

Australian Domestic and Family Violence Clearinghouse Submission to Legal Aid NSW Review

May 2008

Introduction

Traditionally, a very high proportion of legal aid funding has gone to men. This is the direct result of the high priority placed by courts, policy makers and community based advocates on the representation of defendants in criminal matters. As most defendants in criminal matters are men, they receive most of the legal aid available. This is also true for domestic violence defendants, as most are male and most complainants are female. The high priority placed on criminal matters is understandable in light of the serious consequences of a conviction, particularly imprisonment.

At times, domestic violence has been considered not to have serious consequences. More recently domestic violence has been recognised as widespread, its criminal nature has been recognised and the serious health and economic costs have been acknowledged.¹ The consequences of domestic violence are long lasting, with sometimes permanent effects on a woman's physical and mental health, employment prospects, financial security and relationships with her children.² Domestic violence breaches the right to life, liberty and security of the person set out in Article 3 of the *Universal Declaration of Human Rights*.

Recommendation: That in light of the serious and long term consequences of domestic violence, Legal Aid NSW ensures that all victims of domestic violence receive appropriate legal services and advocacy, regardless of their geographic location, ethnic background or income. To achieve this goal, the Clearinghouse recommends expansion of and improvements to the Women's Domestic Violence Court Assistance Scheme (WDVCAS) and the Domestic Violence Solicitor Scheme (DVSS).

Recommendation: That private solicitors be properly compensated for performing work for women experiencing domestic violence and that Legal Aid NSW establish Women's Legal Aid units in all its branches.

Recommendation: That the Domestic Violence Advocacy Service be expanded to allow it to assist more women, particularly those with multiple/complex needs, such as those with disabilities, experiencing poverty and with language difficulties.

¹See for example Access Economics, *The cost of domestic violence to the Australian economy* Office of the Status of Women, Canberra 2004, where the lifetime cost per victim of domestic violence was estimated at over \$224 000; VicHealth, *The Health Costs of Violence: Measuring the burden of disease caused by intimate partner violence*, Victorian Health Promotion Foundation, Melbourne 2004.

² Ilsa Evans, *Battle-scars: the long-term effects of domestic violence* Monash University, Melbourne, 2007.

Recommendation: That Legal Aid NSW actively advocate on behalf of women experiencing domestic violence, to ensure that:

- legal aid for Commonwealth matters, in particular family law, is properly funded
- courts provide safe places for women experiencing domestic violence to wait, free from harassment
- police and court staff are properly trained in domestic violence issues
- female interpreters are available
- support services, such as health and housing, are available.

Legal Aid NSW services to people who have been or are in domestic violence situations

Expansion of WDVCAP

Most women applying for Apprehended Domestic Violence Orders (ADVOs) find the court process confusing and alienating. They are concerned about being harassed and intimidated by their partner or ex-partner at court, they are unsure about where to go and who to speak to, and they find court proceedings difficult to follow and understand. This may be exacerbated for migrant and refugee women, Indigenous women and women with disabilities. Without support, a woman in these circumstances is more likely to withdraw from court proceedings.

The objectives of the NSW Women's Domestic Violence Court Assistance Program (WDVCAP) are to:

- ensure the accessibility of the local court system
- ensure integrated responses from courts, legal practitioners, police prosecutors and community services
- increase the number of ADVO matters finally determined
- ensure women seeking ADVOs are provided with appropriate support, information and advocacy throughout the process
- work with courts to ensure that court processes are responsive to the needs of women and their children
- assist women and their children seeking ADVOs to feel safe within courts
- raise awareness and educate the public and other service providers about domestic violence.³

These objectives are achieved by providing information about safety before, during and after the court appearance, ensuring that ADVOs contain appropriate orders, empowering women by providing information about the dynamics of domestic violence, ensuring that women are aware of their options, advocating their needs to the relevant solicitor, police or court officer and referring women to support services.⁴ Women's Domestic Violence Court

³ WDVCAP Policy Manual, Legal Aid Commission, 2004 at p5.

