# CHAPTER 4

# WOMEN AND FAMILY LAW

4.1 This chapter discusses:

- the particular barriers faced by women in accessing the legal system, particularly in the context of family law matters;
- the impact of current legal aid family law funding arrangements on women; and
- how the current legal system might be changed to more adequately provide access to justice for women in family law matters.

## Introduction

4.2 During the course of its inquiry, the Committee received evidence that current legal aid arrangements do not provide sufficient or nationally uniform access to justice for women, and are fundamentally inadequate.[1] Women are particularly affected by a lack of legal aid funding in family law matters. Several submissions argued that the reduction in Commonwealth legal aid funds for family law matters since 1997 has had a serious impact on the rights of adults and children who are victims of domestic violence.[2]

4.3 The ALRC report, *Equality Before the Law: Justice for Women*,[3] and the Attorney-General's Department report, *Gender Bias in Litigation Legal Aid*,[4] argued that women were systematically disadvantaged by the fact that the legal aid system was strongly biased towards criminal law. Legal aid arrangements for women have not significantly changed since the publication of these reports. While additional funds for women's legal services were allocated by the Commonwealth Government under Prime Minister Keating in 1995, much of this funding has been withdrawn by the current Commonwealth Government.[5]

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1 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 4.

2 See, for example, National Council of Single Mothers and their Children Inc, *Submission 19*, p. 4; Sole Parents Union, *Submission 20*, pp. 6-7.

3 Report No 69, ALRC, 1994.

4 Office of Legal Aid and Family Services, Commonwealth Attorney-General's Department, 1994.

5 J Giddings, 'Women and legal aid' in J Giddings (ed), *Legal Aid in Victoria: at the crossroads again*, Fitzroy Legal Service, Melbourne, 1998, p. 125.

4.4 The Committee heard that it has become especially difficult for women and children to achieve safety and due process through the legal system. Women were described as 'a particularly vulnerable sector of the community'[6] and it is widely suggested that the incidence of domestic violence in Australia is underestimated. The information that is available reveals that hundreds of thousands of Australian women are subjected to violence within their relationships. Studies consistently indicate that such violence occurs in all social classes, races and cultures, and that women comprise the majority of victims, while men constitute the majority of perpetrators.[7]

## Particular issues facing women in accessing justice

4.5 Family law matters raise significant issues for women. Women may face various legal problems following a separation or divorce, often in circumstances that are quite different to those of men. For example, limited financial resources remain a major impediment faced by many women in need of legal assistance.[8] Evidence received by the Committee suggests that, amongst other things, men are more likely to have a better capacity to afford private legal representation after a separation or divorce[9] and many women (and their children) often become 'permanently financially disadvantaged following separation or divorce.'[10]

4.6 Among the main concerns voiced by women's groups who made submissions was the violence that takes place by men against women, particularly in the home, and the failure of the legal system to adequately address it. It is suggested that 'the message is that the legal system incorporates (the) bias (in society) and helps to perpetuate it.'[11] The legal aid system has a central role to play in improving the access that women have to equality and justice.

4.7 While women as a group in society with particular needs may find it difficult to achieve access to justice and equality of rights, it is especially difficult for certain women. For example, Indigenous women, women from non-English speaking

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6 Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 54.

7 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, pp. 2-3.

8 J Giddings, 'Women and legal aid' in J Giddings (ed), *Legal Aid in Victoria: at the crossroads again*, Fitzroy Legal Service, Melbourne, 1998, p. 123.

9 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, pp. 4-5.

10 Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 54.

11 J Giddings, 'Women and legal aid' quoting E Evatt, 'Foreword' in R Graycar & J Morgan, *The Hidden Gender of the Law*, 1990, Federation Press, Leichardt, p. v, in J Giddings (ed), *Legal Aid in Victoria: at the crossroads again*, Fitzroy Legal Service, Melbourne, 1998, p. 123.

backgrounds and women with disabilities are chronically marginalised in terms of access to legal services and face significant disadvantage in relation to awareness and exercise of their legal rights, and support in areas such as domestic violence.[12]

## Impact of current legal aid funding arrangements on women

4.8 The majority of applicants for and recipients of legal aid for family law matters are women and children.[13] Therefore, issues regarding the effect of current legal aid funding arrangements on women usually arise in the context of family law. Evidence received by the Committee overwhelmingly emphasised the difficulty women experience in obtaining legal aid in matters important to them, particularly family law matters. The majority of these submissions addressed the impact of the current family law legal aid funding arrangements on women.

4.9 The Commonwealth Government's current family law funding priorities were introduced in July 1997 and include more restrictive criteria for applications of legal aid than had previously been in place. For example, the merits test is more extensive, the types of family law matters that can be funded by legal aid are more limited, there is an overall "cap" on the amount of legal aid available to be expended by a party in relation to a matter, and applicants are only to be granted legal aid for court proceedings if attempts to resolve the dispute through primary dispute resolution (PDR) have been unsuccessful.[14]

4.10 The practical implications of the family law funding priorities and guidelines appear to have a far-reaching and serious effect. The National Network of Women's Legal Services (NNWLS) submitted:

> There is no question that legal aid availability for representation in family law proceedings has diminished over the last few years. So have the numbers of private solicitors prepared to take on legal aid family law cases.[15]

The Committee also received evidence that the limited amounts of funding available for family law matters 'creates a tension between providing assistance to a greater number of clients in less resource intensive cases and providing appropriate services and representation for clients involved in difficult and complex matters.'[16]

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12 Women's Legal Service SA Inc, *Submission 72*, p. 2; Northern Territory Legal Aid Commission, *Submission 82*, p. 9; National Network of Women's Legal Services, *Submission 86*, p. 3.

13 See, for example, Women's Legal Service SA Inc, *Submission 72*, p. 5; Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5.

