

**Review of Commonwealth Laws for Consistency with Traditional Rights, Freedoms and Privileges by the
Australian Law Reform Commission**

Submission by Women's Legal Services Australia

February 2015

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, child support, family and 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 LGBTIQ¹ communities, young women, older women and women in prison are not further disadvantaged by the legal system.

We provide holistic, high quality and responsive legal services to women from a feminist framework, placing the individual client at the centre of our interactions and try to respond to them as a 'whole person' rather than just their 'legal problem'. Some of our services, where funding permits, employ domestic violence counsellors and other support staff to assist in this holistic response.

Throughout the lifetime of our network we have recognized the disadvantage of women living in rural, regional and remote areas to accessing legal advice and most of our services have tried to address this by the provision of a 1800 free call Statewide telephone number. Some services have specific lawyers or adopted service provision models that allows for the provision of specialised services to women who live in non-metropolitan areas of Australia.

WLSA seeks to promote a legal system that is safe, supportive, non-discriminatory and responsive to the needs of women in accessing justice.

We thank the government for the establishment of this inquiry and provide the following response for consideration by the Australian Law Reform Commission in its reference. Our response will be limited to the right to a fair trial.

Fair Trial

Why focus on criminal matters without consideration of civil trials?

Women lack substantive social and legal equality by virtue of their gender and this impacts on their ability to achieve a 'fair trial'. The ALRC *Discussion Paper 54 Equality Before the Law*, advised that to the extent that it exists in the Australian legal system, gender bias should be regarded as a form of discrimination, systemic in

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

nature which prevents women from enjoying full equality before the law, equality under the law, equal protection of the law and equal benefit of the law².

Legal institutions, the law- its practice, priorities and impact have been developed and interpreted from a male perspective. This can be based on stereotyped views about the proper social role, capacity, ability and behaviour of women and men, which ignore the realities of their lives and result in laws and practices that particularly disadvantage women³. Violence against women, the gender pay gap and poorer health outcomes for women are just a few examples of how gender inequality can manifest in our society.

Interestingly, a prime example of gender bias is the way that this topic of 'right to a fair trial' is not considered in the ALRC Discussion Paper. We note that the ALRC in a footnote to the topic advises *that civil trials should also be fair but this chapter focuses on criminal trials*. WLSA regards the non-consideration and exploration of this issue as flawed.

Many of WLSA's members provide legal services to women in prison who represent some of the most marginalised and vulnerable of our client group. Despite having committed criminal offences, the majority are victims of crime themselves mainly family and domestic violence and often childhood abuse, including childhood sexual abuse and some have also been brought up in state care. In most if not all cases, no criminal sanction has ever been taken against their perpetrators.

We therefore agree that right to a fair trial in the criminal justice system is fundamental to a free and democratic society. What is interesting however, is that criminal law is an area of law that in the main affects men and involves the undertaking of criminal acts in the public domain and/or against members of the public⁴. Legal representation is viewed as fundamental to the criminal justice system and is based on the premise that *it is better for a guilty party to be set free, then for one innocent person to be wrongly imprisoned*. This in turn is based on the idea that the accused is at considerable disadvantage, as compared to the prosecution vis-à-vis funding and resources.

Traditional approach ignores issues that affect women

The narrow "traditional" focus adopted by the ALRC is disappointing as it essentially ignores a fundamental issue for women that impacts on their right to a fair trial in Australia; violence against women and their lack of ability to afford legal representation and/or adequacy of legal aid.

As the ALRC would be aware, the extent of violence against women in Australia is at unacceptably high levels. According to the Australian Bureau of Statistics one in three women have experienced physical abuse since the age of 15 and almost one in five has experienced sexual violence⁵.

Separation is an extremely dangerous time for women and children escaping family and domestic violence with at least one woman a week killed by her current or former partner. Levels of danger peak again for women and children when women take steps post-separation towards permanent separation (i.e. the finalisation of family law matters that can take place 12-18 months after separation⁶).

² Australian Law Reform Commission Discussion Paper 54 Equality before the law Sydney 1993 (ALRC DP 54), para 3.41.

³ Senate Standing Committee on Legal and Constitutional Affairs Gender bias and the judiciary Senate Printing Unit Canberra 1994.