⁴ Jane Mulroney and Domestic Violence Advocacy Service, *WDVCAP Support Workers' Kit*, Domestic Violence Advocacy Service, 2005 at p76-78.

Assistance Scheme (WDVCAS) Coordinators are often the best source of information about what services are available for women experiencing domestic violence in a particular area.

An early evaluation of the NSW WDVCA⁵ showed a high level of satisfaction with the service.

All women experiencing domestic violence are entitled to integrated court support and legal services. However, at present in NSW court support and legal services are unevenly available. In particular, women in rural and remote areas receive significantly lower levels of service and Indigenous and women from culturally and linguistically diverse (CALD) communities often do not receive culturally appropriate services. They do not have equitable access to court support, and they do not have the same access to legal representation for Apprehended Violence Orders.

Legal Aid NSW funds 33 WDVCAS servicing 55 local courts. Unfortunately, women using some of those 55 courts receive a very limited service. For example, women seeking in AVO in Wellington Court are served by the Dubbo WDVCAS. Court support workers are only available the half day per month that AVO matters are heard. They are not able to offer face to face information, support and referral except on this half day. Women using other courts are not served at all by the WDVCA⁵. Major towns lacking a WDVCAS include Goulburn, Mudgee, Parkes, Queanbeyan and Tamworth.

The potential benefits of an integrated court support and advocacy program are illustrated by the Quincy Court Domestic Abuse Program in Massachusetts. This program, which incorporates dedicated domestic abuse clerks and victim/witness advocates providing advice, information and emotional support, has been credited with an increase in the number of victims gaining final restraining orders. Quincy also has high rates of women following through with their applications for protection orders compared with neighbouring counties, and the lowest rate of domestic homicide in the state.⁶

Recommendation: that there should be a locally based WDVCAS at every court where ADVO applications are heard. Where the number of ADVO applications is low, the WDVCAS workers could engage in outreach and prevention activities, such as community education about the court process and victims' rights. This model has been used successfully in Victoria with women from African communities.⁷

⁵ Bradfield, J and Nyland, J (1998) *Evaluation of the NSW Women's Domestic Violence Court Assistance Program: A Report to the NSW Legal Aid Commission August 1998*, Bradfield Nyland Group & NSW Legal Aid Commission.

⁶ Tsai, B. (2000) *The trend towards specialized domestic violence courts: Improvements on an effective innovation* Fordham Law Review, vol 68, no. 4, pp1285 – 1327 cited in Davies, C *Justice Matters: a feasibility study for a court support service for victims of domestic violence, sexual assault and child victims* Women Tasmania, Department of Premier and Cabinet, 2002 at pp 49 – 50.

⁷ Anne Goldsbrough, Samia Baho and Maria Dimopoulos, 'Courts and community collaboration – a partnership between African communities and the Magistrates Court to

Paid support workers

WDVCAS are usually staffed by one or two workers, who are assisted on court days by seconded workers from other services or volunteers. Most schemes have difficulty recruiting and keeping seconded workers. The use of seconded workers can also place a strain on the seconded workers employing agency and can also result in issues of conflicting accountability or policy. This process also obscures the real costs of providing services for victims of domestic violence. In some instances volunteers are used to provide this important service. Volunteers are not always appropriately trained and supervised. The provision of funding for paid support staff will encourage a higher level of service from the WDVCAP staff enabling them to be advocates for their clients as opposed to simply be support providers.

Recommendation: WDVCAS should be funded to pay for part time staff to assist on court days.

Provision of culturally appropriate WDVCAP services

NSW Legal Aid has acknowledged a need to ensure that structural and institutional discrimination within the schemes is eliminated, and to ensure that all women can access an equitable share of the resources and services to which they are entitled.⁸ To this end, specialist worker positions have been established at some courts. However, there are insufficient numbers.

Recommendation: If a WDVCAS is located in an area with a significant Indigenous or CALD population, the scheme should be funded to employ a specialist worker to provide equitable access to justice for this population. It is recommended that specialist workers be provided using local demographic data as the basis for determining the needs of each particular area.