14 R Hunter, 'The Mirage of Justice: Women and the Shrinking State', *The Australian Feminist Law Journal*, vol 16, p. 69.

15 *Submission 86*, p. 8.

16 Legal Aid Queensland, *Submission 31*, pp. 13-14.

4.11 Evidence presented to the Committee suggests that the current guidelines place constraints on the use to which legal aid funding can be put even in the narrow areas of law where Commonwealth funding is available. Restrictive criteria in relation to means and merit testing can result in assistance being unavailable to families with high and complex needs.[17] Further, empirical evidence indicates that at least from mid-1997 to mid-2000, the level of Commonwealth funding for family law legal aid was insufficient even to provide grants to everyone who met these restrictive criteria.[18]

4.12 Ms Zoe Rathus from the NNWLS told the Committee:

> We are very concerned about the way the merit test is applied. It is basically a budgetary control mechanism used by legal aid commissions, which are drastically underfunded. We are very concerned about the way that has had a bearing on legal matters, because it often means that legal aid is withdrawn just before trials or even during trials … We are concerned to see things like cost orders becoming more likely, the issues around cost orders being made in respect of paying for child representatives and the expectation legal aid commissions appear to increasingly have that people are advised of the possibility of having to make a contribution towards a child representative once that representative has been appointed.[19]

4.13 In Queensland, for example, the merits test appears to be applied particularly stringently, arguably as a means of limiting access to legal aid as opposed to facilitating it:

> Research carried out by a number of respected socio-legal researchers since the late 1990's indicates that Legal Aid Queensland has increasingly applied means and merits testing more stringently as a means of regulating a shrinking pool of legal aid funding for family law matters … where family law clients meet the means test imposed by Legal Aid Queensland, a higher number of them would have their application for assistance rejected on the basis of merit than in any other state … In effect, clients who are deemed ineligible for assistance in Queensland would conceivably receive assistance from legal aid if they live in some other state.[20]

4.14 Professor Rosemary Hunter and Associate Professor Jeff Giddings from Griffith University submitted that the Commonwealth guidelines for family law legal aid grants restrict the availability of legal aid for particular categories of cases (for example, divorce, property matters, variation of orders, enforcement proceedings) and

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17 Redfern Legal Centre, *Submission 61*, p. 5.

18 R Hunter with A Genovese, A Melville and A Chrzanowski, *Legal Services in Family Law*, Justice Research Centre, Sydney, 2000, p. 220 in R Hunter, 'The Mirage of Justice: Women and the Shrinking State', *The Australian Feminist Law Journal,* vol 16, p. 68.

19 Ms Zoe Rathus, National Network of Women's Legal Services, *Committee Hansard*, 10 March 2004, p. 10.

20 Queensland Association of Independent Legal Services Inc (QAILS), *Submission 73*, p. 27.

include a series of eligibility tests and funding "caps" in areas in which legal aid is available.[21] These restrictions have an adverse impact on identifiable groups of women applicants, including women who have been victims of violence by their former partners.[22] For example, the requirement for family law disputes to be in relation to a "substantial issue" often causes problems:

> To apply for a contact order is considered to be a substantial issue but to apply for residence, and formalised residence and contact arrangements, is often seen to be not substantial and therefore legal aid is not granted. That can often leave a situation where women and children are at risk.[23]

4.15 There are further problems with the Commonwealth guidelines as they apply to family law:

> The guidelines were intended to provide for some form of rational and consistent decision-making in a situation where funds were severely limited. However … this situation now pertains unevenly across the country, so that in some States the guidelines continue to be applied stringently, while in other States, there is funding available that is unable to be spent due to the restrictions imposed by the guidelines. While the guidelines have undergone some revision over the years, it is arguable that a thorough review of their impact and continuing relevance is required.[24]

4.16 The Committee notes that the Commonwealth will contribute approximately $20 million towards the Community Legal Services Program (the Program) in 2003-2004.[25] The Attorney-General's Department advised that some of the CLCs funded by the Program provide legal services in specific areas of law, including women's legal service, Indigenous women's projects, child support services and rural women's outreach projects.[26] The Department's submission included a list of CLCs funded by the Commonwealth under the Program. Specialist women's legal services in each state/territory (one in each state and the ACT, and three in the NT) are included in this funding.[27]

4.17 The Committee also notes that the Commonwealth Government's Budget 2004-2005 includes an increase in legal aid funding for family law matters arising under Commonwealth law.

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21 Professor Rosemary Hunter & Associate Professor Jeff Giddings, *Submission 24*, p. 4.

22 ibid.

23 Ms Marie Hume, *Committee Hansard*, 11 November 2003, p. 2.

24 Professor Rosemary Hunter & Associate Professor Jeff Giddings, *Submission 24*, p. 4.

25 Attorney-General's Department, *Submission 78*, p. 8.

26 ibid, p. 9. CLCs are discussed in more detail in Chapter 11.

27 ibid, Attachment D.

### *Indirect gender bias in current legal aid arrangements*

4.18 On the surface, the granting of legal aid appears to be gender-neutral because legal aid guidelines do not distinguish between men and women applicants. However, gender-neutral guidelines do not necessarily produce the same results for men and women in practice. Evidence presented to the Committee argued that women do not have equal access to legal aid, nor to the legal system in general, and that there is an indirect gender disparity in the way that legal aid is granted.[28]

4.19 Criminal matters in which there is a possibility of imprisonment are given the highest priority in relation to legal aid funding due to the High Court decision of *Dietrich v R*[29]. Statistics indicate that the majority of recipients of legal aid are men and that it is more likely that men will receive a criminal law grant as opposed to a family law grant.[30] Overall, many more men than women receive grants of aid and there are fewer limitations on grants made in criminal law proceedings than family law.[31] For example, in the 2000-2001 financial year, women received 52 per cent of family law grants but only 34 per cent of all grants made by Legal Aid Queensland, comprising 37 per cent of Legal Aid Queensland's grants expenditure for that year.[32] Men are also more likely to have access to a larger amount of legal aid funding than women.[33] This creates gender inequity as the "cap" in criminal and civil law matters is greater than the "cap" in family law matters.[34]

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28 See, for example, National Network of Women's Legal Services, *Submission 86*; Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*.

