

**Submission
No 45**

**INQUIRY INTO DOMESTIC VIOLENCE TRENDS AND
ISSUES IN NSW**

Organisation: Women's Legal Services NSW

Date received: 23/09/2011



16 September, 2011

The Director
Standing Committee on Social Issues
Parliament House
Sydney NSW 2000

By email: socialissues@parliament.nsw.gov.au

Dear Director,

Domestic violence trends and issues

1. Women's Legal Services NSW (WLS) thanks the Legislative Council Standing Committee on Social Issues for the opportunity to contribute to the Domestic violence trends and issues inquiry.
2. WLS 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 the 12 month period up to September 2011 over 60% of all the advice provided to women through our advice services raised issues of domestic violence.
4. In summary, WLS submits the following:
 - A. WLS is concerned that a significant policy initiative such as the introduction of GPS monitoring, involving very significant costs and potential for raising a false sense of security in victims, not be introduced without a sound evidence base for its efficacy.
 - B. WLS considers that the existing NSW penalties are appropriate.
 - C. NSW Police be better resourced to successfully prosecute defended applications for police ADVOs.
 - D. The NSW Domestic and Family Violence Action Plan should address how the initiatives are to be financed and a monitoring and evaluation framework to monitor the Action Plan's progress should be an integral part of the Plan.



Women's Legal Services NSW PO Box 206 Lidcombe NSW 1825

Administration: (02) 8745 6900 Fax: (02) 9749 4433 Website: www.womenslegalservices.nsw.gov.au

Women's Legal Resources Limited ACN: 002 387 699 ABN: 88 002 387 699

- E. WLS supports the adoption of a 'primary aggressor' policy by NSW Police Service.
- F. WLS supports a NSW *Human Rights Act*.
- G. WLS supports the establishment of mechanisms for referral of cases involving family violence to specialised family violence courts and the appointment of a high level inter-agency advisory group to investigate the potential for specialist family violence courts to be established in NSW.
- H. Increased funding is needed for integrated services for victims of domestic violence, including regional services.
- I. Increased funding is needed for refuge, counselling and health services.
- J. Various measures are needed to improve access to justice and legal assistance services especially for Indigenous women, women from CALD backgrounds and women with disabilities.
- K. The NSW Government should provide a comprehensive response to the recommendations made by the Australian and NSW Law Reform Commissions in *Family Violence – A National Legal Response* to improve the interaction between the family law system and the child protection and domestic violence systems.
- L. If a law like 'Clare's Law' which seeks to provide a warning by way of access to a criminal record check for prospective intimate partners were to be introduced in NSW, it should be done so on the basis of strong evidence that it would increase safety for women.

Introduction

5. Violence against women is one of the most widespread human rights abuses. Both the National Plan to Reduce Violence against Women and Children and the NSW Domestic and Family Violence Action Plan recognise the widespread and urgent nature of the problem. In Australia:
 - domestic violence puts more women aged 15-44 years at risk of ill health and premature death than any other risk factor;
 - one in three Australian women will report being a victim of physical violence and almost one in five will report being a victim of sexual violence in their lifetime according to the Australian Bureau of Statistics.¹ We also know that family violence and sexual assault are under reported.
 - approximately 350,000 women will experience physical violence and 125,000 women will experience sexual violence each year.²
 - some groups of women experience higher rates of violence. These include Indigenous women³, women with disabilities⁴, women from culturally and

¹ Australian Bureau of Statistics (2005) Personal Safety Survey, ABS Cat. No. 4906.0, Canberra: Commonwealth of Australia. (ABS 2005).

² Australian Bureau of Statistics (2005) Personal Safety Survey, ABS Cat. No. 4906.0, Canberra: Commonwealth of Australia.

³ ABS (2005); Mouzos, J. and Makkai, T. (2004) Women's experiences of male violence: Findings from the Australian component of the International Violence Against Women Survey, Research and Public Policy Series, No. 56, Canberra: Australian Institute of Criminology.

linguistically diverse backgrounds⁵, younger women and older women.⁶

- whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the community.
- domestic and family violence is the biggest single cause of homelessness among women and children.
- almost one in four children in Australia have witnessed violence against their mothers or step-mothers.
- violence against women also comes at an enormous economic cost. New research released by the Government shows that each year violence against women costs the nation \$13.6 billion.⁷ This figure is expected to rise to \$15.6 billion by 2021.

