

SUBMISSION

ACCESS TO JUSTICE ARRANGEMENTS

Prepared by Women's Legal Service Victoria for the
Australian Productivity Commission

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INTRODUCTION

Thank you for the opportunity to provide a submission to the inquiry.

We congratulate the Commission on undertaking such a comprehensive review of access to justice arrangements.

Our submission focuses on access to justice in the family law system for women experiencing family violence and relationship breakdown.

We consider the family law system to be a key part of the civil justice system. Almost half of all marriages in Australia will end in divorce according to the Australian Bureau of Statistics. As such, family law is an area of law that affects many Australians. Outcomes in family law impact on their social and economic well-being, as well as that of their children.

Relationship breakdown has a close nexus with family violence. Family violence against women and children is one of the most prevalent forms of violence in our community. The family law system has an important role to play in protecting children and minimizing the risk of family violence.

Given this social context, it is particularly important that the family law system is accessible, effective and responsive.

Our submission identifies the barriers to accessing the family law system from the perspective of the women that we work with. Our client group consists of women from a range of different cultural, ethnic and religious backgrounds. The women we assist are low income earners and have experienced other forms of disadvantage such as physical and mental disability.

Our submission includes case studies, some of which are individual client cases that we have assisted with at our service and some of which are examples of types of cases that we commonly see. All individual client case studies are de-identified and provided with the consent of the client.

WOMEN'S LEGAL SERVICE VICTORIA

Women's Legal Service Victoria (WLSV) is a not for profit organisation that has been providing free legal services to women for over 30 years. We specialise in issues arising from relationship breakdown and violence against women. WLSV provides free and confidential legal information, advice, referral and representation to women in Victoria.

Through our associated service, Family Law Legal Service, WLSV operates a daily duty lawyer service at the Family Law Courts and provides legal advice and representation to participants in VLA Roundtable Dispute Management and clients of the Melbourne Family Relationship Centre.

We initiate and participate in law reform activities, ensuring that clients' experiences are taken into account when legal policy is being developed or when changes are being made to the law.

We deliver legal education, training and professional development to a range of organisations and professional groups.

We also coordinate a volunteer program with over 100 volunteers.

We are funded by the Indigenous Justice and Legal Assistance Division, Attorney General's Department, Canberra and Victoria Legal Aid.

CONTEXT

We have provided some background to the issues that face disadvantaged women who access the family law system. This context is important because it illustrates the complex nature of problems that arise for women accessing the family law system. It also highlights why reform of the family law system must be a priority for Government.

The two areas of family violence and relationship breakdown are complex and interrelated.

Family violence

In Victoria family violence is one of the most prevalent forms of violence, constituting 26% of all crime against the person.

Family violence affects the emotional, psychological, physical, social and economic well being of women and their families. It can include emotional, verbal, social, economic, psychological, spiritual, physical and sexual abuse and is characterised by an ongoing pattern of behaviour aimed at controlling one's partner through fear.¹

In the background paper for The National Plan to Reduce Violence against Women and their Children, family violence is recognised as a complex phenomena where the vast majority of cases are perpetrated by males against females.

The impact of family violence on the health and well-being of women and children is profound. It is the leading cause of death, disability and premature death for women aged between 15 and 44 years.² Close to 20% of all homicides are intimate partner homicides.³ Older women experience violence and abuse at a rate that 2.5 times that of older men.⁴ Almost a quarter of children in Australia have witnessed violence against their mother or step-mother.⁵

¹ The National Plan to Reduce Violence against women and their Children 2009

² VicHealth (2004), The health costs of violence; Measuring the burden of disease caused by intimate partner violence: A summary of findings; Victorian Government.

³ ibid

⁴ ibid

⁵ ibid

Relationship breakdown

Relationship breakdown is the second most common reason people become homeless.⁶ Like family violence it disproportionately impacts on women and children. Women are economically worse off after relationships breakdown because they are more likely to have taken time off to care for children, and are therefore less likely to have ongoing income, future earning capacity or substantial superannuation.

The lack of equitable economic opportunity, economic independence and/or economic literacy significantly increases the likelihood of women being not just poorer but poor when the relationship breaks down.

The nexus between family violence and relationship breakdown

When women and their children experience family violence and relationship breakdown, the legal issues multiply. Women in this context may find themselves attempting to resolve legal issues in several jurisdictions at the same time or in very close succession. For example they may have to deal with:

1. a family violence intervention order in the Victorian Magistrates' Court
2. criminal charges arising from the family violence in the Victorian County Court
3. complex property and children issues in a family law case in the Federal Circuit Court or Family Court
4. child support matters in the Federal Circuit Court and
5. in some instances, child protection issues in the Children's Court.

Understanding disadvantage

Chapter 5 of the Commission's Issues Paper poses the question, 'what groups are particularly disadvantaged in accessing civil justice and what is the nature of this disadvantage?'

Women who experience family violence and relationship breakdown are particularly disadvantaged in accessing the civil justice system. Alongside disadvantaged that arises due to their gender and their experience of family violence, they are face disadvantage due to:

- economic status (low income earners)
- social status
- levels of education and literacy
- mental or physical disability
- inter-generational trauma
- cultural, ethnic or religious background
- migration status
- residential location (particularly for a person in rural, regional and remote areas)

⁶ Australian Institute of Health and Welfare (AIHW) Homeless people in SAAP: SAAP national Data Collection annual report, SAAP NDCA report series 12, Canberra 2008

- degree of marginalization in the community.

Disadvantage does not create homogenous groups of people with the same legal needs. For example, the term 'culturally and linguistically diverse communities' (CALD) is a commonly used description of groups of people and can lead to an assumption that the needs of individuals in such communities are the same.

However, individuals from CALD backgrounds have a range of different and complex needs that are influenced by other circumstances; for example, their levels of literacy, understanding of English, experience of the legal system in their home country or migration status (they may be on a temporary spousal visa or have migrated thirty years ago).

AVENUES FOR DISPUTE RESOLUTION AND THE IMPORTANCE OF ACCESS TO JUSTICE

Access to justice is fundamental to the rule of law. It is also essential for the enjoyment of basic human rights, social inclusion and the effective functioning of any democracy.

A good justice system must be accessible in all aspects. Accessibility means it must be fair, simple, affordable and easy to understand and navigate. It must also have pathways for early intervention to prevent further disadvantage.

LEGAL NEED

Defining legal need

Legal need is a complex concept that encompasses a spectrum of issues. When legal need is met, access to justice is facilitated. If legal need is met it can assist people to:

- prevent and intervene early to address legal problems
- access and retain timely and specialist legal advice and representation
- gain an understanding of law, legal process and options for resolution
- overcome power imbalances between parties (especially in family law disputes where family violence has occurred)
- access court and tribunal systems in a manner that meets a person's specific needs (for example, their need may be disability access or an interpreter)
- obtain a positive outcome during the legal process and from the resolution of their legal problem (both at an objective and subjective level).

Applying a gendered lens to legal need

There are structural and systemic barriers for women in accessing justice. It is important that any definition of legal need be developed within a gendered framework.