29 (1992) 177 CLR 292. The High Court held that a person accused of a serious crime has a right to a fair trial and, if the judge forms a view that a fair trial is unlikely to result because the accused cannot afford or does not have legal representation, a stay of proceedings must be ordered. Similarly, under the *Crimes Act 1958* (Vic) for example, a court may order that Victoria Legal Aid provide representation if the court is of the view that the accused may not obtain a fair trial without it: Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5.

30 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5.

31 National Network of Women's Legal Services, *Submission 86*, p. 8.

32 Women's Legal Aid, *Gender Equity Report: A Profile of Women and Legal Aid Queensland*, Brisbane, 2002, pp. 4-5 in Professor R Hunter & Associate Professor J Giddings, *Submission 24*, p. 3.

33 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 5; Women's Legal Service SA Inc, *Submission 72*, p. 5.

34 Women's Legal Service SA Inc, *Submission 72*, p. 5. In criminal law matters, the minimum available "cap" is $15,000 with a maximum "cap" of $60,000. The "cap" in family law matters is $10,000 and there is a $15,000 "cap" for child representatives.

4.20 The Women's Legal Service SA submitted that the notion that a criminal matter may have more serious consequences for an individual, and therefore warrant representation where other matters may not, is a gendered one. Although the potential sanctions involved in a criminal prosecution can indeed be serious, the NNWLS argued that there needs to be recognition that the potential consequences of family law proceedings can also be serious.[35] In evidence at the Melbourne hearing, Ms Kathryn Seear of the Women's Legal Service Victoria stated that:

> Our view is that family law funding should be a priority at a Commonwealth level ... There needs to be a philosophical shift in the sense that family law matters are particularly serious. People tend to think of them in a way that is different from criminal law matters. There seems to be a general view that criminal law matters have a very significant consequence if somebody is found guilty of an offence. But, in our view, there are very serious consequences for clients we see in family law matters—women who lose their children; children who are being subject to sexual abuse or child abuse—and there is simply not the money available to fully investigate those matters.[36]

4.21 The Women's Legal Service SA also stated that it is ironic that women and children are often the victims of the criminal offences for which men receive legal aid, but are left unrepresented in any legal proceedings they may have to initiate as a result.[37] The NNWLS contended that the decision of the Commonwealth Government to insist on two separate pools of funding for criminal law and family law has exacerbated the problems already created by the preference for funding criminal law matters.[38]

*Committee view*

4.22 Evidence presented to the Committee suggests that there is gender disparity in the distribution of legal aid funds in practice, resulting in indirect but significant discrimination against the circumstances and needs of women in their access to justice. The Committee is concerned about the Commonwealth Government's apparent lack of recognition of some of the particularly grave consequences of family law disputes. The Committee does not believe that legal aid funding for criminal law matters should come at the expense of funding for family law.

4.23 The Committee considers it unacceptable that there should be fewer grants of legal aid for family law matters than for criminal law matters. It is also unacceptable that less funding is available for family law matters generally. LACs should not be

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35 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 6; Women's Legal Service SA Inc, *Submission 72*, p. 5.

36 *Committee Hansard*, 12 November 2003, p. 56.

37 Women's Legal Service SA Inc, *Submission 72*, p. 5.

38 National Network of Women's Legal Services, *Submission 86*, p. 8.

forced to effectively misapply the Commonwealth guidelines and priorities in order to regulate an inadequate amount of funding for family law matters.

4.24 The Committee is of the view that a reassessment of the application of the Commonwealth guidelines and priorities to determine grants of assistance is urgently required. Recognition in the legal system of the particular circumstances and needs of women may help them to better seek legal redress and lessen the financial burdens they often experience. The continuing focus of the legal aid system on criminal law does not assist women in achieving equality of treatment.

**Recommendation 12**

**4.25 The Committee recommends that the Commonwealth Government address discrimination against the circumstances of women in the application of the current family law legal aid funding guidelines and priorities, by commissioning national research into the perceived gender bias in legal aid decision-making.**

**Recommendation 13**

**4.26 The Committee strongly endorses the recommendation made in the Committee's *Third Report* that legal aid expenditure be closely scrutinised by the Commonwealth Government to determine generally if disproportionate expenditure in certain priority areas is having the effect of depriving other areas of appropriate funding.**

**Recommendation 14**

**4.27 The Committee recommends that the Commonwealth Government increase as a matter of urgency the level of funding available for family law matters.**

**Recommendation 15**

**4.28 The Committee recommends that the Commonwealth Government and state/territory governments, in conjunction with legal aid commissions, the courts and relevant women's organisations, give priority to an urgent and comprehensive review of legal aid services to women with the aim of formulating more appropriate and wide-reaching services to meet their specific needs. In particular, the Committee considers it imperative that the Commonwealth Government and state/territory governments recognise and address the gender-specific barriers to justice that women face in order to better structure and tailor the legal aid system to meet their particular needs and experiences.**

***The "cap" in family law matters***

4.29 Individual litigants seeking legal aid assistance in family law matters are subject to a $10,000 funding "cap". There is a $15,000 "cap" for child representatives. The Committee's *Third Report* found that while capping may bring some benefits in the form of more efficient expenditure of legal aid funding, the "cap" created many

problems and was too low.[39] The Committee notes that the "cap" in family law matters has not increased since the time of the *Third Report*.