A key task for WDVCAS workers is to ensure that court staff have arranged for appropriate interpreters. It is not always possible to locate female interpreters in all community languages. For some women, disclosing domestic assault, particularly sexual assault, to a male interpreter is inappropriate.

Recommendation: Legal Aid NSW should liaise with the NSW Community Relations Commission to ensure that sufficient female interpreters are recruited and trained in community languages.⁹ Particular focus needs to be placed on the languages of new and emerging communities.

address family violence', paper presented at the *Just Partners Conference: Family Violence, Specialist Courts and the Idea of Integration*, Canberra, 22 -23 May 2008.

⁸ WDVCAP Policy Manual at p4.

⁹ See further, *A Long Way to Equal* Recommendation 9.

Independent domestic violence advocates

The WDV CAP functions well in supporting the large numbers of women who attend court to apply for ADVOs. However, for women who have experienced more serious levels of assault or are at high risk of further violence, more intensive support may be necessary for them to move towards safety. In particular, the period between charges being laid and those charges being finalised (either through conviction or dismissal) can be a particularly dangerous time.

In the United Kingdom, women whose partners or ex-partners are being prosecuted are assigned an Independent Domestic Violence Advocate whose task it is to focus on the safety of the survivor, conduct a risk assessment, help survivors make safety plans and access both legal and non-legal services.¹⁰ Assigning an advocate to a survivor means that she does not have to re-tell her story every time the matter is mentioned at court. It also means that those women with multiple disadvantages can have all of their needs addressed in a holistic way, rather than being given a list of referral agencies to contact.

This service differs significantly from the Witness Assistance Service offered by the Office of Director of Public Prosecutions in NSW or the services currently provided by the WDV CAP. The Witness Assistance Service offers information about court proceedings as well as referrals to counselling, other support services, and court support.¹¹ This limited form of support is insufficient for the most disadvantaged, traumatised and at-risk survivors of domestic violence.

Recommendation: That Legal Aid NSW consider the recruitment and training of Independent Domestic Violence Advocates for women at high risk of domestic violence.

Legal representation

Between 20 and 30% of ADVOs are sought by women applying for do so privately (the remainder are applied for by police on behalf of the protected person). These women may prefer not to involve the police or may have been refused assistance by the police.¹²

Women applying privately need legal representation, both at the mention and the hearing of their application. Where a WDV CAS is in operation, the

¹⁰ Nottingham Crime and Drugs Partnership, Domestic Violence, Local Initiatives <http://www.nottinghamcdp.com/index.asp?pageid=pageid243.xml> accessed 20/5/2008. See also Co-ordinated Action Against Domestic Abuse < <http://www.caada.org.uk/aboutus.html>> accessed 20/5/2008.

¹¹ ODPP, Services for Witnesses and Victims of Crime <http://www.odpp.nsw.gov.au/was/was.html> accessed 20/5/2008.

¹² Police are only obliged to apply for an order where they believe a domestic violence offence has recently been or is being committed, or is imminent, or is likely to be committed: Crimes (Family and Personal Violence) Act 2007 s 49.

WDVCAS is responsible for helping to arrange legal representation. Ideally, these will be legal practitioners who are trained and experienced in the handling of domestic violence matters.¹³ At some courts, Community Legal Centres (CLC) provide a duty solicitor for mention days and will act at hearings. At the twelve courts where the Domestic Violence Solicitor Scheme is in operation, private solicitors are paid by Legal Aid NSW to attend mentions and hearings.

At many courts, however, there is no WDVCAS, no DVSS and no CLC. Where there is a branch of Legal Aid NSW in the area, Legal Aid NSW solicitors are often unable to act because they have already assisted the defendant. It is sometimes difficult to find a private solicitor who is willing to act in an ADVO application, particularly in rural and remote areas.¹⁴ Solicitors who have experience in criminal proceedings may have assisted the defendant in the past and, therefore, be unable to act for the applicant. Some solicitors prefer not to work for Legal Aid rates (discussed further below). Legal representation is crucial for the successful conduct of a private application for an ADVO.