Strategies to reduce breaches and improve compliance with Domestic Violence Orders

a. The use of GPS bracelets

6. The Inquiry seeks comment on the use of GPS bracelets as a strategy to reduce breaches and improve compliance with ADVOs. However, there is no background information to provide a context or proposal on which to comment. We therefore describe our understanding of the possible options, in order to provide a context for our comments.⁸ We raise some broad issues about the use of GPS bracelets and seek an opportunity to provide further comment if a more concrete proposal is developed.
7. The use of GPS monitoring is to place restrictions on an offender's movements. The GPS technology monitors the movement of the offender who must wear the electronic bracelet. The GPS is programmed to create an 'exclusion zone' around the victim. The latter must carry a transmitter, around a fixed point (such as the victim's home, school or work, or both) to restrict the offender's access to these locations. Entry into the exclusion zone by the offender will instantly trigger an alert at the monitoring centre. Depending on the model of device used, it may also trigger an audible alarm on the transmitter, alerting the victim of the offender's proximity.
8. We understand that monitoring by GPS bracelet can be 'Active', 'Passive' or 'Hybrid'.
9. Active monitoring provides continuous 'real time' monitoring of an offender's movements. The GPS unit transmits the offender's location information to a central monitoring centre in 'near real time' via GPS networks.
10. Passive monitoring does not provide 'real time' monitoring of an offender's

⁴ ABS (2005); Lievore, D. (2005a) 'Prosecutorial Decisions in Adult Sexual Assault Cases' Trends and Issues in Crime and Criminal Justice, Issue.1, p. 291.

⁵ ABS (2005).

⁶ ABS (2005).

⁷ KPMG (2009) The Cost of Violence against Women and their Children. Safety Taskforce, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government.

⁸ Substantially drawn from Tashina Orchiston, GPS Tracking and Domestic Violence Offenders (Australian Domestic and Family Violence Clearinghouse Newsletter, forthcoming, 2012). Tashina Orchiston, GPS Tracking and Domestic Violence Offenders (Australian Domestic and Family Violence Clearinghouse Newsletter, forthcoming, 2012).

movements. The GPS unit stores but does not automatically transmit the offender's location information. Location information must be periodically uploaded to the monitoring centre.

11. Hybrid monitoring systems combine both active and passive tracking. Firstly, the GPS unit transmits data to the monitoring centre's server in 'near real time' via the GPS network (active). Where GPS satellite signal is unavailable, the GPS unit stores the offender's location data in its internal memory and transmits this to the monitoring centre once a signal becomes available.
12. There are a range of advantages and disadvantages associated with the use of GPS tracking/monitoring.⁹
13. Advantages include:
 - aid probation and parole officers in monitoring and managing offenders' behaviour in the community
 - augment offender accountability and potentially reduce their likelihood of reoffending
 - be applied to diverse offender groups, including domestic violence offenders, and across various stages of the criminal justice process
 - reduce prison population and the need to build more correctional facilities if used as an alternative to incarceration
 - be a major tool to offender rehabilitation and reintegration (for some)
 - avoids adverse psychological affects of incarceration
 - permits inclusion and exclusion zones to be specified
 - victim can be notified when perimeter boundaries are violated by pager or text message providing enhanced level of protection and increased feelings of security
 - offenders perceive GPS tracking as less restrictive than incarceration
14. Disadvantages include:
 - there can be no guarantee that authorities will be able to intervene before a victim is harmed, raising a false sense of security
 - system perceived by victims and public as being too lenient a sentence
 - problems with technology, including, technical faults, poor monitoring coverage, equipment failure and uncomfortable devices
 - despite safeguards, the device is not always tamperproof and destruction of the device can lead to all information regarding offender's whereabouts being lost
 - the device serves as a daily reminder that the offender is being monitored, and can contribute to stigma in society
 - active GPS is very expensive because of both the hardware necessary and manpower needed for 24 hour monitoring seven days a week

⁹ Bottos, Shauna, Correctional Service Canada, 'An Overview of Electronic Monitoring in Corrections: the Issues and Implications' (April 2007), pp 9-19 <<http://www.csc-scc.gc.ca/text/rsrch/reports/r182/r182-eng.shtml>>.