Such a framework is important because poor outcomes in the family violence, family law and child protection jurisdictions disproportionately affect women. Women are significantly more likely to be victims of family violence. According to 2011 Australia Bureau of Statistics women also continue to be the primary carer in single parent families, accounting for 83% of single parent families.

Gender inequality is evident in grants of legal aid assistance. Women access legal aid for family violence, discrimination, family law and child protection cases. However, legal aid funding is concentrated on criminal law cases, where the accused is more likely to be male.

Unmet legal need

There is a significant level of unmet legal need amongst disadvantaged women who experience family violence and relationship breakdown.

Given the prevalence of family violence and relationship breakdown in our community, it is little wonder that the areas of family law and family violence are two of the highest demand areas in terms of legal advice and information.

Victoria Legal Aid identified in its 2008/2009 Annual Report that:

“Of the 88,732 information calls received by [VLA’s] phone advice line this year, the top two queries related to children’s living arrangements and settlement of property after divorce. Left unresolved, or without someone to help, these factors are known triggers for violence and intimidation.”

Unmet legal need in this context encompasses the following:

a. Lack of access to legal information, advice and representation

- lack of access to timely and specialist legal information and advice to prevent legal problems from arising or intervening early (that may be prior to separation and/or during the violence).
- difficulty accessing legal aid in family law cases due to:
 - a shortage of Government funding to legal aid commissions
 - the limited funding allocation within legal aid for areas of law that women are likely to access
 - strict funding guidelines that preclude assistance to women on low incomes or who may have a small level of financial support from family members, charities or friends
 - strict funding guidelines in Victoria which result in women losing their legal representation at trial.

- limited availability of assistance from community legal centres that specialize in family law, due to a shortage of Government funding to community legal centres.
- prohibitively expensive costs of private legal representation and barristers' fees in family law.
- lack of availability of pro bono legal representation in family law (both by private law firms and barristers).

b. Complexity of multiple legal issues and jurisdictions

- difficulty resolving multiple legal issues that arise in the areas of family law, family violence, criminal law, victims of crime compensation and child protection. These issues are dealt with in different courts, different jurisdictions and under different pieces of legislation.
- a lack of understanding of the complex intersection between family violence and family law and how each area of law impacts and informs the other.

c. Law and court process

- prohibitively expensive court fee structure in family law that applies to low income individuals who do not satisfy the financial hardship test.
- the 'reduced' divorce application fee of \$265 that applies to individuals who experience financial hardship.
- lack of legislative protections in court hearings for victims of family violence who are exposed to direct cross-examination by an abusive ex-partner
- complex pieces of legislation, such as the *Family Law Act* that are extremely difficult to read and understand for a non-legal professional.
- complex and lengthy processes in the family law jurisdiction.

d. Lack of specialist training and expertise

- family report writers, independent children's lawyers, judicial officers, courts staff and legal advisors do not necessarily have the knowledge of the dynamic of family violence to deal with women who are victims of family violence,.
- there is also a lack of training around working with individual parties in the family law system who experience disability – there is a very limited understanding of mental health issues and what is culturally and religiously appropriate in the family law system.

Examples of unmet legal need

We have provided the Commission with two specific examples, below, to illustrate the degree of unmet legal need for women who experience family violence and relationship breakdown.

We have provided further examples of unmet legal need in response to the questions in Chapter 4 - The cost of accessing civil justice.

Women with small property claims in family law disputes

The large majority of clients that we see at WLSV are low income earners. For such women, seeking a property settlement when their relationship breaks down is prohibitively expensive.

In relationships where both parties are low income earners and may experience other forms of disadvantage, the assets from the relationship are generally of relatively small value⁷. These assets may include:

- a car
- furniture
- pets
- money in a joint bank account
- superannuation and / or
- a property (where there is little equity due to a large mortgage).

Women who experience family violence often leave the family home with little more than their children and their clothing. As such, the assets remain in the possession of their ex-partner. In some instances cars and titles to property are in the sole name of their ex-partner.

For such women, pursuing a property settlement through the Federal Circuit Court is cost and time inefficient. The cost of legal representation, filing fees and disbursements are prohibitively expensive. If their ex-partner disputes their claim, resolution of their legal problem can be prolonged for months and years.

The financial benefit gained from an equitable property settlement in these instances are far outweighed by the cost and time of accessing the complex family law system.

Though the financial benefit for women may be small it can have a significant impact on the economic and social well-being of women well into the future. A small equitable property settlement can provide a woman with:

- the money needed to pay a bond for a rental property or
- a car (if it is transferred into her name) so that she can drop her children off at school and drive to work or
- a share of superannuation to provide some financial security for her retirement.

We have set out in more detail below (4 – Consequences of unmet legal need), the economic and social consequences for women in situations where they are unable to have their legal needs met.

When the family law system is inaccessible for so many women who have small property claims, this becomes a significant area of unmet legal need.

⁷ We define 'small value' as being less than \$100,000, though more commonly for clients their assets are of less than \$50,000 value.

In response to questions in Chapter 6 – Avenues for improving access to civil justice, we have proposed the creation of a family law - small property claims tribunal to facilitate better access to justice for disadvantaged individuals.

Access to legal aid funding

Legal aid is a cornerstone of our legal system however our experience in Victoria is that legal aid has become increasingly limited for disadvantaged women. Our comments are limited to the Victorian Legal Aid guidelines.

It is our experience assisting disadvantaged women, that there is significant area of unmet legal need for women who are either unable to access legal aid or whose legal aid is withdrawn during their family law proceeding due to the current family law guidelines.

Our service is seeing an increasing number of women in this category who are “falling through the cracks”. They are unable to afford private legal representation and as a result must negotiate and represent themselves in family law proceedings.

For women in family law proceedings, access to legal representation is key to promoting financial security and avoiding homelessness. Legal representation also provides women with an opportunity to raise allegations of family violence and to ensure that their children’s safety is prioritized.

The gendered nature of legal aid funding is an ongoing concern and has been raised by Women’s Legal Services Australia in its submission to Allens Consulting on the Review of the National Partnership Agreement on Legal Assistance.

We are also concerned that withdrawal of legal aid at particular stages of a family law proceeding can be a barrier to the timely resolution of the proceeding and can contribute to court delays.

Losing legal aid for trial in family law cases

In December 2012, VLA announced changes to how it would fund criminal law and family law cases in Victoria. The changes came into effect on 7 January 2013. The reason cited for the guidelines changes was a budget deficit for VLA.

In family law cases, VLA’s new guidelines provide that if one party is unrepresented at trial in parenting disputes, then the other party will not be eligible for legal aid. According to VLA’s information “*funding of parents in family law matters...will be limited to trial preparation.*”⁸

In our experience, the nature of matters that proceed to trial in family law parenting disputes are often high conflict cases with multiple and complex issues. These include cases where there is

⁸ A more recent change to the guideline has resulted in the creation of narrow exceptions for a person with an acquired brain injury, a person with a diagnosed mental illness in the care of prescribed mental health service or a case listed in the Magellan list.

a long history of serious family violence, drug and alcohol issues, physical and mental health issues and issues of child safety.

At a practical level this has had the perverse outcome so that where both parties are legally aided, both parties lose their legal aid (and thereby their legal representation) at trial.