⁴ Women make up a small percentage of the overall prison population.

⁵ Australian Bureau of Statistics 2006

⁶ Hardesty Jennifer L. "Separation Assault in the Context of Post-divorce Parenting: An Integrative Review of the Literature" Violence against Women 2002 quoting Ellis (1992) at p.600.

Additionally, we are aware that:

- Intimate partner violence was found to be the main contributor to death and disability to women aged 15 to 44 in Victoria.⁷
- Family and domestic violence claims the lives of more Australian women under 45 than any other health risk, including cancer.⁸
- Every three hours, a woman is hospitalised from domestic violence.⁹
- Aboriginal and Torres Strait Islander women are up to 35 times more likely to be hospitalised.¹⁰
- Family and domestic violence is not a “post code” crime and affects all socio-economic, cultural and religious groups.

Women face substantial barriers in reporting crimes against them and civil legal remedies are a necessity to achieving safety

Women face substantial barriers to reporting family and domestic violence to police and other authorities and, even when this is done it does not ensure their and their children’s safety. Women will use civil legal remedies more readily than a criminal approach, in attempt to achieve safety.¹¹ Civil remedies for women are therefore not a choice but are a necessity.

Overwhelmingly, women seek assistance from our services about family and domestic violence, personal protection orders, family law issues concerning children and property, child protection issues, victims of crime compensation matters and discrimination. Often these issues are not discrete and there can be overlap between them. Eg. One client matter can involve family and domestic violence issues, discrimination, victims of crime compensation claim and family law children’s matters.

Substantial power imbalances exist when there is family and domestic violence

Often our clients cannot afford their own lawyer to represent them in court, are ineligible for legal aid or legal aid does not provide funding in the areas they seek assistance in. They are then left with an unenviable decision to either continue their legal action without legal representation or give up and not pursue their legal action at all.

In some cases, the impact on the individual woman, children and society as a whole is considerable because some women will return to their abusive spouse, often with their children. These women ultimately make the decision that it is easier to go back and live with the perpetrator of violence rather than stay separated, endure his ongoing post-separation violence, hand over their children to him unsupervised and without protection, as well as litigate their court case unsupported.

⁷ <http://www.vichealth.vic.gov.au/Programs-and-Projects/Freedom-from-violence/Intimate-Partner-Violence.aspx>

⁸ *ibid.*

⁹ Pointer S & Kreisfeld R (2012) Hospitalised interpersonal violence and perpetrator coding, Australia, 2002-05. Injury research and statistics series no. 77

¹⁰ Australian Institute of Health and Welfare (2006) Family Violence among Aboriginal and Torres Strait Islander peoples

¹¹ Sometimes this is because the police can approach family and domestic violence as a civil and not a criminal matter.

Being without a lawyer places our clients at a fundamental disadvantage

A major concern for our clients when there is family and domestic violence is their and their children's safety. Being without a lawyer in court places these clients at a fundamental disadvantage because of the exploitation of power used by violent men to coerce, threaten and make women fearful. This is exacerbated when the other party is self-representing and can compromise the evidence given by a woman.

A legislative amendment of the Family Law Act about protecting vulnerable witnesses is required to ensure fairness

Separate from issues concerning inadequate level of legal aid funding, WLSA has advocated for legislation to protect victims of family and domestic violence in family law from being subject to cross-examination by the perpetrator who is self-representing and to provide assistance with the victim's cross-examination of the perpetrator (if the victim is also self-representing). Our reasons for supporting such an amendment include:-

- that the cross-examination by the perpetrator of the victim can compromise the quality of evidence given to the court;
- even if appropriate questions are asked, because of the power and control dynamics involved in family and domestic violence relationships, there can still be a huge psychological impact on the victim;
- Perpetrators of violence are skilled manipulators and cross examination allows questions to be asked which might have hidden and sinister meanings for the victim but that lawyers and the judge would not be aware of;
- As family violence is important to determining the best interests of the child, the perpetrator could ask the victim directly about incidents of violence;
- it can have a negative effect on the victim's psychological wellbeing in the short and medium term;
- it can be viewed by to the victim as system's abuse ie. the legal system is participating in the abuse.
- It can act as a disincentive for victim's to proceed to trial;
- And some victims may feel pressured to enter into consent agreements that may be unsafe or unworkable for themselves and their children, to avoid the trial experience.