4.30 The ALRC in its report, *Managing Justice,* found that statistics provided by the LACs showed that 'only a very small percentage of cases actually reach the cap before resolution.'[40] However, the Committee received a substantial amount of anecdotal evidence indicating that exhaustion of the family law funding "cap" is a significant problem. For example, the National Council of Single Mothers and their Children (NCSMC) contended that the cap on legal aid funding in family law matters 'is limited in the sense that it is unlikely to meet the demands of a complex case'.[41] There is often insufficient funding to last the duration of Family Court hearings:

> … in the pre trial manoeuvring, in interim contact orders and variations to those, specific issues orders and perhaps breach of contact orders, the cap gets exhausted and then, come the trial, the person can be left literally in the middle of the trial without representation. And they have no capacity to deal with that.[42]

4.31 Mr Sam Biondo of the Fitzroy Legal Service noted that:

> There is a lot of anecdotal discussion about the capping situation. In the initial stages of the cap, I recall quite clearly that we had many people approaching us for assistance, and many agencies who had also been approached by people who had reached their caps had significant problems.[43]

4.32 Ms Sally Smith of the Community Legal Centres Association (Victoria) concurred:

> When I worked at Werribee Legal Service we had quite a few clients come in whose cases were quite progressed in the family law court. They would come in with folders of stuff when they had run out of legal aid. There was often domestic violence involved, and they had been to court quite a few times. These women were very distressed, and it was very difficult for us too. We could not represent them in court. We would have to try to find a pro bono barrister to represent them. We could provide them with some assistance and try to help them navigate the system, but at that level of the Family Court proceedings it is very difficult for someone to represent themselves.[44]

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39 *Third Report*, p. xx.

40 ALRC *Managing Justice: a review of the federal civil justice system,* 2000, para 5.103.

41 Dr Elspeth McInnes, National Council of Single Mothers and their Children, *Committee Hansard*, 11 November 2003, p. 3.

42 ibid.

43 *Committee Hansard*, 12 November 2003, p. 49.

44 ibid.

4.33 Mr Mark Woods of the Law Institute of Victoria argued:

> Although it is not noted in our submission, the reality is that the fee caps which were imposed, I think, six years ago now have not kept pace with either inflation or changes to the law, certainly not to changes to the cost scales. What that means is that, whereas six years ago someone would get X quantum of legal work done within the fee cap, they now simply cannot get to that stage. The reality is that only five per cent of cases ever go to hearing—therefore, the proposition that budgets are put together on the basis that they all go to hearing, and hence we should have that sort of cap, is economic nonsense.[45]

4.34 Mr Woods argued further:

> Given that only five per cent of cases go to hearing, I expect that [only] two per cent [of cases reaching the "cap" before resolution] is probably quite right. There are certainly cases that can be conducted and concluded within the existing fee caps; there is no doubt about that. I do not know how many cases two per cent translates to, but I am sure it is in the hundreds, even though I do not have the figures in front of me. The point is, though, that the fee cap applies to all family law matters in relation to a particular grantee of aid so that, if that person has a contested matter which runs to a hearing and the $10,000 is used up and a further problem develops that requires not enforcement but actual changes in orders of the court—changes of circumstances and so forth—then the cap continues to apply. So, although the initial grant may be sufficient for three per cent of that five per cent, it will not be if there is a change in circumstances, as there so often is.[46]

4.35 Legal Aid Queensland expressed the following view:

> If the financial cap is reached there is a residual discretion in the Chief Executive Officer of Legal Aid Queensland to extend the cap. Again, there is only one fund in relation to family law matters, so the more that is expended on a case of particular difficulty or complexity, the less that is available for other parties seeking assistance for representation in family law proceedings.
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> A party who reaches the financial cap, but still satisfies the means and merits tests applied in the normal course by Legal Aid Queensland, can therefore be refused further aid. It is likely that these cases will have features of complexity or difficulty and assistance will have to be withdrawn at possibly the most crucial time of the case, and the client will have to represent themselves at the final hearing.[47]

4.36 This may have distressing consequences for a number of reasons:

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45 ibid, p. 23.

46 ibid, p. 24. For further discussion of self-represented litigants, see Chapter 10.

47 Legal Aid Queensland, *Submission 31*, p. 15.

> It is questionable whether many of these clients will have the capacity to conduct their own case, whether because of complexities of legal issues, or family dynamics or cultural issues involved in the case, or because of the mental or physical functioning or language capabilities or level of education of the client.[48]

4.37 Between 1998 and 2000, the Family Court in Melbourne conducted the Magellan Project, which involved special judicial case management of cases in Victoria in which there were serious allegations of sexual or physical abuse of children. It has now been established in all Australian states and territories, except NSW (where it has yet to be launched[49]), and WA (which has its own experimental program called the Columbus Project). Under the Magellan Project legal aid "caps" are waived for child representatives and for lawyers representing parents, provided they satisfy the means and merit tests in Magellan cases.

4.38 At the second public hearing in Canberra, Chief Justice Alastair Nicholson of the Family Court of Australia stated that the Magellan Project could usefully be adapted to other sensitive areas of the Family Court's work.[50] However, he emphasised that:

> … one of the ingredients of the success of Magellan has been the cooperation of the state welfare authorities and their investigative activities.[51]

4.39 Chief Justice Nicholson indicated that the Family Court hopes to have the cooperation of the relevant state authorities in utilising similar programs in domestic violence matters in the future.