For women who have experienced family violence and struggle with other forms of disadvantage, this is an extreme point of unmet legal need.

For such cases to go to trial with two parties unrepresented impacts detrimentally on the parties to the dispute, the children who are the subject of the dispute and more broadly the family court system and the judiciary.

For women who are victims of family violence, who are faced with coming face to face with their abusive ex-partner in the court room, the consequences of losing legal representation for trial are profound. The consequences include:

- poorer legal outcomes at trial (with the risk of losing care of their child)
- inappropriate parenting settlements prior trial (to avoid having to go to trial)
- risk of direct cross-examination by their abusive ex-partner and
- emotional stress, trauma and exacerbation of mental health issues

Case study:

Jenny is a single mother with three children under the age of 18. Her ex-partner, David, has spent time in prison and has drug and alcohol issues. During the relationship there were serious incidences of family violence and a long standing intervention order exists. Jenny suffers from post traumatic stress disorder as a result of a serious assault against her by David. David was convicted over this assault. Her children have not seen their father in several years. Jenny applied to the Federal Magistrates Court in 2012 for an order that her children live solely with her.

Jenny was granted legal aid and had private lawyers assist her in preparing her case. After the VLA guidelines changed, her private lawyer wrote to VLA requesting that legal aid funding continue for trial representation. Her lawyer argued that she was extremely vulnerable as a victim of family violence and as someone who suffered mental health issues. VLA responded to say that the guidelines changes provided no flexibility for special circumstances and she would not be eligible for trial representation if her ex-partner was also unrepresented.

Unfortunately, her ex-partner also lost his legal representation for trial, as he too had a grant of legal aid. Both Jenny and David came to court on the date of the trial unrepresented.

Jenny was terrified of facing David in court. She asked to sit in the safe room while she spoke to our court duty lawyer. The court duty lawyer then spoke to David to try and negotiate a settlement.

Every time it was mentioned to Jenny that if negotiations broke down, she would have to go into court by herself, she fell apart. She started shaking and crying. The thought of David not only being in the same room as her, but also being able to directly cross-examine her was too much for her.

It took five hours for the duty lawyer to negotiate a settlement between David and Jenny. For that whole time, Jenny sat in the safe room contemplating the real possibility she would have to run a trial by herself, against the man who had seriously assaulted her.

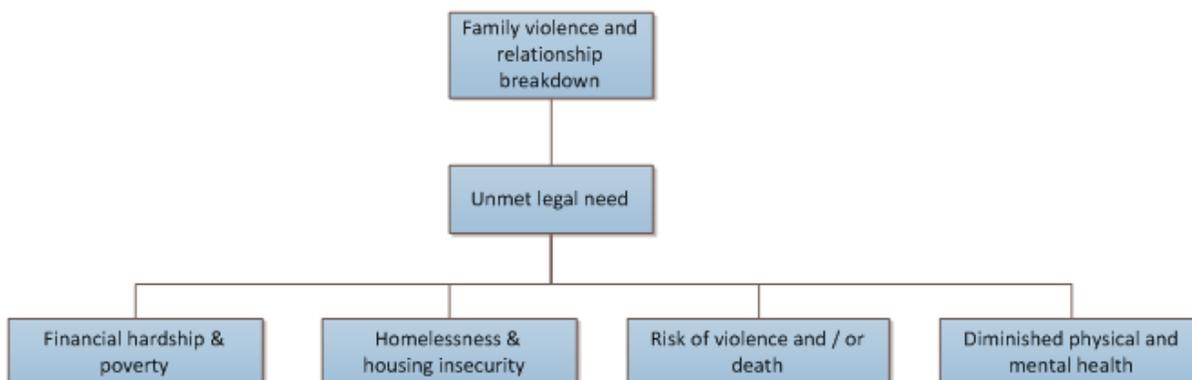
Consequences of unmet legal need

For women experiencing family violence and relationship breakdown, the consequences of unmet legal need can be profound.

The consequences of a failure to access justice for women and their children include:

- financial hardship and poverty
- homelessness
- heightened risk of violence and/or death
- diminished emotional, mental and physical well-being

The consequences of unmet legal need are heightened when women experience specific forms of disadvantage (such as, for example, disability, background or locality). When a person experiences a form disadvantage, they can encounter additional barriers to accessing justice and additional consequences of unmet legal need.



Risk of future family violence and/or death

The most significant consequence of unmet legal need for women and their children, who experience family violence and relationship breakdown, is the future risk to their safety.

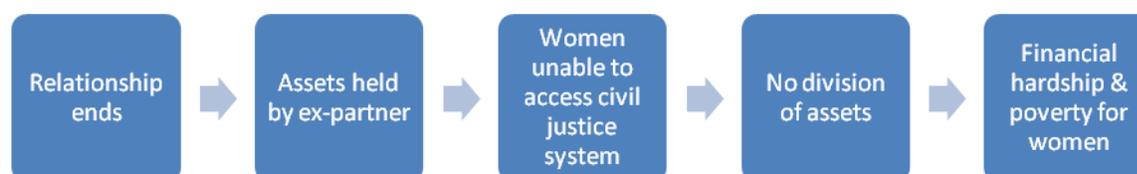
Women are more likely than not to remain in a violent relationship if they are unable to access justice through the civil justice system. Interventions in family law can assist women to become financially stable and avoid homelessness. However where women are unaware of such interventions or cannot access them, then the fear of financial hardship

and homelessness more often than not compel women to remain with a violent partner.
Impact of family violence on health and well being.

We have outlined above some of the impact of family violence on the health and well-being of women and their children. The economic costs to the Australian economy are also substantial. According to the Access Economics report, the cost of violence against women in 2002 – 2003 was estimated at \$8.1 billion. \$3.5 billion was attributable to pain, suffering and premature mortality of the victims.⁹ Without appropriate action, the estimated cost of violence towards women and their children to the Australian economy will be \$15.6 billion by 2021 – 2022.¹⁰

Financial hardship and poverty

Family violence and the breakdown of a relationship are key social determinants of financial hardship and poverty for women and their children in Australia.



We have highlighted above the different forms of unmet legal need for women in the areas of family law. When legal need is met, it can facilitate good outcomes in family law including:

- equitable property settlements
- access to spousal maintenance and
- appropriate child support payments.

The statistics and research outlined below illustrate the significant and disproportionate impact that family violence and relationship breakdown can have on women and their children.

Financial impact of relationship breakdown

A 2009 study by the Australian Institute of Family Studies found that at least 60% of separated women experienced some form of financial hardship – such as going without food or being unable to pay bills, in the first year after divorce. Four years after divorce, women were still significantly worse off than divorced men and women who had never divorced¹¹.

According to the Australian Bureau of Statistics, women continue to be the primary carer in single parent families, accounting for 83% of single parent families. It is these women who are most vulnerable to experiencing financial hardship and poverty (ABS 2011).

⁹ The National Plan to Reduce Violence against Women and their Children, 2009

¹⁰ *ibid*

¹¹ Gray, Stanton, Qu, Australian Institute of Family Studies, 'The effect of relationship breakdown on income and social exclusion' paper presented to the Australian Social Policy Conference, 8 July 2009.