Recommendation: That Legal Aid NSW consider innovative uses of communications technology to deal with this problem. A solicitor from another town (whether private, CLC or Legal Aid NSW) could conduct client and witness conferences by video link (using court house equipment if available) and Legal Aid NSW should fund the full cost of the solicitor's travel expenses if the matter goes to hearing.

Legal Aid Queensland (LAQ) has had a specialist unit known as Women's Legal Aid since 1995. This unit, made up of two solicitors, a social worker and a court support worker provides legal advice and representation to women and also takes a lead role in addressing gender equity issues across the organisation. Its objectives are to:

- increase women's access to Legal Aid Queensland's services
- improve the responsiveness of Legal Aid Queensland to women
- improve access to legal services for disadvantaged women in the Logan area and to improve access to the justice system for women and children affected by domestic violence who access Brisbane and Beaudesert Court.¹⁵

A large proportion of its work is concerned with domestic violence and family law.¹⁶

¹³ WDVCAP Policy Manual at p6.

¹⁴ Personal communication, Rachael Martin, Wirringa Baiya Aboriginal Women's Legal Centre, 28.4.2008.

¹⁵ Women's Legal Aid *Evaluation Report*, 2002 p2. Viewed 20.5.2008
<<http://www.legalaid.qld.gov.au/NR/rdonlyres/D1900E45-F477-4391-8C4B-400D398C2914/0/wlaevaluationreport02.pdf>>

¹⁶ *Evaluation of the Women's Legal Aid Program – Report*. Viewed 20.5.2008
<<http://www.legalaid.qld.gov.au/NR/rdonlyres/0A042518-EC29-45CA-B0F4-EAEE09EF7503/0/wlaevaluationreportfinal1999.pdf>>

Specialist Women's Legal Aid units would be particularly valuable in rural and regional areas where legal representation and court support services are lacking. They would also be able to assist women whose special needs mean that Legal Aid rates are insufficient to cover the costs of a private solicitor. For example, where it is necessary to use an interpreter or where a woman's mental illness or intellectual disability means that several client conferences are necessary, then Legal Aid rates do not cover the full cost of preparing for a hearing. In the Sydney metropolitan area, the Domestic Violence Advocacy Service and other Community Legal Centres provide legal representation for some of these high needs clients but there are gaps in coverage in regional areas.

Recommendation: That Legal Aid NSW establish a specialist Domestic Violence Unit to provide specialist legal assistance to clients and mentoring and advice to other legal officers. In addition

Recommendation: That a specialist domestic violence solicitor position be established in each of its regional offices.

Recommendation: that a domestic violence solicitor panel be established at all courts in major metropolitan centres and then progressively across the State until all courts where domestic violence matters are heard are served by a Domestic Violence Solicitor Panel.

Inadequate funding and limited grants

Current legal aid services do not adequately provide for the legal needs of people experiencing domestic violence.¹⁷ While telephone and face to face advice is available through Legal Aid NSW, CLCs and Law Access, representation is subject to stringent means tests and caps on funding.

Means test: assets

An applicant for an ADVO is only eligible for a grant of legal aid if she has less than \$1000 in assets (plus \$500 per child).¹⁸ However, to pay for a solicitor for an ADVO hearing costs at least \$1500. Applicants who are not legally aided also become liable to pay the costs of the other party if the application is found to be frivolous or vexatious. A woman with \$1200 in the bank would be both ineligible for legal aid and unable to pay for a solicitor. Many women are employed on a casual basis, experience considerable variation in their weekly wage and are not entitled to sick leave or maternity leave. In light of this, many women are reluctant to leave themselves with less than \$1000 in the

¹⁷ Australian Council of Social Service *Access to justice and Legal Aid: submission to the Senate Legal and Constitutional Committee* ACOSS, Sydney, 2003.