4.40 Several submissions and witnesses argued that such an approach would have significant benefits. For example, Ms Kathryn Seear from the Women's Legal Service Victoria said:

> We are also concerned that women who are the victims of domestic violence will resort to self-representing in the Family Court and in state family violence matters where legal aid funding is not available. We would propose the introduction of a pilot project, similar to Project Magellan, which is discussed in some detail in our written submission. The evaluation of that project was overwhelmingly positive. We would propose that a pilot project be introduced, whereby the usual legal aid guidelines be altered in cases involving allegations of domestic violence, especially where children

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48 ibid, p. 15.

49 NSW 'is the only state where we have not been able to launch it because the state department is simply not cooperating. I have seen the minister, and she has indicated cooperation, but we do not seem to be able to get past the bureaucratic backlog': Chief Justice Alastair Nicholson, Family Court of Australia, *Committee Hansard*, 10 March 2004, p. 4.

50 *Committee Hansard*, 10 March 2004, p. 4.

51 ibid.

> have witnessed such violence or where there is a risk that they may continue to witness violence.[52]

4.41 Ms Seear continued:

> My understanding is that the Columbus Project, which is in operation in Western Australia at the moment—I am not sure whether you are familiar with it—extends the principles of the Magellan Project into areas of domestic violence. We would be proposing something similar. But certainly many of the concepts in the Magellan Project would be appropriate for a domestic violence type issue. In the Magellan Project the usual means and merit tests in legal aid matters were maintained but there was no cap on legal aid funding. We would be suggesting a pilot project in domestic violence issues, so that woman who are victims of domestic violence would be guaranteed unlimited legal aid funding. In reality, the financial consequences of the Magellan Project were very great, and some information has been provided to you in that regard. But in cases involving domestic violence we would hope that principles similar to those in the Magellan Project could apply.[53]

4.42 Ms Seear noted further:

> There is an example … of a case wherein a woman involved in Family Court proceedings had legal aid terminated at the beginning of a trial. As a result, she represented herself and, because of her self-representation, the ensuing case became extremely long and drawn out. It ended up being one of the five most expensive cases in Project Magellan. There was a consensus at the end of the project that it may have been more financially viable for that woman's legal aid to be continued, rather than to have the flow-on effect of wasting Family Court resources and so forth.[54]

4.43 The vexatious litigant approach was also raised as a problem faced by many women in their negotiation of the legal aid system. The NCSMC argued that women whose ex-partners use violence are typically faced with responding to the violent person's repeated applications to the court. This uses up legal aid funding, often resulting in women being left without representation in the middle of a trial:

> This seriously limits their capacity to protect themselves and their children from a violent partner. The cap on legal aid is unrealistic and quickly exhausted.[55]

4.44 Other submissions and witnesses presented similar evidence. At the Melbourne hearing, Ms Kathryn Seear of the Women's Legal Service Victoria expressed the following view:

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52 *Committee Hansard*, 12 November 2003, p. 55.

53 ibid, p. 59.

54 ibid, p. 60. See Chapter 10 for further discussion of self-represented litigants.

55 *Submission 19*, p. 3.

> My understanding is that, at this stage, there is a stage of matter funding limit in family law matters so that each stage of the proceeding has a maximum that is allocated. We would suggest that that remain in place but that perhaps each stage of the matter be increased. We see clients on a regular basis who are facing vexatious litigants—people who take them back to the Family Court time and again weeks or months after final orders are made and a new application is issued—and there is certainly a risk of this. But I do not think that that is any reason for avoiding funding for women who do need it. If a woman is facing a vexatious litigant there is an even greater need for her to have financial assistance.
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> …
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> We see a number of clients who are legally aided and whose cap is exhausted because the other party knows that the woman is legally aided and only has a certain amount of money that she can access. We regularly see cases where a man has access to significant financial resources. I know of one case where a man was able to spend upwards of $150,000 on his own legal fees whereas the woman was subjected to the $10,000 cap. He knows that and he knows that sooner or later her funding will be exhausted. So in fact in our experience it has been the reverse. It is a disincentive rather than an incentive to settle, where you have a difficult opposition.[56]

4.45 Ms Naomi Brown of the Community Legal Centres Association (WA) agreed:

> I recall talking to a community legal centre about the fact that, at every point along the legal process, there was some sort of barrier to going forward. The intention was expressed by one party to the other party, the woman, that the reason he was putting up these barriers was that he knew her funding was going to run out.[57]

4.46 At the Sydney hearing, the President of the ALRC, Professor David Weisbrot, told the Committee:

> With the Family Court, although we did not go into substantive family law, we certainly saw evidence of many cases where it seemed that the parties would use the processes of the court as another aspect of their internecine warfare, rather than as a means of resolving disputes. Some of the disputes seemed to me to be frivolous if they were not so serious for the parties concerned. There were long drawn out battles about the exact point at which children would be dropped off or picked up. It was not an uncommon thing to see a very large portion of the family estate dissipated in litigation which probably ended in a result that was not going to be very different from what it would have been if the parties had engaged more constructively at the beginning.[58]

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56 *Committee Hansard*, 12 November 2003, pp. 56-57.

57 ibid, p. 50.

58 *Committee Hansard*, 13 November 2003, p. 21.