Financial impact of family violence

It was also found that women who report spousal violence are more likely than women who report no violence to have received a minority share of assets at the end of a relationship.

Economic abuse is a key element in the dynamics and nature of family violence. A recent Australian study into family violence found that 80% of victims surveyed had experienced financial abuse¹². Economic abuse limits women's ability to "acquire, use and maintain" economic resources and can lead to women and their children experiencing financial hardship and poverty¹³ (Adams et al 2008).

Women's economic recovery from relationship breakdown and family violence is constrained by a range of factors including:

- debt incurred during a marriage (such as mortgages and credit cards)
- reduced earning capacity due to having a greater role in caring for children after separation
- lack of adequate child support and
- increased household expenses (such as transport, food, school fees) which must be covered on a sole income or Centrelink benefit.

Homelessness

Unmet legal need for women experiencing family violence and relationship breakdown can lead to housing insecurity and homelessness.

This can occur in the following ways:

- women leave the family home after a family violence incident and are unable to return
- women are unable to negotiate positive outcomes in property settlements leading to financial insecurity and loss of their home
- women are not linked in with housing providers when they access courts and lawyers.

If women are unable to access timely and specialist legal advice, they are not aware of what options they have to secure good outcomes in family law and ways in which they may be able to remain in their home safely.

Similarly if they are unable to access the civil justice system due to the costs of running a family law property claim, they are unlikely to obtain an equitable property settlement that may assist in preventing homelessness and housing insecurity.

¹² Evans, *Battle-scars: long-term effects of prior domestic violence*, Centre for Women's Studies and Gender Research, Monash University, 2007.

¹³ Adams, Sullivan, Bybee & Greeson, 2008 'Development of the scale of economic abuse' *Violence Against Women*, vol 14, no 5, p 564.

Marginalisation, disability and unemployment can further compound women's exposure to housing insecurity and homelessness.

The Government's White Paper on homelessness, *The Road Home: A National Approach to Reducing Homelessness* identified family violence as a major driver of homelessness and the single biggest reason for people seeking homelessness assistance.

The White Paper also identified relationship breakdown as the second most common reason people seek assistance from specialist homelessness services.

Though over 40% of people experiencing homelessness are women, women's experiences of homelessness and strategies to meet their specific housing needs are not always part of the mainstream policy debate.

Women and their children experience homelessness in different ways to men. Women experiencing family violence and relationship breakdown may struggle to keep or access safe, secure and appropriate housing. Without access to temporary housing women are left with few options.

Case study

Adriana separated from her husband after ten years of marriage. Adriana's husband had been physically and emotionally abusive towards her.

Their 8 year old son James had witnessed some of the violence and had been developing behavioural problems including bed wetting.

When Adrianna left the family home (after another violent incident) she took only James with her. Her husband controlled the finances and she suspected that there were unpaid credit card debts. Her husband owned a business but she had no knowledge of its worth.

Adriana moved between houses of relatives and friends until she found a small unit to rent. She worked a part time job in the hours when James was at school. She had trouble meeting the day to day costs of living such as rent, school fees, food and bills.

As a single parent she spent much of her time working and caring for James. There was no time during the week for her to see a lawyer, nor did she think she could afford one on her limited income.

Though she wished to get a divorce from her husband, the filing fee of \$265 was too much for her.

She reluctantly agreed to let her husband spend time with James, though she was worried for his safety and well-being. Her husband had threatened to take her to court if she did not let him see James.

For Adriana the consequences of unmet legal need are significant. Due to a lack of legal information, advice and representation, Adriana is not aware that she has an entitlement to child support and an equitable share of the property pool (including the business) after ten years of marriage. She is not aware that in family law the safety of the child is a priority when deciding whether a child spend time with a parent.

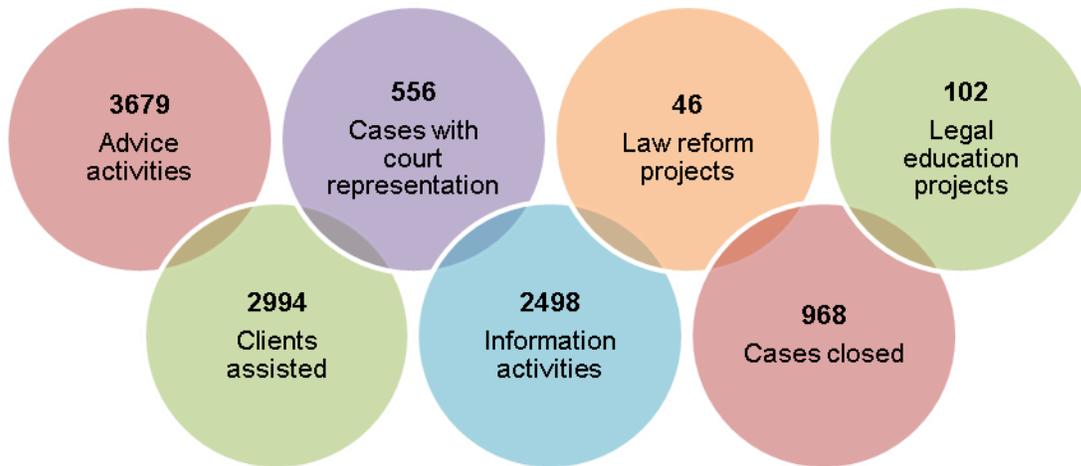
As such, Adriana and her son suffer significant financial hardship as well as experiencing homelessness. Her son's safety and emotional well-being is at risk by being in the care of a person who has perpetrated family violence.

Frequency, nature and types of disputes

We have provided a breakdown of WLSV's statistics from the last financial year to illustrate the demand for assistance in the areas of family violence law and family law.

In the last financial year, WLSV assisted 2994 individual clients and provided a total of 3679 instances of advice. We also represented 556 women before the Courts.

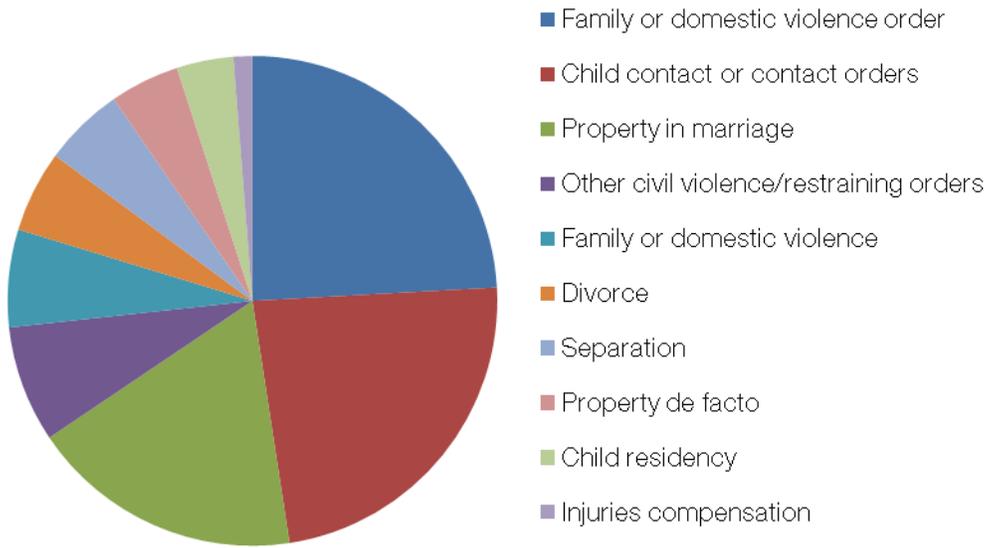
The following is a breakdown of our service delivery in the last financial year¹⁴:



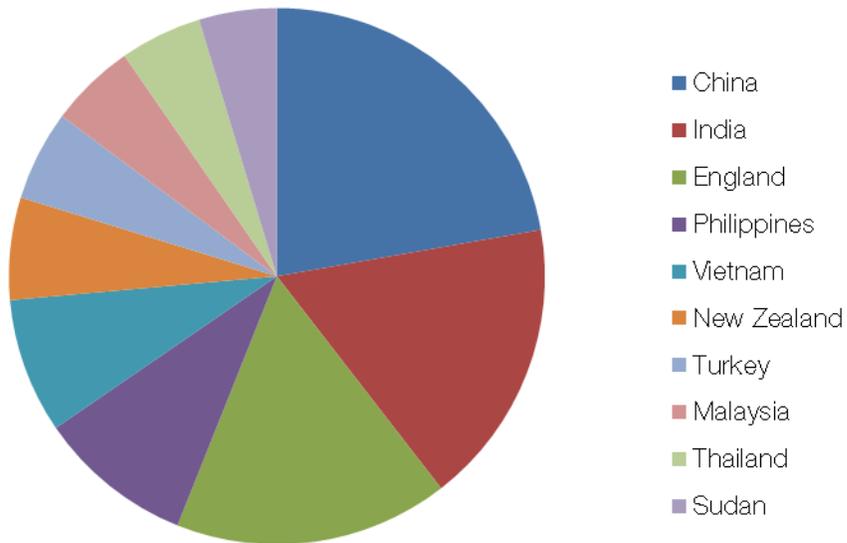
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¹⁴ Women's Legal Service Annual Report 2013 (not publicly available as yet)

Top Ten Problem Types



Top Ten Occurrences of Country of Birth



IS UNMET NEED CONCENTRATED AMONG PARTICULAR GROUPS?

Self-represented and unrepresented litigants

We do not agree that the term 'self-represented' should be used to describe people who have sought and been unable to obtain legal representation. A person who chooses to be legally represented however is not, should be described as 'un-represented'.

In the 2011/2012 financial year, the Family Court of Australia reported that in their finalised cases for the year, 17% had at least one party self represented and 10% of the cases saw both parties unrepresented.¹⁵

In the same financial year, the Federal Magistrates Court (now the Federal Circuit Court) reported that 7.22% of the cases before them had both parties unrepresented, 20.43% had the respondent unrepresented and 3.49% had the applicant unrepresented.¹⁶

Growth in unrepresented women in family law

We have seen a significant growth in the number of women who are unrepresented in family law proceedings in 2013, due to guidelines changes announced by Victoria Legal Aid (VLA)

In family law cases, VLA's new guidelines provide that if one party is unrepresented at trial, then the other party will not be eligible for legal aid.

In practice, this means that a women who is a victim of family violence and who has legally aided representation, will lose legal representation at trial.

THE COSTS OF ACCESSING CIVIL JUSTICE

Financial costs

Why private legal representation in family law is unaffordable for so many

Private legal representation comes at a price. Unfortunately for most low to middle income earners, that price makes legal representation unaffordable.

In family law, it is common for private lawyers to charge anywhere between:

- \$300 to \$450 per hour for the services of a junior lawyer
- between \$400-\$450 per hour for the services of an associate
- in excess of \$450 per hour for a senior associate and

¹⁵ Family Court of Australia Annual Report 2011/2012

¹⁶ Federal Magistrates Court of Australia Annual Report 2011/2013

- partners between \$500-\$600 per hour.

Fee structures are dependent on factors such as the location of the practice and the seniority of the lawyers. It is noteworthy that suburban practices commonly charge less than firms located in the CBD area, possibly due to the costs of overheads.

In addition to the hourly fees for the services of a lawyer, the client will also have to bear fees such as for scanning, faxing and photocopying. The example of photocopying is a classic one. The Federal Circuit Court costs scale sets the costs of photocopying at 0.69C per page and the Family Court costs scale sets this at 0.74C per page.¹⁷ In a family law matter where a significant amount of work goes into writing an affidavit, it is not hard to conceive that these costs can easily add up and make an impact on the final bill.

There are then other disbursements such as court costs (filing fees, setting down for trial fees), costs to obtain reports from professionals (eg. family report writers, medical practitioners) and costs for a barrister's appearance at the actual court hearings. Barristers' costs can escalate to more than \$4,000 per day depending on the nature of the issues before the court and seniority of the barrister. Reports from medical professionals often cost between \$1,200 to \$3,000 per report.

Our enquiries of private practitioners have uncovered a general estimate to the total costs a client bears in the following scenarios:

Complexity of Family Law Case	Small Suburban Firm (\$)	Specialist CBD Firm (\$)	Large Firm (\$)
Less Complex Case ¹⁸ (Including pre-action negotiation, court proceedings, trial <2 days)	\$20,000-\$30,000	\$15,000-\$30,000	\$20,000 - \$40,000
Complex case ¹⁹ (including pre-action negotiation and court proceedings to trial ≥3 days)	In excess of \$200,000	In excess of \$300,000	In excess of \$250,000

The high costs associated with legal fees, for single mother's who do not qualify for legal aid assistance, is a prohibitive consideration in deciding whether to firstly consult a lawyer and secondly to pursue a legal remedy.

¹⁷ Schedule 1, Federal Circuit Court Rules 2001 and Schedule 3, Family Court Rules 2004

¹⁸ Relatively straightforward, few issues

¹⁹ Huge intractable conflict between the parties and a range of more than three issues

Our free legal services can assist in alleviating some of the legal costs for our clients, however, the costs of disbursement (which CLCs do not have the funding to pay), can also be a significant barrier for women.

For a single mother raising her child on a pension and receiving little financial help from family, the costs of disbursement (such as barrister's fees or medical reports) are often prohibitive and is a factor she considers when deciding to continue on with legal proceedings or to accept an unsatisfactory settlement of her matter which may not necessarily be in the best interest of the child.

Legal aid funding guidelines in family law

We have highlighted above the issue of women losing their legal aid funding (and thereby their legal representation) at the point of trial in Victoria.

There are a number of other issues with the VLA family law guidelines which result in women being unable to access legal aid funding or losing funding in the middle of their family law proceeding.

Financially associated person (FAP)

According to the VLA family law guidelines a 'FAP' is defined as:

“any person who usually provides the person applying for a grant of legal assistance with financial support or

any person who could reasonably be expected to financially assist the person applying for a grant of legal assistance.”