Other State jurisdictions in sexual assault criminal trials and domestic violence protection order matters have introduced similar legislation and arguably family law is currently out of step on this issue. This recommendation for legislative amendment concerning vulnerable witnesses was supported by the Productivity Commission's recent inquiry into civil justice.¹²

Parallels with criminal processes

In child protection proceedings, there are parallels with the criminal process but very clear differences in outcomes in relation to availability of legal aid. Our clients can have their children taken from them by a well-funded and resourced government department. However, they can still experience difficulty in obtaining legal aid funding for legal representation. Many of these clients face multiple levels of disadvantage and are victims of family and domestic violence. The question needs to be asked whether the impact on individuals and society is just as great when we compare cases that involve decisions about removing children from their mother and principal care-giver (on a 'person's life, liberty and reputation' – including those of the children) as going to prison. The wrongful removal of a child can have intergenerational impacts, as recent events in Australia's history have taught us.

¹² Productivity Commission Inquiry Report, *Access to Justice Arrangements*, Overview No 72, 5th September 2014 Recommendation 24.2.

Also, in family law, contravention proceedings are quasi-criminal processes but are invariably difficult to obtain legal aid assistance. Contravention proceedings are proceedings brought by a party to a family law order that alleges the order is not being complied with and the party seeks redress from the court. The court is able to make a variety of orders, if a party is found guilty of the contravention, including imposing criminal sanctions. Eg. Good behavior bond, a fine, imprisonment (in the most severe cases). Legal aid may be available if a respondent is facing imprisonment. However, other serious consequences can also flow from lesser charges of contravention. For example, a client was in family and domestic violence relationship and separated from her husband but continued to live in the house with the children with him for economic reasons. During this time the husband arranged for her to enter into consent orders for the children to spend 50:50 time with each parent. The client did not receive any legal advice before entering these orders. The violence then escalated and she escaped with the children to refuge. He then brought contravention proceedings on the basis she was in breach of the orders. She was unable to obtain legal aid, represented herself and was found guilty of the breach, despite arguably having a reasonable excuse. The matter was then referred to a court process that considered whether to vary the orders. However, the guilty verdict for the contravention had a negative impact on her perception in these proceedings and also impacted on her ability to obtain legal aid funding.

Women are discriminated against in accessing grants of legal aid by virtue of their gender-specific legal needs and this can lead to unsafe outcomes and overall unfairness

Inextricably linked to the idea of a fair trial is having access to legal representation. This in turn raises issues about access to legal aid. Even in the arena of legal aid assistance- an initiative designed to assist vulnerable and disadvantaged people to access justice, ingrained societal gender-bias still operates to prevent women from accessing justice and ensuring women and their children are safe from violence. One important example of this is the disparity of grants of legal aid between genders.

The gender bias in grants of legal aid was first formally identified as a concern in the early 1990s and was raised early as an issue by one of our member services, Women's Legal Services Victoria. An issues paper published in 1994 by the Legal Aid and Family Services (LAFS) branch of the Attorney-General's department, *Gender Bias in Litigation Legal Aid*¹³, found that women do not receive as much legal aid funding for litigation as men do. In 1992/3, 63% of national legal aid expenditure on litigation assistance was paid on behalf of men and the success rates for women's applications for aid were lower than men. LAFS found that "a female applicant has less chance of getting legal aid than a male applicant"¹⁴. The report made it clear that the disparity was a result of indirect discrimination against women. Eleven years later Legal Aid Queensland in their Gender Equity Report observed in the period 2003-2004, women received 35% of legal aid grants and had a higher percentage of refusals.¹⁵

It would seem not much has changed in the 20 years when this was first identified and the gap may be widening. Funding allocated to legal assistance services still favours criminal law matters.¹⁶ This systematically disadvantages women, as men are more likely to be charged with an offence that could likely result in imprisonment and are therefore more likely than women to seek assistance in criminal law matters. For example, a recent study found 75% of the highest users of Legal Aid in NSW were men and all participants in the study

¹³Office of Legal Aid and Family Services (OLAFS) *Gender Bias in Litigation Legal Aid* (Canberra) Commonwealth Attorney-General's Department 1994.