4.47 Ms Libby Eltringham of the Domestic Violence and Incest Resource Centre argued that the family law system itself can perpetuate such problems:

> One of the things that domestic violence services would argue or submit is that sometimes the family law system is part of continuing the abuse—the vexatious litigant approach is used to continue to maintain power over a woman and to continue to make life difficult for her. That is a significant thing for many of the women that we work with. We acknowledge that it is still a small proportion of family law cases that have to go through to contested hearings, but family violence is a significant factor in the cases that do go up, and that it is often used as a means of controlling a woman or trying to keep tabs on her. We see that quite a lot through the services that we work with.[59]

4.48 The Committee also received evidence that, unlike other jurisdictions, the Family Court may be more reluctant to declare someone a vexatious litigant. This means that an individual must have brought many applications before they will be declared "vexatious":

> Up until that time, women we see may be subject to countless family law proceedings; often these proceedings are initiated by her former partner over relatively minor matters.[60]

*Committee view*

4.49 The Committee agrees that the "cap" in relation to family law funding creates significant problems. The Committee believes that if the "cap" is to remain, there needs to be greater discretion to exceed it in particular cases. However, the Committee reiterates its view in the *Third Report* that, given the lack of funding generally, 'any exercise of the discretion becomes an exercise in robbing Peter to pay Paul.'[61] It is not appropriate that applicants in more expensive cases benefit at the expense of other equally meritorious applicants. The Committee strongly believes that more funding is required. As the *Third Report* concluded, '(n)o amount of juggling with discretions and cap levels will overcome this sort of dilemma.'[62]

4.50 The Committee notes the Commonwealth Government's announcement in the Budget 2004-2005 that there will be an increase in certain "caps" on grants associated with family law matters.

**Recommendation 16**

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59 *Committee Hansard*, 12 November 2003, p. 60.

60 Women's Legal Service Victoria (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 8.

61 *Third Report*, p. xx.

62 ibid.

**4.51 The Committee repeats the recommendation in its *Third Report* that the Commonwealth Government should act to ensure the necessary data on the operation of the "cap" in family law matters is collected, analysed, published and acted upon to ensure that capping does not deny justice in particular cases.**

**Recommendation 17**

**4.52 The Committee recommends that a pilot project similar to the Magellan Project be adopted where the usual legal aid guidelines are altered in cases involving allegations of domestic violence. In effect this would mean removing the "cap" on legal aid funding so that women who are victims of domestic violence would be guaranteed unlimited legal aid funding. Similarly to the Magellan Project, the usual means and merit tests should be maintained. Pending wider application of that principle, the Committee recommends that the "cap" should be indexed annually for movements in the Consumer Price Index.**

### *The impact of the Commonwealth and state/territory dichotomy*

4.53 As discussed in Chapter 2, since 1 July 1997 the Commonwealth has accepted responsibility for providing legal aid funding for certain Commonwealth matters only and in accordance with Commonwealth priorities and guidelines. This includes matters arising under the *Family Law Act 1975* (Cth) (Family Law Act), the *Child Support (Assessment) Act 1989* and the *Child Support (Registration and Collection) Act 1988* but does not include, for example, state/territory court proceedings in relation to domestic violence. It has been stated that the Commonwealth and state/territory dichotomy is not ' legally or intellectually justified' and that it creates:

> … very real problems … out in the field for … lawyers who have to apply … an artificial distinction between federal and state matters.[63]

4.54 According to the Commonwealth priorities set out in the Commonwealth-State Legal Aid Agreements 2000-2004, family law cases involving children are priority matters. As a matter of urgency, legal aid is to be granted for an interim order or injunction where a child's or applicant's safety or welfare is at risk, where there is an immediate risk of removal of a child from Australia or to a remoter geographic region in Australia, where there is a need to preserve assets, or other exceptional circumstances exist.[64] Further:

> In deciding whether to grant legal aid for a family law matter, the highest priority must be given to protecting the safety of a child, or a spouse, who is at risk.[65]

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63 Mr Mark Woods, *Committee Hansard*, 12 November 2003, pp. 21-22.

64 Commonwealth-State Legal Aid Agreements 2000-2004, 'Commonwealth priorities', Sch 2, subclause 2(5).

65 ibid, subclause 2(4).

4.55 However, the NNWLS has submitted that these seem to be the very cases excluded from grants of aid[66] since the Commonwealth does not provide funding for family law matters which involve domestic violence only. Further, the NNWLS submitted that:

> In practice, this level of priority seems to be restricted to cases where there has been an abduction or other extreme action, where unusual risks exist. The on-going potential for abuse in families which experienced domestic violence and/or child abuse prior to separation of the parents, does not seem to attract such priority.[67]

4.56 Commonwealth legal aid funding may be available to deal with certain aspects of a family dispute but in cases involving state-based issues such as domestic violence, Commonwealth funding is not available for that particular problem upon a relationship breakdown.[68] As a result, women and children with domestic violence issues may not be receiving the extent of assistance they need.

4.57 In the *Third Report*, the Committee expressed the view that a major issue of concern was 'the capacity of the legal aid system to deal effectively and rapidly with domestic violence issues'[69] since in the context of legal aid agreements between the Commonwealth and the states/territories, domestic violence is a priority area for the Commonwealth only to the extent that domestic violence is linked to matters within the jurisdiction of the Family Court.[70]

4.58 This was also noted by Mr Tony Parsons of Victoria Legal Aid in evidence in the current inquiry at the Melbourne hearing:

> The arrangements … only permit commissions to assist applicants in Family Law Act matters. Inevitably in those situations there are corresponding state law issues that need to be addressed, often including intervention order applications under state law. That service cannot be provided by Commonwealth funds. Often the Department of Human Services is involved in care and protection applications for the children of a relationship. Assisting people in those proceedings cannot be done using Commonwealth funds, so commissions using Commonwealth funds can only partially address the priorities of the Commonwealth itself, because of those arrangements.[71]

4.59 Mr Parsons stated further:

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66 National Network of Women's Legal Services, *Submission 86*, p. 18.

67 ibid, p. 9.

68 Mr Mark Woods, *Committee Hansard*, 12 November 2003, p. 22.

69 *Third Report*, para 5.14, p. 74.

70 ibid, para 5.18, p. 74.

71 *Committee Hansard*, 12 November 2003, p. 33.