We consider the current guidelines to be so broad that they result in assessments that are, in our view, unreasonable and detrimental to disadvantaged women.

The breadth of the current guidelines allows an assessment to be made that any person who assists a woman to meet any financial costs that arise is a FAP. For a woman who is struggling to keep her family above the poverty line, it is not unreasonable for family members and friends to provide once off, or ongoing financial assistance, to assist her to pay her family's daily living costs.

For example, a woman with three school aged children on a single parent benefit may not be able to pay her rent one month. Her parents, who are retired, offer to pay her rent. They also offer to pay her monthly phone bill so that she does not have to be concerned that her phone will be cut off. Her parents draw on their superannuation money to provide this support to their daughter. On the application of the current guidelines, the woman's parents would be considered FAPs. Is it reasonable that retired parents living off a small amount of superannuation be expected to pay their daughter's legal fees as well as providing other financial support to her and her family?

In our experience, if there is a suggestion that a woman may have financial assistance from another source, her legal aid application will be rejected in the first instance. Though an appeal process is available it must be understood that for a woman who does not have an understanding of VLA guidelines and processes, a written appeal is not a realistic option. Therefore, the unintended consequence is that vulnerable and marginalised women who are assessed as having a FAP in the first instance are denied legal representation.

Substantial issue in dispute

Quite rightly the focus of legal aid funding is on matters that have “substantial issues in dispute”.

Our understanding is that VLA monitors proceedings and makes assessments at different points in a proceeding whether a substantial issue in dispute exists. Therefore, aid may be withdrawn in the middle of a proceeding, or immediately before trial.

There are several problematic issues that arise in this context.

Firstly, there is often no written reasons provided as to why a decision has been made to withdraw aid or what evidence was relied on to make the decision. We see many women who are informed by their private lawyer that they can no longer act for her because her aid has been withdrawn. She is simply left to find another lawyer or to seek assistance from our service in the middle of her case.

Secondly, there are significant adverse consequences when aid is withdrawn at crucial times in a family law proceeding. Where a woman loses her private legal representation and the parties are close to settling, she is left in an unequal negotiating position. Often where there is an unequal power dynamic, women may be pressured into agreeing to a settlement that is detrimental to her and to her children’s safety. Faced with having to proceed without legal representation, it is understandable that a woman may agree to a property settlement or parenting arrangements that are not in her best interests.

Thirdly, when aid is withdrawn in the middle of a family law proceeding, it contributes to substantial court delays. In fact, a decision to withdraw aid can change the course of a proceeding quite significantly. When aid is withdrawn, women are often required to appear at their next hearing or at trial to seek an adjournment. Or, a woman may choose to represent herself at a hearing or trial or choose not to appear at all, increasing the likelihood that she will have orders made against her.

Court fees

Reduced fee to file an application for divorce

On 1 January 2013, the reduced fee to file an application for divorce increased from \$60 to \$265. For a mother on a single parent benefit or disability support pension, a fee of \$265 is prohibitively expensive.

For a victim of family violence, finalizing a divorce is an important step in ending an abusive relationship and recovering emotionally and physically from the trauma of the relationship.

The following de-identified client case illustrates the importance of ensuring that divorce is accessible to the most marginalized in our community:

Dina

Dina is a single mother and arrived in Australia as a refugee several years ago. She is on Centrelink benefits and is the sole carer for her 6 year old daughter. She has no assets and lives in a rental property. Every week she must meet the costs of rent, utilities bills, food, school fees and transport.

Two years ago she fled a violent marriage and moved interstate for her safety. After she left the relationship, her husband told all her family and friends in her community here in Australia and overseas that she was adulterous during their relationship. While she is still married to her husband, her family and friends continue to be critical of her and accuse her of adultery. Divorce is an important step for Dina both culturally and for her to finally sever ties from her abusive husband.

Dina has tried to save money to file for divorce, but is struggling to do so. Dina not only needs to pay the \$265 filing fee but also a \$100 translation fee for the marriage certificate and, at least, an \$88 fee for a process server to serve the divorce application.

Every day we see women such as Dina who are simply unable to finalise the end of their marriage because of the \$265 divorce fee. This fee is on top of the disbursement they often pay for a process server to locate and serve the application upon the violent ex-partner.

Low income earners who are not exempt from filing fees

We believe that individuals on low incomes, who may not necessarily satisfy the test for financial hardship applied by the court, are unfairly disadvantaged by the current structure of fees in the family law jurisdiction.

For those who fall outside of the financial hardship test, full fees apply. This includes, in the Federal Circuit Court, \$500 to file an application that relates to children and property, \$560 to defend a matter and \$800 for divorce. This is prohibitively expensive for a woman on a low income who may not satisfy the financial hardship test because she works and has a small amount of savings in the bank.

We suggest a different approach to assessing court filing fees in the family law jurisdiction, which ensures a fairer, more accessible system for all users of the court system.

We recommend that filing fees be assessed according to an income scale. For example, a person earning \$35,000 pays 30% of the full fee, a person earning \$50,000 pays 70% and a person earning \$80,000 or more pays the full fee.

Timeliness and delays

Vexatious litigants and abuse of process

Vexatious litigants are a significant problem for some of the women that we assist.

The nature of family violence is such that it is characterized by issues of control and dominance. In some instances this translates into prolonging family law proceedings by refusing to negotiate a settlement.

It also can result in vexatious litigation, where numerous applications are made over a long period of time in several different jurisdictions – for example multiple applications in the family law jurisdiction together with cross-applications and appeals in the criminal and family violence intervention order jurisdiction.

We have provided detailed comment about vexatious litigants in response to questions in Chapter 11 – Improving the accessibility of courts.

Loss of legal aid funding leads to delay and multiple adjournments

We have outlined some of the issues with VLA's funding guidelines in family law ,above. When an assessment is made by VLA to withdraw legal aid funding during a court proceeding, women are often forced to seek an adjournment in order to find alternative legal assistance (usually from a community legal centre or pro bono). This can lead to substantial delays and create inefficiency in the court system.

Simplicity and usability

The complexities of navigating the legal system when multiple issues arise

The intersection between family violence and family law often means that women are faced with a confusing and complex legal framework which they are required to navigate alone. Women whose legal problems arise in the context of family violence and relationship breakdown regularly deal with multiple pieces of legislation and several different jurisdictions. For example, a woman may be required to have contact with:

- The Commonwealth family law system in the Federal Circuit Court or Federal Court because of parenting matters, spousal maintenance, property and divorce proceedings.
- The Victorian civil justice system in the Magistrates' Court because they are subject of an intervention order or they require the protection of one.
- The Victorian criminal justice system in the Magistrates' Court, County Court or Supreme Court because their partner has committed an assault or sexual offence against them.