¹⁴ Ibid p53

¹⁵ Hunter R (Ed) 2008) "Rethinking Equality Projects in Law: Feminist Challenges, USA, p.92

¹⁶ Productivity Commission, *Access to Justice Arrangements – Productivity Commission Draft Report*, April 2014 at 627.

had accessed criminal law services.¹⁷ On the other hand, women are more likely to require assistance in relation to being a victim/survivor of domestic and family violence, particularly in the family law system and/or civil law system.

In the seminal work of Graycar and Morgan¹⁸, the gender bias in legal aid funding was directly attributed to the impact of the High Court decision of *Dietrich and R* (1992) 177 CLR 292 which upheld the need for legal representation in major criminal matters to ensure the right to a fair trial. As a result of Dietrich there was a skewing away of legal aid funding from family law and civil matters, such as discrimination and personal injuries damages claims for past abuse (issues that mainly impact on women) towards criminal law. Graycar and Morgan conclude:

*“...But the barriers of the type we have described above operate as a latter day form of civil death in that they prevent women from invoking the legal system to redress the harms they have suffered. In that sense, they create considerable obstacles to women’s full enjoyment of citizenship, an essential aspect of which is access to the justice system.”*¹⁹

The Productivity Commission in its recent report into *Access to Justice Arrangements*²⁰ made the recommendation to increase funding for civil legal assistance services by an additional \$200 million. The recommendation indirectly gives support to the existence of gender bias by recommending that such funding *not be diverted to criminal legal assistance*.²¹

To be clear, WLSA supports the Productivity Commission’s recommendation for additional and new monies for civil legal assistance (and that it not be re-distributed from current levels of criminal law funding) and that it be quarantined from re-distribution towards criminal law matters in the future.

Gender bias in the application of Legal Aid Commission family law funding guidelines also results in injustice and impacts on a fair trial

Gender bias is also evident in the application of Legal Aid Commissions’ family law policies and guidelines. For example, some legal assistance services have reported cases of legal aid grants being terminated if a party does not agree with the recommendations made by a family report writer who has been appointed to comment on the care, welfare and development of a child in a family law matter.²² This is particularly concerning given that there are no universally applicable minimum standards or mandatory training for family report writers in relation to their knowledge of family and domestic violence, which can impact on the conclusions they reach in their reports. This is despite issues of family and domestic violence and child abuse being so frequently raised in the family law system that they are referred to as ‘the core business’ of family law.²³

Women’s Legal Services have raised concern for approximately 15 years about gender bias in the interpretation of legal aid guidelines, to the disadvantage of women who have experienced family and domestic violence. A particular concern is the need for clients to establish a “substantial dispute” to be eligible for legal aid in family law matters. On the face of it, such a requirement seems reasonable because we all would want public monies expended on important and substantive rather than frivolous issues.

¹⁷ Cited in Productivity Commission (2014). *Access to Justice Arrangements – Productivity Commission Draft Report*.

¹⁸ Regina Graycar and Jenny Morgan (1995) *Disabling Citizenship: Civil Death for Women in the late 1990s* 17 Adel LR 49-76 at p52

¹⁹ Ibid p.76.

²⁰ Productivity Commission Inquiry Report, Overview No 72, 5th September 2014

²¹ Recommendation 21.4

²² For example, Women’s Legal Services Australia (WLSA), a national network of community legal centres specialising in women’s legal issues in the *WLSA submission to the Productivity Commission’s Access to Justice Inquiry*, 4 November 2013 at 18.

²³ Brown T, Fredrico M, Hewitt L, Sheehan R *Child Abuse and the Family Court*, Australian Institute of Criminology, Trends and Issues, No 91

However, it is the way that this guideline is interpreted in practice that is particularly concerning for women who are trying to negotiate safe 'time with' arrangements for their children. It is not uncommon for women in family and domestic violence to feel guilty, bullied, exploited, or manipulated into arrangements for their children that are unsafe or expose themselves or their children to ongoing violence. For example, women can believe the law says the children should be shared 50:50 and enter into arrangements on this basis before obtaining legal advice. The need for formal 'living with' orders (custody orders) that clearly set out arrangements for children is an issue of safety for many women and children who experience violence. However, women who have experienced family and domestic violence can be ineligible from obtaining these orders. The reasoning is explained below.