- passive GPS creates heavier workloads for probation and parole officers since software would require them to sift through each day's prior movement data in order to identify any violations
 - Reliance on wireless data service coverage and potential areas where no coverage is available such as in remote NSW
15. There also may be adverse affects on co-residents such as family members living with the offender who may have their own right to privacy breached and be indirectly punished as a result of being under constant surveillance.
 16. WLS is concerned that a significant policy initiative such as the introduction of GPS monitoring, involving very significant costs and potential for raising a false sense of security in victims, not be introduced without a sound evidence base for its efficacy.

b. Whether existing penalties for domestic violence are adequate

17. WLS considers that the existing NSW penalties are appropriate.
18. WLS supports legislation directing courts to adopt a particular approach on sentencing for breach of protection orders, as is the case in NSW. For example section 14(4) of the *Crimes (Domestic and Personal Violence) Act 2007 (NSW)*, requires courts to sentence offenders to imprisonment for breach of protection orders involving violence, unless they otherwise order and give their reasons for doing so. Such provisions provide an important safeguard.
19. The most common sanction for a low level breach in NSW is a good behaviour bond. WLS considers this to be appropriate as the consequences for the defendant if they offend again include sentencing them for the original offence as well as the new offence. If a fine only is imposed, there is no ongoing sanction if a further offence is committed, other than reference to the prior conviction in sentencing.
20. If national approaches are being considered, WLS supports a consistent national approach to maximum penalties for breach of protection orders.
21. However, NSW Police could be better resourced to successfully prosecute defended applications for police ADVOs. Prosecutors have little opportunity to prepare for hearings in the Local Court and to spend time with the victim or other witnesses prior to the trial. In our experience women victims of domestic violence are often contacted too close to the hearing date to ensure adequate preparation of a prosecution case.

Early intervention strategies to prevent domestic violence

22. Preventing violence before it occurs is recognised as central to the long-term goal of eliminating family violence.
23. In 2010 the NSW Government published a NSW Domestic and Family Violence Action Plan '*Stop the Violence End the Silence*'.
24. WLS supports the initiatives outlined in the Action Plan, however has concerns about the extent to which the plan is sufficiently robust and with adequate resources allocated to achieve its policy objectives.

25. Preventative strategies implemented must be long-term strategies, engaging all members of society, aiming to change deeply entrenched attitudes about women, inequality, power imbalances and the justification of violence within society.
26. Effective prevention projects also depend on having adequate services available to respond to the experience of violence.
27. The NSW Action Plan should address how the initiatives are to be financed.
28. A monitoring and evaluation framework to monitor the Action Plan's progress should be an integral part of the Plan and should also:
 - include baselines and indicators
 - be transparent, accountable and participatory, and
 - include feedback from people affected by the Plan.
29. While WLS acknowledges the initiatives to prevent Indigenous family violence within the NSW Action Plan, a separate plan and budget could better ensure adequate coverage. WLS suggests that consideration be given to the implementation of a NSW plan focusing primarily on strategies preventing Indigenous family violence, to work parallel to the NSW Domestic and Family Violence Action Plan.

The increase in women being proceeded against by police for domestic violence related assault

30. In recent years WLS has seen an increase in the number of instances where police apply for protection orders for a male person against a woman, despite a history of violence perpetrated by the male. In our experience, after incidents or alleged incidents where police fail to determine who is the actual victim, police will often make applications for protection orders against female victims of family violence. This may be because at the time the victim was considered 'hysterical' and is deemed 'the aggressor'.
31. Factors which lead to proceedings against the victim include:
 - failure to speak to the woman independently
 - failure to ask directly if she has been hurt or holds fears because she was not the person who made the call to police
 - police officers making a quick judgment that it was a mutual fight without getting the full picture, or being eager to believe men who allege violence without recognising that calling the police could be part of the domestic violence
 - victims sometimes being told that if they want the police to proceed with charges they would have to charge her as well
 - Often physical evidence such as bruising not showing immediately.