In a 2010 University of Sydney study on '*Women's experiences negotiating the family law system in the context of domestic violence*' it found that the lack of coordination between the family violence system and the family law system was a significant barrier to justice for women. The experience of women was explained as follows:

“In order to protect themselves and their children, the women found that they had to navigate a fragmented and uncoordinated service system, marked by delays and barriers to accessing accurate information.”²⁰

The Australian Law Reform Commission, in its 2010 report on *Family Violence – A National Legal Response* identified the lack of accessibility, fairness and effectiveness in the family law system when dealing with family violence matters as a significant issue. This has also been recognised by the Commonwealth Government who commissioned a series of reports to consider how the family law system could better respond to allegations of family violence and child abuse.²¹

Amendments to the *Family Law Act 1975* and changing terminology

Amendments to the *Family Law Act* in 2006 introduced a change in terminology which continues to contribute to confusion in family law. In 2006, terminology in children’s orders included “custody” “guardianship” and “access”. This changed to “long term responsibility for the child’s care, welfare and development, residence”, “live with” and “spend time with”.

The term “custody” continues to be used in the media and in general conversation. The changes in terminology have created a disconnect between users of the court system and family law professionals.

AVENUES FOR IMPROVING ACCESS TO CIVIL JUSTICE

What approaches to improving access to justice are not captured?

The current consultation matrix does not explore what alternatives to the current justice system framework may create a more efficient, effective and accessible system.

We have suggested the creation of a family law tribunal for small property claims. This suggestion also addresses the questions in Chapter 8 about effective matching of disputes and processes.

Creation of a family law tribunal

We have highlighted in our submission the difficulty for women who have assets that are of a small value. The family law system is currently inaccessible to many due to legal costs, filing fees and complex law and court procedures. Currently, the only alternatives available to parties that enter the family law system to resolve property disputes are mediation or court.

²⁰ Laing L, *No way to live: Women’s experiences of negotiating the family law system in the context of domestic violence (2010)*, Faculty of Education and Social Work, University of Sydney.

²¹ *Evaluation of the 2006 family law reforms*, Australian Institute of Family Studies (AIFS), *Family Courts Violence Review*, Professor Richard Chisholm AM and *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*, Family Law Council.

We recommend that in order meet legal need and facilitate access to justice, a family law tribunal is established to hear and determine small property claims.

In Victoria, certain disputes can be heard by the Victorian Civil and Administrative Tribunal. VCAT was established to provide an alternative, more cost-effective and accessible avenue in tenancy, consumer law, planning and mental health/guardianship. A similar structure to VCAT could be adopted for any future family law tribunal.

Jurisdiction of the tribunal

The tribunal would be limited to hearing property disputes only. It is important that parenting disputes continue to be heard and determined in a more formal setting due to the issues of safety and well-being of children.

In order to ensure that only small claims are heard, the jurisdiction of the tribunal could be less than \$100,000.

Fees

In order for the tribunal to be accessed by the most disadvantaged, it would be appropriate for filing fees to be kept low. As in the VCAT jurisdiction, fee waivers on financial hardship grounds should apply.

It should also be a no costs jurisdiction to ensure that there is no disincentive to parties accessing the tribunal.

Powers of the tribunal

In order to ensure that the tribunal is not adversarial and protects vulnerable parties, it should have broad inquisitorial powers.

One aspect of family law proceedings that is prohibitively expensive is the cost of subpoenas and accessing financial information. The tribunal should have the discretion to request information from financial institutions, superannuation funds and employers.

Lodging an application

Applying to the tribunal should be an easy process that individuals can do without assistance. Rather than providing a supporting affidavit, it would be more appropriate to have an application that poses a series of questions that identifies the necessary information about a person's claim.

Accessibility

The development of the tribunal should be informed by the needs of parties who experience disadvantaged.

For example, accessibility for people with limited literacy and English skills should be put in place. This may include publications in different languages, verbally recorded information and interpreters at the tribunal to assist with completion of an application.

PREVENTING ISSUES FROM EVOLVING INTO BIGGER PROBLEMS

Strategies for avoidance and early resolution of civil disputes

Community legal centres play an important role in working with disadvantaged communities to prevent legal problems from arising and intervening early to resolve problems.

Telephone legal advice line

WLSV's telephone legal advice service is the only service in Victoria that specialises in providing legal advice to women over the telephone on issues of family law and family violence law.

The telephone legal advice service enables women to speak to a lawyer prior to a legal problem arising or at the very early stages of a legal problem arising.

Preliminary findings from two important Victorian research projects indicate that there is a significant need for better access to legal advice for women experiencing family violence and relationship breakdown.

The SAFER research suggests that there is a need for a "legal assessment" to be conducted, to support and complement the safety and welfare supports that can be provided by other services. Research being undertaken by the Immigrant Women's Domestic Violence Service on the legal needs of culturally and linguistically diverse women experiencing family violence and relationship breakdown demonstrates that women are generally only able to access legal information at the crisis stage and that, if they had known their legal rights earlier, they may have been able to do something to address the violence.

Early access to legal advice can prevent further violence as women are empowered to understand their legal rights in relation to the violence itself and in relation to at least two of the key issues that can keep women in violent relationships – uncertainty about what will happen with their children and uncertainty about their financial futures. With this understanding, women are able to take the steps necessary to protect themselves – reporting to the police, seeking an intervention order on their own behalf and, ultimately, leaving the relationship if the violence does not stop.

Legal advice also supports long term recovery from violence by ensuring women have safe arrangements in place in relation to the violent partner's contact with the children and that they receive a fair and equitable share of the property of the relationship.

Case study

Lidia has agreed to a trial period of separation with her de-facto partner of eight years. They have two young children. Lidia doesn't know if they will get back together again but she wants to make sure she knows what her rights are if they do permanently separate.

As they are not married she is not sure whether family law applies to her relationship. She is apprehensive about what will happen to the children and how her and ex-partner will work out where the children live and go to school. She also has questions about the rental property they live in, who gets to keep the car and what she should do about the joint bank accounts.

When she rings WLSV's telephone legal advice line, the lawyer is able to work through each of her concerns with her, identifying what issues relate to family law.

The lawyer provides an explanation of the steps required to obtain a divorce and how property and children's issues are dealt with in family law. She provides advice about proactive steps that Lidia can take which will be helpful should the couple permanently separate. This includes practical advice about collecting information about bank accounts, superannuation, the car and other shared assets. She also suggests that Lidia and her de-facto partner attend mediation in order to draw up an agreement about children's arrangements.

IMPROVING THE ACCESSIBILITY OF COURTS

The conduct of parties in civil disputes and vexatious litigants

There are undoubtedly a range of psychological, social and legal factors which contribute to someone repeatedly commencing litigation with little merit.

However we have observed that some vexatious litigants appear to misuse the legal system to retain control over the other party or to continue to harass them in a way which mirrors stalking or family violence conduct.

Family violence is characterized by one party attempting to control and exert power over the other party while in stalking cases one party attempts to contact or maintain contact with the other party against his/her wishes. Similarly a key feature of at least some vexatious litigation is an attempt to control the other party or maintain contact with him/her via persistent litigation.

In our experience vexatious litigation often commences or escalates when other avenues for the vexatious litigant to have contact with (or control over) the other party have been severely limited (quite properly in our view) in order to protect the victim, for example, when a court grants an intervention order

This conduct is very stressful and upsetting for parties who are the focus of the excessive litigation, particularly those who have also been previously subjected to stalking or family violence by the vexatious litigant. In some cases the persistent litigation can continue for 12 years or more.