> We face the ridiculous problem of service delivery to clients where, if we are going to be absolutely scrupulous about the application of the Commonwealth funding agreement—and we try at all times to be—we actually have to say to a client, 'The solicitor that you have built up a relationship with, the one that you have learnt to trust, the one that is running your major matter in the Family Court is not funded to go to court for you to get an intervention order to stop the domestic violence, so you have to go to another lawyer to provide that kind of service.' That affronts every precept of appropriate service delivery to clients, and we do not do it. We refuse to disillusion clients in that way when no other legal practice in the country would treat a client so poorly, but it is very difficult. But it is very difficult because, at the end of the day, our accounts are still audited by the Victorian Auditor-General and we still have to sign off to make sure that we are executing our side of the Commonwealth agreement effectively and with integrity. So we end up dividing the resource to have that particular lawyer in the office between the state and the Commonwealth. It is just unnecessary administration to provide a better service for the client, and therefore those are dollars wasted on administration that could be used to purchase legal services.[72]

4.60 This point was also made by Ms Judith Walker of the Legal Aid Commission of NSW:

> We often have the situation where domestic violence matters are going to be dealt with in the state court and there might be concurrent proceedings in the Family Court or the Federal Magistrates Service, which is also involved in domestic violence issues. So people are moving between courts. The proceedings come under the Commonwealth program when in the Family Court, but when they are in the state court they come under a different program, but it could be the same client. The solicitor who may be assisting in the Family Court is not going to be the solicitor who may be assisting in the state court. That is a difficult situation.[73]

4.61 Legal Aid Queensland agreed:

> Clients frequently have legal problems in their lives that include issues of domestic violence, family law and child protection. Their difficult situations are compounded by additional barriers and complexities caused by different forums, legislation and funding issues created by family law issues being a Commonwealth jurisdiction and child protection and domestic violence issues being State jurisdictions.
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> …
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> It is confusing for clients to have to attend different courts, and apply for separate grants of aid for what they see as one set of problems surrounding the breakdown of their relationship and family. The effect of the artificial divide between funding in State and Federal matters means that a party can

72 ibid, pp. 35-36.

73 *Committee Hansard*, 13 November 2003, p. 5.

> be represented in one forum but not another. This causes distress and confusion to parties who are already in very stressful situations and militates against holistic service delivery for clients.[74]

4.62 The Committee also noted in the *Third Report* that since the separation of funding between Commonwealth and state/territory matters and the fact that Commonwealth funding cannot be used for state/territory domestic violence matters, the onus is on the relevant state/territory to fund such matters. However, that state/territory may not give priority to domestic violence. This may in turn send the message that the safety of women and children is not a priority.[75]

4.63 During the current inquiry, Dr Elspeth McInnes of the NCSMC stated:

> … the majority of referrals from the Family Court to the state child protection system do not get investigated. The court simply gets information back which says, 'This has not been substantiated.' But it also encompasses the fact that it has never been investigated.[76]

4.64 The NCSMC indicated that one of the reasons for the failure of referrals of child abuse to be investigated is the lack of consistency between Commonwealth and state/territory laws. Although the Family Law Act requires that any disclosure of child abuse must be reported to the relevant state/territory child welfare authority, the relevant child welfare authority is not subject to the Family Law Act. Such reporting means that Family Court officers have complied with their obligations under the Family Law Act but the child welfare authority is not compelled to take the matter further. The reality is that 'only a relatively small percentage of high-risk, immediate danger to children'[77] cases are investigated:

> The state department looks at the referrals from the Family Court in the same way as it would look at referrals from any other source. They prioritise those referrals according to their criteria, which means that the majority of referrals from the Family Court do not rate an investigation, because they are not seen as immediate and serious on that day. The Family Court cannot instruct state departments to do anything, so a frequent outcome is that there is no investigation of those allegations.[78]

4.65 There are also problems if allegations of child abuse 'come out in the Family Court after there has been a decision not to proceed with criminal charges for whatever reason'.[79] The role of the Family Court is not to determine whether or not

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74 *Submission 31*, p. 17.

75 *Third Report*, para 5.20, p. 75.

76 *Committee Hansard*, 11 November 2003, p. 6.

77 ibid.

78 ibid, p. 8.

79 Ms Marie Hume, *Committee Hansard*, 11 November 2003, p. 5.

abuse has actually occurred but rather to determine the best interests of the child and whether there is a risk of abuse of the child in the future. This means that:

> … often … information is not available to the court to make a decision because of the problems between that system and the state child protection system. In a lot of cases, no investigation is conducted because they see this as a federal matter and therefore the Family Court is left with making decisions without a proper investigation being conducted.[80]

4.66 The Committee notes the pertinent point made by the Queensland Association of Independent Legal Services (QAILS) in relation to the dichotomy issue:

> This process of demarcation is worthy of comment because in many respects it goes to the heart of a justice system in which the question "who is responsible" has replaced "who is in need". Two observations are relevant. Firstly, the distinctions often drawn (for example between so-called "Commonwealth and state matters") are arbitrary and take place in a vacumn [sic], which ignores the interconnectedness of law and policy.
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> The most notable example of this has been in the area of family law and domestic violence … The potential for family law problems to manifest themselves in other ways (such as through domestic violence) or to lead to non-family law problems (such as debt problems arising from the breakdown of a relationship) inevitably involves a raft of laws at both Commonwealth and State level. To this end, the Commonwealth and the states must be committed towards working together to ensure the operation of a seamless system of justice for those people affected by family breakdown. Regrettably, in the experience of Queensland community legal centres, this has not been, and continues not to be, the case.[81]

4.67 QAILS also argued that there is 'something manifestly unjust' with a legal system:

> … which tells clients that the success of having their legal need met depends upon their ability to:
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> - identify which Commonwealth/State laws afford protection; and
> - make a decision to proceed under the law most likely to afford access to legal aid (rather than access to a solution to their immediate problem).[82]

4.68 QAILS noted that, in the experience of Queensland CLCs, the "seamless system" which existed prior to the distinction between Commonwealth and state/territory laws

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80 ibid.