*"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."*²⁴

Socially excluded women are not getting legal aid

Research by Hunter and De Simone 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. Their research 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'.²⁵

The article goes on further to say that *"the guidelines and 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"*²⁶

The legal aid merit test is not a true test of the legal merit of a case

This research evidences WLSA's argument that the legal aid merit test is not a true and independent test of the legal merit of a case. The decision-making around funding a case on merit can be overly influenced by funding availability.

A recent example of the issue around substantial dispute and how it disadvantages victims of family and domestic violence involved a woman who was a victim of horrific abuse from her former partner. He was charged with serious criminal offences after attacking her violently with a weapon in a public space in front of their children. She was hospitalised for some time as a result of the attack. He is currently in prison on remand for the offences and she made application for legal aid for family court orders that would provide her with certainty around the living arrangements for the children. Legal aid was refused on the basis there was not a substantial dispute as her case was "too strong". She suffered post-traumatic stress after the incident and was very frightened about the upcoming court case in case he made an appearance, even via telephone/ video. This is exasperating. Sometimes our clients are just unable to win – either their case is too weak and not substantial

²⁴ 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.

²⁵ 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

²⁶ Ibid p. 389

enough to warrant public expenditure or their legal case, or it is too strong- and this again precludes them from funding.

Urgent need for the development of a specific legal aid pathway for family law and victims of family and domestic violence to enhance justice

As this last case example illustrates, the position of WLSA is there is an urgent need for the development of a specific legal aid pathway for women in family law who have experienced family and domestic violence, with their own set of national funding guidelines that take into account the complex dynamics of violence and abuse. As the Hunter research highlighted, socially excluded women are being refused legal aid funding. These national guidelines should be comprehensive but with a degree of flexibility and developed with professionals who have specific expertise in family and domestic violence.

Conclusion

Traditional approaches can entrench discrimination

A restriction of the Inquiry to traditional notions of 'what is a fair trial' and to only consider issues relating to criminal law and not civil law will result in entrenching discriminatory practices that exclude the lived experience of women, their legal rights and priorities. Such an approach is out of step with the values of a modern society.

A broader understanding of rights is warranted

We urge the ALRC to adopt a broader understanding of rights, perhaps adopting a traditional understanding of them but expanding their application to other legal areas. For example, WLSA advocates that the right to a fair trial in family and domestic violence protection order, family law and child protection proceedings, especially where there is family and domestic violence. We believe that this should be viewed as just as fundamentally important to society, as notions of a fair trial in criminal law proceedings as these matters invariably involve issues of women and children's safety.

A narrow focus on legal remedies by themselves will not promote fairness

We also urge the ALRC to not restrict its consideration to just legal remedies. Some of the remedies we have advocated concern overall funding issues for civil law matters in Australia and for some specific legal aid guidelines to be developed that take into account issues of family and domestic violence in family law matters. Both of these issues are within the realm of the federal government to change without legislative amendment.

WLSA supports the Productivity Commission's recommendation about additional and new funding

We of course support the Productivity Commission's recommendation for a \$ 200 million increase in funding for civil legal assistance services in Australia, as this would go some way to increasing fairness in Australian society. WLSA supports the Productivity Commission's recommendation for additional and new monies for civil legal assistance (and that it not be re-distributed from current levels of criminal law funding) and that it be quarantined from re-distribution towards criminal law matters in the future.

A legislative amendment to family law that protects vulnerable witnesses will promote justice and fairness

WLSA also urges the ALRC to not restrict its recommendations of this Inquiry to laws that are currently in existence that limit a fair trial but consideration should be given to the development of new laws, that if implemented would enhance a fair trial. In particular and consistent with the Productivity Commission's recommendation, WLSA supports amendment to the *Family Law Act 1975* to introduce vulnerable witness protection to prevent perpetrators of family and domestic violence who are self-representing from directly cross-

examining their victims in family law proceedings and to provide assistance with the victim's cross-examination of the perpetrator (if the victim is also self-representing).