Case study 1

Jo attended the police station after being assaulted by her ex-boyfriend. She was bruised and swollen and needed medical attention. Jo was taken into an interview room. A short time later Jo's ex-boyfriend attended the police station and asked that an Apprehended Violence Order application be made for his protection as Jo had 'intimidated' him. The police applied for this order. When Jo emerged from the interview room she was informed that she would need to attend court later that day. Jo was astonished to hear that an order was being made for her ex-boyfriend's protection when she was the one who was assaulted. Jo does not understand how the police could be assisting him when she went to the police station to ask for help and she was injured.

Case study 2

Ruby was at home with her partner John. John became verbally abusive towards Ruby. He grabbed her arm and pushed Ruby up against the wall then put his hand around her neck. Ruby struggled and her nails dug into his wrist - there were marks but no blood. John let her go but continued to shout and move around the room knocking things over. Ruby screamed at him to stop. Neighbours called the police because they heard the shouting. John said there had been a verbal fight and that Ruby had scratched his wrist. Ruby told the police that John had assaulted her but the police said that they couldn't see any blood so didn't believe her. They warned her to calm down, told her she was lucky they weren't arresting her for assaulting John, then left. Ruby went to a friend's house and by that time could see bruises on her neck and arm.

Case study 3

Sue, aged 65 and her husband Fred had been married for 40 years. Throughout their marriage Fred had been emotionally abusive, financially controlling and had isolated her from her family. He had been physically violent early in the marriage but Sue had learned how to appease him so he had not hit her in recent years. Fred expected Sue to have sex with him whenever he wanted. Sue decided she wanted to leave Fred but when she told him that she would be going to stay with their daughter for awhile Fred stood over her and threatened that she would pay if she left him. Fred became very aggressive and shouted abuse at Sue. Sue locked herself in the bedroom and started packing some clothes. About half an hour later the police arrived. They said that Fred had called them because Sue had assaulted him. She said that she had tried to tell the police that about the emotional abuse and controlling behaviour but they wouldn't listen. The officer asked if her husband had hit her, and Sue said "no not recently". She tried to explain that was only because she knows how to placate him, but felt they weren't listening to her. Because the police officers were dismissive she did not feel comfortable to tell them about the sexual abuse. She said that one of the police officers told her that she should stop hen-pecking her poor husband. The police arrested Sue. It was late so she was kept in custody overnight. The police did not end up pressing charges because they lacked sufficient evidence. Sue was extremely distressed because she had never been in trouble with the police before.

32. Police action against a victim can stem from a lack of understanding of the gendered nature of domestic violence and its dynamics.
33. Our view is that errors made by police in identifying the primary aggressor could be prevented by the following:
- the development of a clear policy and procedure for police to address the identification of victims of family violence in ambiguous circumstances which involves police looking to the context of a particular incident including history of family violence (reported and as far as possible unreported) and an assessment of self defence as a factor.
 - a willingness of police to withdraw applications for protective orders and / or charges if it becomes evident that they are dealing with a victim as an alleged defendant.
 - a willingness of the police to investigate actively the family violence, and then to charge or apply for protective orders against the violent party.

- ongoing training for police and quality supervision on these issues.
 - the adequate resourcing of specialist police within Local Area Commands to ensure that police practice is monitored. This would assist in providing guidance in identifying the primary aggressor in the context of family violence.
34. Judicial oversight of the issuing of protection orders is also an important step in ensuring that police are using their powers appropriately. Police should not be able to issue protection orders, even time limited, without oversight as this risks potentially criminalising (and further abusing) victims of violence. Further, issuing a protection order is a judicial function as it has potential criminal consequences for the defendant

c. Other issues

The need for formal human rights protections

35. The recent National Human Rights Consultation found that Australia's legal and institutional protection of human rights is inadequate, particularly for marginalised and disadvantaged individuals and communities.
36. WLS maintains that both the NSW and the Australian Governments should adopt a Human Rights Act. A Human Rights Act should include, at the very least, the rights that Australia has an international obligation to protect as well as provide for legal remedies when rights are breached. The right to protection from violence should be included.