While we do not wish to see people's right to initiate legal proceedings unduly or unnecessarily restricted, the civil justice system must limit vexatious litigation for three important reasons:

- to prevent significant harm and injustice to individuals who are subjected to repeated applications against them (particularly if they are already victims of violence or stalking)
- to prevent the erosion of community confidence in the justice system which is likely to result if one party is permitted to continually commence litigation against another party which has no reasonable grounds and
- to prevent significant costs to individuals, the legal system and the state in responding to vexatious litigation and to prevent scarce legal resources from being wasted.

In properly addressing the issue of vexatious litigants, we are of the view that improving the efficacy of the processes and procedures for monitoring and investigating potential vexatious litigants is just as important as the nature of the legal test that is to be applied.

There appears to be poor communication between various individuals and organizations affected by a vexatious litigant. Currently no agency seems to have overall responsibility for co-ordination of matters related to potential and declared vexatious litigants. This makes it very difficult to manage them effectively.

A central coordinating agency could play the following role:

- a. Receive notifications of potential vexatious litigants for investigation from the judicial officers, lawyers and parties subjected to persistent litigation.
- b. Keep a register and central file of people being investigated as vexatious litigants.
- c. Investigate vexatious litigants and prepares applications and briefings to the Attorney-General in relation to potential applications for someone who has been declared vexatious.
- d. Keep a register of all persons declared vexatious litigants in Victoria and answers inquiries from appropriately authorized court personnel about them.
- e. Provide advice, information and education to court personnel, members of the judiciary and members of the public about the general issue of vexatious litigants and how they should be handled.

EFFECTIVE AND RESPONSIVE LEGAL SERVICES

Community legal centres are an effective solution to meeting legal need

Community legal centres are well placed to meet the legal needs of the most disadvantaged in our community. There are multiple reasons why CLCs can most effectively meet legal need:

- Generalist CLCs have strong connections to their local communities and have an excellent understanding of the needs of the most marginalized and disadvantaged in the community.
- Specialist CLCs hold expertise in particular areas of law and a sound understanding of how the area of law impacts on people who experience disadvantage.
- CLCs utilize their law reform work to ensure that systemic issues in the law and legal system, that are barriers to justice for disadvantaged people, are addressed.
- CLCs have the capacity to collect case studies directly from their clients, to inform and educate policy and law-makers of the barriers to accessing justice.
- CLCs educate individuals, the community and other stakeholders in order to promote better access to justice.

There are some misconceptions about the nature of the work CLCs do. CLCs can undertake complex and significant casework. For example at our service, we routinely take on a substantial number of family law cases and conduct the case from start (negotiations/pre-action procedures) to finish (settlement/trial).

At present, our service has 175 open case files, 44 of which are matters currently before the Family Law Courts.

Equally, it is important to understand that CLC lawyers undertake court appearance work and deliver services at court to advise and represent clients.

The ability of WLSV to leverage pro bono and volunteer resources

Community legal centres are an efficient way of delivering legal services to the disadvantaged.

At WLSV and FLLS we are able to leverage over 3500 hours of volunteer and pro bono contributions to assist our clients. On a very conservative costing, this is equivalent to \$530,000 worth of services.

Through our mediation support services we assist on average 199 clients every year at a cost of less than \$105,000. Through RDM, we are directly involved in mediations in complex and/or high conflict cases which would otherwise have been unable to proceed to mediation. Over 83% of the matters in which we assist achieve a settlement or partial settlement.

This result is significant cost savings to government through avoiding court time and reducing the substantial social costs that result from unresolved conflict in families.

Innovative and integrated approaches to meeting legal need

CLCs are at the forefront of creating partnerships and integrated approaches to meeting legal need and facilitating access to justice. Partnerships are formed with courts, other CLCs, non-legal service providers and Government in order to effectively meet legal need.

We have provided two examples below of the innovative projects that WLSV are undertaking to meet legal need.

Using skype technology to meet legal need in RRR communities

Since June 2012 WLSV, in collaboration with Women's Health in the North and Women's Health in Goulburn North, have run a pilot project to provide legal advice, information and, where appropriate, representation to women who have experienced family violence and relationship breakdown.

The pilot project uses Skype communication to facilitate face to face consultations between our lawyers and women. The women are supported by their family violence workers. There are currently 9 partner agencies (that are family violence agencies and community health services), 5 of them rural.

Our approach allows women to overcome geographic and other barriers which they may face in accessing legal services, whilst still facilitating private, safe and meaningful connections with lawyers. The Skype Program is cost effective and highly flexible as an outreach service can readily be relocated or changed as community needs change.

In the first 9 months to March 2012 there were 110 face to face consultations (via Skype), 31 of which were secondary consultations between workers and lawyers.

The number of legal issues raised in consultations was large – 19 – reflecting the complex nature of the situation women find themselves in when relationships break down in the context of family violence. In addition to family law and family violence issues, matters such as Centrelink entitlements, tenancy rights and obligations and injury compensation were raised on a regular basis in the context of separation in circumstances of family violence.

Client case study

One woman who found it difficult to meet new people, as she had low confidence and is self-conscious of a visible medical condition, received timely and important advice through the project regarding proceeds from the sale of her family home. She would not have met face to face with a lawyer due to her anxiety and hence without the project she would not have found out about money owed to her.”

“The Skype legal service has enabled rural women to access professional legal advice that “understands family violence”. This particular specialization resonates with women who often find that the legal system can be a “walk in the dark” and difficult to navigate without trustworthy no cost legal advice.”

Unfortunately, this program is only funded (under a grant from the Victorian Legal Services Board) until the end of November 2013 but we are actively seeking resources to continue the program.

We recommend that future funding of CLCs include ongoing funding for projects that use technology to provide access to justice in RR communities.

Addressing financial hardship and poverty of women through integrated service delivery

WLSV recently received funding from the Legal Services Board for its Stepping Stones project. The project is for two years beginning in January 2014. The project aims to create pathways to economic well-being for women and their children in two main ways:

- developing and implementing an inter-disciplinary model to deliver financial counselling services and legal services to WLSV clients and
- researching and drafting a report on the complex legal and financial issues that arise for women experiencing family violence and relationship breakdown.

Lawyers and financial counsellors working together

By developing new ways for lawyers and a financial counsellor to work together at Women’s Legal Service Victoria, women experiencing family violence and relationship breakdown will have access to timely and holistic legal and financial counselling assistance.

Developing a new model for working together will also provide a platform for greater collaboration and partnerships between the community law and financial counselling sectors well into the future.

Identifying and overcoming barriers to achieving economic well-being

The project will produce a report that captures women’s experiences and the often overlapping and complex web of legal and financial problems that arise from family violence and relationship breakdown. The report will provide law and policy makers, the finance, legal and family violence sectors with information and strategies to improve systems and responses to women experiencing family violence and relationship breakdown.

It is important for the Commission to consider how the innovative work that CLCs do can be more sustainable than it currently is. Many of the access to justice projects undertaken in CLCs are currently funded via philanthropic short term funding.

We recommend that the Commission consider how such innovation can be promoted through the National Partnerships Agreement and other government funding arrangements.