to settle their family law children's matters on less than satisfactory terms to avoid being cross-examined by a violent ex-partner.

84. We propose that part of a solution is an amendment to the *Family Law Act* to provide protection from being cross-examined by an alleged perpetrator of violence.

85. Similar legal protections exist in State law in criminal jurisdictions for sexual offences, for example, s294A *Criminal Procedure Act 1986 (NSW)*. In such cases, the court appoints a person to ask questions on behalf of the alleged perpetrator.

86. Such provisions in family law matters would provide fairness for all parties involved and increase the focus on what is in the best interest of the child.

If you would like to discuss any aspect of this submission, please contact me or Liz Snell, Law Reform and Policy Coordinator on 02 8745 6900.

Yours faithfully,
Women's Legal Services NSW

Helen Campbell
Executive Officer

⁵ Ibid.

⁶ Jane Lee, 'Violence Victim Forced to Answer Ex-partner in Court', *The Age*, 27 September 2013, <http://www.theage.com.au/victoria/violence-victim-forced-to-answer-expartner-in-court-20130927-2uk2t.html>

⁷ 'Eleanor' in 'Self-representing Litigants', *The Law Report*, 1 April 2014, <http://www.abc.net.au/radionational/programs/lawreport/self-representatives-in-court/5355528>