Specialised family violence courts

37. WLS supports the establishment of mechanisms for referral of cases involving family violence to specialised family violence courts. However, we note that much consideration needs to be given as to how the courts would be run and the circumstances in which referrals would be made.
38. Specialised family violence courts would need to be developed in close consultation with stakeholders. WLS believes the following features would be appropriate for inclusion in specialised family violence courts:
- especially selected judicial officers;
 - specialised and ongoing training on family violence issues for judicial officers, prosecutors, registrars, and police;
 - victim support workers;
 - arrangements for victim safety; and
 - mechanisms for collaboration with other courts, agencies and non-government organisations (ALRC 2010).
39. The following features should be adopted or continued as far as possible within the existing court system dealing with family violence.
- identifying, and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law act and

child protection matters;

- providing victim and defendant support, including legal advice, on family violence list days;
- assigning selected and trained judicial officers to work on cases related to family violence;
- adopting practice directions for family violence cases;
- ensuring that facilities and practices secure victim safety at court; and
- establishing a forum for feedback from, and discussion with, other agencies and non-government organisations (ALRC 2010).

40. WLS NSW supports the appointment of a high level inter-agency advisory group to investigate the potential for specialist family violence courts to be established in NSW.

Integration of services for victims for domestic violence

41. WLS strongly supports a co-ordinated approach to addressing domestic and family violence in NSW. However we believe that for such a strategic framework to have a lasting impact it will require a high level of sustained commitment from senior levels of government and sufficient resources allocated. The Victorian experience¹⁰ in developing an integrated response to domestic violence demonstrates that the key elements are a high level of leadership, a commitment by both government departments and non-government agencies to work together, and the resources to enable this to occur.

42. WLS supports the establishment of a network of integrated and holistic services for women who have experienced domestic violence. These services should be available across NSW and should:

- be responsible for a geographic area based on local courts, police jurisdictions or geographic access;
- have a focus on accessibility;
- work in conjunction with the courts and police in that area;
- meet domestic violence victims' support and legal representation needs throughout the legal process, including ADVO hearings;
- be able to assist women to get income support, accommodation, assistance for their children, and counselling;
- be able to provide legal assistance for other related matters such as family law;
- be able to refer to alternative services in cases of conflict of interest;

¹⁰ Office of Women's Policy, Victoria "Reforming the Family Violence System in Victoria: Report of the Statewide Steering Committee to Reduce Family Violence" 2005 Melbourne.

WOMEN'S LEGAL SERVICES NSW

- undertake community development and education work at a local level;
- contribute to law reform and policy work from a grounding in practice.

Increased resources and funding for regional integrated services for victims of domestic violence

43. Resources and funding should be provided for regional integrated services for victims of domestic violence that meet clients' support and legal representation needs, and provides for consistent and holistic service provision. Integrated and holistic services for victims of domestic violence could:

- be responsible for a geographic area based on local courts and police jurisdictions;
- work in conjunction with the courts and police in that area;
- meet domestic violence victims' support and legal representation needs throughout the legal process, including ADVO hearings;
- provide continuity of service;
- cater for the potential for alternative services to be available in cases of conflict of interest;
- undertake community development work at a local level; and
- contribute to law reform and policy work from a grounding in practice.

Increased funding for refuges, counselling and health services

44. It is necessary to ensure that other services that are essential for victims of violence are adequately funded. For example, more funding is needed for refuges, counselling and health services, which can assist women and children after experiencing violence, and can also play an important role in preventing further violence.

Access to justice and legal assistance services

45. Women experience unequal access to justice, particularly in relation to domestic and family violence. A State Plan should identify details about barriers and issues with access to justice for women in general, as well as for particular groups of women and outline detail for improving access to justice.

Aboriginal and Torres Strait Islander women

46. Access to justice is particularly limited for Aboriginal and Torres Strait Islander women, and women living in rural and regional areas. The 2006 Census reported that 21% of the Indigenous population lived in Inner Regional areas; 22% in Outer Regional areas; 10% in Remote areas and 16% in Very Remote areas compared to less than 2% of non-Indigenous population living in Remote and Very Remote areas.¹¹ The 2004 Senate Legal and Constitutional Affairs Committee Inquiry into

¹¹ Australian Bureau of Statistics, Population Characteristics, Aboriginal and Torres Strait Islander Peoples 2006, ABS cat no 4713.0 (2008) p 13.