¹⁸ Legal Aid Commission, Policies 7.4.11, Means Test B. Viewed 27.5.2008
<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=758&cid=993&policyid=1&chapterid=25§ionid=3209#paragraph_8971>

bank and their safety is at stake if they are unable to seek the protection of an ADVO because of financial constraints.

Also some women may appear to be asset rich but in reality may not have access to any assets to enable her to pay for legal representation.

Recommendation: That a new test be developed for complainants applying for legal aid for domestic violence issues. The new test needs to take into account the specific dynamics of domestic violence which may leave women with no access to money or other assets.

Means test: income

The income test excludes many women from obtaining the representation they need for AVO hearings. A woman with no dependants is excluded from legal aid if she has an income of \$318 per week after housing costs (Policies, 7.4.7). The income excludes almost all working people from obtaining legal aid, including those who do not earn enough to pay for representation.

Recommendation: That a new test be developed for complainants applying for legal aid for domestic violence issues. The new test needs to take into account the specific dynamics of domestic violence which may leave women with no access to money or other assets.

Caps on aid – family law

Legal aid for family law matters is limited to \$12 000.¹⁹ Many women who have experienced domestic violence become embroiled in protracted litigation in the Family Court. They may be subject to harassing, frivolous and unnecessary litigation by unscrupulous ex-partners to intentionally exhaust the funds available (known as “burning off”) and leave the woman with no choice but to self-represent or agree to the ex-partner’s demands.²⁰

When the cap is about to run out, the solicitor must advise the client to settle, self-represent or act pro bono. The client may have to agree to arrangements that are not safe for themselves or their children. For example, the report of Rathus, Rendell, and Lynch cites the case of a woman being pressured to agree to have her young child’s contact with his father being supervised by the father’s adult son, whose arm the father had broken four years previously.²¹ Some women are forced to reconcile with their violent partner

¹⁹ Legal Aid Commission Practice Directions 2.8.2 Viewed 28.5.2008
<http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=759&cid=993&policyid=4&chapterid=14§ionid=3088#paragraph_0>

²⁰ Zoe Rathus, Kathryn Rendell, Angela Lynch *An unacceptable risk: a report on child contact arrangements when there is violence in the family* Women’s Legal Service, Brisbane, 2001 at 3 – 4, Rosemary Hunter with Ann Genovese, Angela Melville and April Chrzanowski *Legal Services in Family Law* Law Foundation of NSW, Sydney, 2000. Viewed 28.5.2008
<http://xml.lawfoundation.net.au/files/research/lsfl_rep.pdf accessed 6.6.2008> at para 615.

²¹ Zoe Rathus, Kathryn Rendell, Angela Lynch *An unacceptable risk: a report on child contact arrangements when there is violence in the family* Women’s Legal Service, Brisbane, 2001 at 9 – 10.

so that they can protect their children, rather than subject them to unsupervised contact with a violent parent.²²

We draw the NSW Legal Aid's attention to the report of Rosemary Hunter *et al.*, *Legal Services in Family Law*.²³ This report identifies the following problems with legal aid:

- restrictions on the grant, such as no aid for enforcement matters
- unpredictable decision on the merits test, perhaps disguising refusal because of insufficient funds or prejudgement of matters that should be left to a court
- termination of the grant while the matter is still proceeding
- no aid for property applications
- grant insufficient for the work to be performed, causing legal firms to assign legal aid cases to more junior solicitors, limit contact with the client, limit services to the client, or refuse to do legal aid work
- cap on grant led solicitors to advise clients that they had no option but to settle
- substantial administrative costs for solicitors dealing with legal aid organisations.²⁴

The authors of *Legal Services in Family Law* note that in 2000 the average amount spent by clients whose matters went to hearing was \$21 952, compared with a cap of \$10 000. Since then there has been no real increase in the cap (it has increased to \$12 000 which is about the same as inflation over the seven years). This means that solicitors acting in legal aid matters continue to be forced to choose between offering reduced services to legal aid clients, providing a full service and bearing the cost of that service themselves, or pressuring the client to settle.