WOMEN'S LEGAL SERVICES NSW

Access to Justice reported that there is significant:

evidence concerning Indigenous women's chronic disadvantage in their ability to access justice, including in relation to domestic/family violence and sexual assault. In this regard, the committee considers it highly important for governments to provide Indigenous women with appropriate victim support measures, as well as addressing their legal needs.¹²

47. Aboriginal women face particular obstacles in accessing services and justice. In our experience, Aboriginal women will access a service once a relationship of trust has developed between that service and the Aboriginal community. The disadvantage, discrimination, dispossession, the stolen generations and poor experiences of Aboriginal people with the police, courts, Department of Community Services and legal services in the past, continue to linger today for many Aboriginal people, particularly Aboriginal women.
48. Aboriginal women who are victims of violence (including sexual assault) feel an enormous sense of shame and humiliation about what has happened to them. They are afraid of retaliation and blame by their community if they report the violence and the perpetrator is incarcerated. These women will not report and act to try and stop that violence without the support of trustworthy services and personnel. Often they do not have anywhere safe they can go to in a small community, especially with their children.
49. It is not enough to focus on providing a service in relation to one aspect of the situation for an Aboriginal woman who is a victim of violence. Properly funded and resourced holistic services are essential if Aboriginal women and children who are victims of violence are able to be free of violence and live in safety. Building trust can take a long time and it is essential that local Aboriginal women are employed in services to engage with and support the clients. Any funding of services (for example, refuges, specialist violence services, family support, counselling and legal) must be long term and not done in a piece-meal fashion with the need to constantly apply for new funding every 6 to 12 months. Short term projects have significant limitations in being effective, including difficulty in recruitment of experienced staff, lack of time to develop strong networks and therefore trust in the community, an inability to be able to plan long term projects and lack of capacity to meet the needs of the clients they are intended to assist in any meaningful way.
50. In rural and remote areas, services such as emergency accommodation and counselling can be non-existent or extremely limited. Access to legal services can also be limited or non-existent. This is particularly problematic in the case of urgent matters (for example, in applications for recovery orders following a child abduction by a perpetrator). Legal Aid frequently does not provide a service to the geographic area, and the Aboriginal Legal Service usually does not provide representation for victims due to conflicts of interest. In addition, the Aboriginal Legal Service does not generally act in areas of law applicable to victims of domestic violence, such as family law. Private solicitors face similar conflicts of interest in acting for victims in small communities, particularly due to their limited number.
51. The NSW Government should increase funding to culturally appropriate Aboriginal

¹² Senate Legal and Constitutional Affairs Committee (2004) Inquiry into Legal Aid and Access to Justice, p xix.

and Torres Strait Islander women's legal services to ensure that they have access to justice.

Culturally and linguistically diverse women

52. The NSW Domestic and Family Violence Action Plan should reflect the particular difficulties that culturally and linguistically diverse (CALD) women have in accessing justice. WLS has published two reports on this topic – *Quarter way to equal* (1994) and *Long way to equal* (2004).¹³ Domestic violence was one of the significant legal issues for migrant and refugee women, identified in both Reports.
53. The *Long Way to Equal* research showed that while the needs of migrant and refugee women are by no means static, overwhelmingly the legal access barriers identified by the *Quarter Way to Equal* report, ten years prior, remain significant sources of difficulty for migrant and refugee women in their interactions with the Australian legal system. These barriers included limited finances to fund legal cases; low levels of English language; lack of knowledge about the legal system and legal services; the availability of legal aid; difficulties with the provision of interpreters and translations; and generally a lack of sensitivity to the needs of CALD women.

Women with disabilities

54. The Action Plan should also reflect the barriers faced by women with disabilities in accessing justice. For example, Women with Disabilities Australia has reported that there is an:

acute lack of available gender and disability specific data, research and information - at all levels of Government and for any issue. This aspect of neglect of disabled women in Australia has been specifically identified by the United Nations as an area warranting immediate and urgent attention by the Australian Government.¹⁴

Issues in accessing legal aid

55. Women's access to justice is also affected by their access to legal aid. The Senate Legal and Constitutional Affairs Committee Inquiry into Access to Justice reported that a "reassessment of the application of the Commonwealth guidelines and priorities to determine grants of assistance is urgently required."¹⁵ As the Committee states in the Report, while legal aid guidelines appear to be gender-neutral in that they do not distinguish between men and women applicants, the guidelines do not produce the same results for men and women in practice.¹⁶

56. Women continue to receive significantly less legal aid than men. For example, in the 2007-2008 financial year:

- NSW: 27.8% of legal aid case and in-house duty clients were women;¹⁷
- Vic: women received 36% of legal aid grants;¹⁸

13 Available at <http://www.womenslegalnsw.asn.au/downloads/ALONGWAYTOEQUALWeb_000.pdf>.

14 Women with Disabilities Australia, *Assessing the situation of women with disabilities in Australia: A human rights approach*, (July 2011) p. 6.

15 Senate Legal and Constitutional Affairs Committee (2004) *Inquiry into Legal Aid and Access to Justice*, para 4.24

16 Senate Legal and Constitutional Affairs Committee (2004) *Inquiry into Legal Aid and Access to Justice*, pp 46-48.

17 Legal Aid NSW (2008) *Annual Report 2007-2008*, p 26.

18 Victoria Legal Aid (2008) *Annual Report 2007-2008*, p 17.

WOMEN'S LEGAL SERVICES NSW

- SA: women received 27% of legal aid grants;¹⁹
- WA: women received 31% of legal aid grants;²⁰
- ACT: women received 41% of legal aid grants (based on approved applications).²¹

57. The lower levels of legal aid granted to women can be attributed to the higher level of legal aid funding provided to criminal law matters where men make up the vast majority of recipients. In the 2007-2008 financial year:

- NSW: 50.3% of Legal Aid NSW's overall budget was spent on criminal law services and 31.6% was spent on family law services;²²
- Vic: over 60% of all grants of legal assistance were for criminal law matters;²³
- Qld: 62% of applications approved were for criminal matters and 26% for family matters;²⁴
- SA: 77% of legal aid granted was for crime matters and 18% for family matters;²⁵
- WA: 63% of applications granted were for crime matters and 34% for family matters;²⁶
- Tas: 74% of applications approved in-house or assigned were for crime matters and 25% for family matters;²⁷
- ACT: 54.14% of applications approved were for criminal matters and 31.45% for family matters;²⁸
- NT: 70% of applications approved were for criminal matters and 23% for family matters.²⁹

58. There are limited legal services available to women seeking private ADVOs. In NSW, the Domestic Violence Practitioner Scheme operates in some, but not all, courts to assist women at the mention stage. However, means testing removes support for women just as they reach the most complex and arguably most crucial time for representation in the ADVO process: the hearing. There is limited value in supporting an applicant through court mentions if she is not prepared or unable to self represent, or if she loses a hearing she may have otherwise won with legal representation. Even if an applicant successfully represents herself at a hearing, the process can place unnecessary stress and trauma on someone who is already a victim

19 Calculated from figures provided in Legal Services Commission of South Australia (2008) Annual Report 2007-2008, p 21.

20 Calculated from figures provided in Legal Aid WA (2008) Annual Report 2007/2008, p 16.

21 Legal Aid ACT (2008) Annual Report 2007-2008, p 27. The annual reports for Queensland, Northern Territory and Tasmania legal aids do not provide a gender breakdown of legal aid grants made, applications approved or legal aid services provided across all matter types. Queensland provides statistics on the gender breakdown for civil and family law matters only: Legal Aid Queensland, Annual Report 2007-2008.

22 Legal Aid NSW (2008) Annual Report 2007-2008, pp 18 and 20.

23 Victoria Legal Aid (2008) Annual Report 2007-2008, p 17.

24 Legal Aid Queensland (2008) Annual Report 2007-2009, table 11.

25 Calculated from figures provided in Legal Services Commission of South Australia (2008) Annual Report 2007-2008, p 21.

26 Calculated from figures provided in Legal Aid WA (2008) Annual Report 2007/2008, p 2.

27 Note: These are the 2006-2007 statistics: Legal Aid Tasmania, Annual Report 2006-2007. The 2007-2008 annual report is not available on Legal Aid Tasmania's website.

28 Legal Aid ACT (2008) Annual Report 2007-2008, p 26.

29 Calculated from figures provided in Northern Territory Legal Aid Commission, Annual Report 2007-2008, p 26.

of violence. Having to rely on self or pro bono representation to secure protection against violence undermines the efficacy of the legal aid system, which should prioritise such human rights issues.