The lack of legal aid for property settlements leaves women who have experienced domestic violence vulnerable to bullying and threats when dividing property of the marriage. Women who have experienced domestic violence tend to receive a smaller share of the marital property.²⁵ Ilsa Evans interviewed 134 women who had experienced domestic violence and found that only 26% of them used legal assistance to achieve a property settlement. Where legal assistance was used, the average split was 55/45% in favour of the survivor, while attempting settlement without legal assistance resulted in an average 70/30% split in favour of the perpetrator.²⁶ Some women reported

²² Zoe Ratus, Kathryn Rendell, Angela Lynch *An unacceptable risk: a report on child contact arrangements when there is violence in the family* Women's Legal Service, Brisbane, 2001 at 4.

²³ Rosemary Hunter with Ann Genovese, Angela Melville and April Chrzanowski *Legal Services in Family Law* Law Foundation of NSW, Sydney, 2000. Viewed 6.5.2008 <http://xml.lawfoundation.net.au/files/research/lslfl_rep.pdf>

²⁴ Hunter et al, note 4 above, pp231-248.

²⁵ Grania Sheehan, Bruce Smyth "Spousal violence and post-separation financial outcomes" *Journal of Family Law* Vol 14, No. 2, 2000, pp102-118/

²⁶ Ilsa Evans *Battle-scars: Long-term effects of prior domestic violence* Centre for Women's Studies and Gender Research, Monash University, 2007 at 19.

that they were advised that they were entitled to more but chose not to persist in their claims in order to protect themselves and their children.

Recommendation: that Legal Aid NSW advocate vigorously with the Federal Government to remove the caps and broaden the availability of legal aid funding to include property and enforcement matters.

Restrictions on aid – AVO matters

Solicitors acting in AVO matters for a legally aided client can charge for court appearances and one conference with the client. Approval has to be sought for further client conferences and for any conferences with witnesses. No fees can be charged for time spent preparing client and witness statements. Women who have experienced domestic violence are often reluctant to disclose the full extent of the violence at the first meeting with a legal professional. It may take two or three meetings before a level of trust is established to allow full disclosure of the grounds for the AVO. The limit of one client conference inhibits this process and is likely to result in a solicitor advising a client that insufficient grounds exist to support the making of an AVO.

Again, where solicitors are not paid for the full amount of work required to prepare a case properly, they will either refuse to do legal aid matters, provide a limited service or be obliged to perform work for free. Women experiencing domestic violence should be entitled to a comprehensive legal service and should not have to rely on the charity of legal professionals.

Recommendation: that legal aid funding be more closely related to the real cost of providing the service.

Recommendation That Legal Aid NSW revise its policies and protocols to ensure that no victims of domestic violence have their safety jeopardised as a result of any legal aid policies or protocols.

Legal Aid NSW's relationships with key domestic violence service delivery partners

Lack of integration

Women fleeing domestic violence often face multiple legal problems regarding protection orders, victims' compensation, tenancy, debt and family law. Community legal centres often provide representation regarding protection orders but not family law. A grant of legal aid may be available for children's matters in family law but not property, tenancy or debt problems. We note that the United Kingdom's Legal Services Commission is addressing this problem by using increased funding to buy integrated legal services.²⁷

²⁷ Legal Services Commission, Press Release, 21.12.2007. Viewed on 5.5.2008
<http://www.legalservices.gov.uk/aboutus/press_releases_7171.asp>

Recommendation: that Legal Aid NSW move towards establishing a practice of providing the same solicitor to assist the client with all of her inter-linked legal problems.

Whole of government, integrated responses to domestic violence have been adopted in Victoria, Tasmania and the ACT. An integrated system requires police, child protection, health and domestic violence specialist services to use common definitions of domestic violence, use standard risk assessment tools, share information, refer appropriately and conduct coordinated case management. Such a system rests on well-resourced front-line service provision. Integrated responses aim to ensure that victims or perpetrators entering the service system at any point have access to the range of services and responses they need.

Recommendation: that Legal Aid NSW contributes towards the development of an integrated response for domestic violence victims.