59. Access to domestic violence legal services is a particularly significant issue for women who are involved in family law proceedings and do not meet the Legal Aid means test, either because of their assets – which may not be accessible to them – or their income. As mediation may not be appropriate for victims of domestic violence and as high conflict relationships are more likely to lead to family law litigation, victims of violence will be disproportionately represented in family law litigation.
60. Women who are representing themselves in the family court often have very little time or inclination to go on to represent themselves in more court proceedings. The family law process can also be used by perpetrators to continue committing acts of violence against women. As the post-separation period is one of the most dangerous and high risk times for women victims of domestic violence, affordable or free legal services for family law and domestic violence protection orders are critical to keeping women safe.
61. Following the breakdown of a relationship many women are just above the means test but barely coping financially. The impecunious circumstances of women during this period have a significant impact on their access to domestic violence legal services. Having to pay for an ADVO hearing may be impossible – as a result women may be forced to self-represent if representation by a community legal service or pro bono representation is not available.
62. WLS is of the view that the legal aid means test should be abolished for women who are victims of domestic violence in ADVO or ancillary matters. A less stringent means test should also be applied in family law matters where the client has experienced domestic violence.

Interaction of family violence/protection orders with family law

63. There is often a complex interplay between family law and ADVO provisions. The most recent domestic violence legislation in NSW created a rebuttable presumption that children in a domestic relationship with a protected person should be included on the ADVO. A possible consequence is an increase in the proportion of ADVO matters going to hearing, as parties are less likely to consent if children are listed as protected persons. A corollary increase in evidence about children in ADVO matters may also result in longer hearings. This change is also in the context of the 2006 family law changes, which encouraged cooperative parenting and have raised community expectations about parents spending equal or substantial and significant time with each parent.
64. Many protection orders are consented to because there is little chance the defendant would succeed if the application proceeded to hearing due to the police being able to obtain sufficient evidence of the violence. This means that many of the most serious cases of family violence would involve protection orders made by consent. Unfortunately, as a result of the defendant consenting to the protection order, the police may not investigate further so evidence from witnesses is not obtained. This means that the protection order itself will often be the main contemporaneous evidence available to the judicial officer when determining subsequent parenting

proceedings.

65. WLS sees clear benefits in a system that allows people in need of protection orders to resolve issues with parenting arrangements as a result of family violence in one court. We note that the provisions in section 68R *Family Law Act* are expressed widely enough that the local courts can entirely discharge the existing orders replacing them with wholly new orders if considered necessary (although this rarely happens in practice). This means that there is a clear inconsistency between people with current parenting orders who could have new orders made by the local court during the course of proceedings for protection orders, while people without existing orders must use the family law courts (unless both parties consent).
66. While we acknowledge that empowering state and territory courts to make parenting orders could speed up the process, WLS is concerned that making final orders at this acute point in separation, and in busy local courts that have limited work in the family law jurisdiction, may not be appropriate.
67. The interaction between the family law system and the child protection and domestic violence systems should be better integrated. In 2010 considerable work was undertaken by the Australian and NSW Law Reform Commissions and published in *Family Violence – A National Legal Response*³⁰. The NSW Government should provide a comprehensive response to the recommendations made in this Report.

'Clare's law'

68. In recent months there has been media interest in the UK proposal known as 'Clare's law' which seeks to provide a warning by way of access to a criminal record check for prospective intimate partners.
69. WLS has concerns about such proposals. Rates of domestic violence in Australia remain unacceptably high and more must be done to address this. However, we must be sure that new laws and policies will protect, and not jeopardise further, the safety of women. Our concerns include:
 - a criminal record check would not expose the significant amount of domestic violence that goes unreported or without convictions.
 - the absence of a record may give women a false sense of security.
 - disclosure of past violence may not affect a woman's decision about entering a relationship, depending on the point in the relationship at which the check is made. The cyclical nature of domestic violence can mean that women stay with men they know to be violent, believing that it won't happen again."
70. If a law like 'Clare's Law' were to be introduced in NSW, it should be done so on the basis of strong evidence that it would increase safety for women.

³⁰ ALRC Final Report 114 and NSW LRC Final Report 128.

WOMEN'S LEGAL SERVICES NSW

If you would like to discuss any aspect of this submission, please contact me or Edwina MacDonald, Law Reform and Policy Coordinator on

Yours sincerely,

Janet Loughman
Principal Solicitor