81 *Submission 73*, p. 23.

82 ibid, p. 24.

'functioned more effectively to meet the needs of clients across all areas and jurisdictions'.[83]

*Committee view*

4.69 The Committee reiterates its view in the *Third Report* that the Government's distinction between Commonwealth and state/territory matters is artificial and inappropriate. It is particularly unsuitable in relation to matters involving domestic violence and child abuse. These matters are clearly aligned with the Commonwealth family law legal aid priority of providing assistance to spouses and children who are the victims of domestic violence. The Committee believes that insistence on maintaining the distinction is a convenient excuse being used by governments to shift or avoid responsibility, rather than properly addressing legal needs.

4.70 The Committee considers that it is imperative that there be adequate funding of legal assistance for actions taken under state/territory law involving domestic violence since the scope for action under Commonwealth law is extremely limited. LACs should not be prohibited from applying Commonwealth legal aid funds at their sole discretion to matters arising under state/territory law.

4.71 The Committee considers that if the division between Commonwealth and state/territory matters is to be retained, the Commonwealth Government should comprehensively review the domestic violence and child abuse remedies currently available under Commonwealth law. It should then ensure that adequate legal aid funding is provided to enable victims of domestic violence and child abuse to access appropriate remedies in order to secure safe outcomes. This would necessarily involve amendment of the Commonwealth guidelines to permit Commonwealth funding of matters in support of Commonwealth legal aid priorities.

**Recommendation 18**

**4.72 The Committee repeats the recommendation made in its *Third Report* that the Commonwealth Government should:**

- **either provide an adequate level of funding for legal assistance in matters arising under state/territory law against domestic violence and child abuse (which are clearly aligned with the Commonwealth family law legal aid priority of providing assistance to spouses and children who are the victims of domestic violence); or**
- **enhance the remedies currently available under Commonwealth law for domestic violence and child abuse and then ensure that adequate funding is provided to enable victims of domestic violence and child abuse to access those remedies.**

83 ibid.

***Primary dispute resolution as a prerequisite for legal aid***

4.73 The Commonwealth Government's family law funding priorities promote, as far as practicable, resolution of disputes through non-litigation processes. This includes the use of counselling services and other alternative dispute resolution (ADR) services, such as the conferencing models currently in use in some LACs. Applicants for legal aid are required to use primary dispute resolution (PDR) before any grant is made for court proceedings since assistance for litigation should be pursued only as a last resort.[84]

4.74 Several submissions argued that PDR is usually not appropriate where there has been domestic violence. The NNWLS submitted that:

> A number of LACs now seem to require parties to attend a family law conference as an almost mandatory first step in obtaining legal aid. Concerns have been specifically expressed in NSW, Tasmania, ACT, WA and Queensland.[85]

4.75 While it is acknowledged that there are benefits in attempting to keep some families out of court and giving some parents the best opportunity to reach agreement on parenting arrangements after separation, the NNWLS argued that many of its clients express concern about negotiating with their former partner even in the moderately formal atmosphere of a legal aid conference.[86]

4.76 The NNWLS noted further:

> All LACs which conference have policies which allow clients to be excused from the necessity to conference where there is a history of domestic violence, but the experience of NNWLS is that this rarely happens. It is more likely that 'shuttle' conferencing will be arranged. There is very strong pressure placed on parties to compromise at conferences and many women advise [women's legal services] that they found it impossible to raise the history of domestic violence at the conference itself or that the relevance of any domestic violence was minimised. Therefore it is not taken into account in devising the arrangements for the children.[87]

4.77 Ms Lea Anderson of the National Association of Community Legal Centres agreed:

> Some commissions have the view that they can protect women in those circumstances by offering them shuttle conferences, but it is our view that the negotiations are occurring under the shadow of the law and that that is not good enough. Although people are in separate rooms, they may feel coerced or pressured into arriving at decisions that they will walk away

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84 Commonwealth-State Legal Aid Agreements 2000-2004, 'Commonwealth priorities', Sch 2.

85 *Submission 86*, p. 18.

86 ibid.

87 ibid.

> from and that are unworkable and unfair, and then, in fact, they go back into the system, represent themselves and face litigation.
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> …
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> My view is still that that is where the funds are so clients are being encouraged to go into ADR and PDR in the first instance. I do not think that is the best way to look at clients' legal needs, particularly where there is experience of family and domestic violence. We are glad that there are alternatives within the system, but they are not the panacea and they do not adequately meet the needs of everyone—particularly, women with families who have had experience of domestic and family violence. You cannot replace representation for those clients.[88]

4.78 Other concerns were also expressed by the NNWLS. For example, it submitted that conferencing is used as part of the merit test but what is really assessed is the attitude of the client towards the father and contact arrangements, and the best interests of children are not paramount (reaching an agreement between the parents is the main objective).[89] The NNWLS also argued that, while some LACs have developed policies and procedures for screening clients before conferencing and for conducting conferences where there has been violence, there appears to be no uniformity throughout Australia.[90]

4.79 Ms Sarah Vessali of the Women's Legal Service Victoria also noted some serious problems with PDR processes:

> Because of the nature of the clients we see, the vast majority of our clients have a history of family violence and abuse of some sort. In that situation there are very few cases where we would consider requiring the woman to attend some form of PDR would be appropriate. There are reality issues of a power imbalance. Whether or not the mediator will be thinking about that, the woman just cannot mediate on a level basis with the perpetrator of the violence against her, against the children or against both of them.[91]

4.80 Chief Justice Nicholson of the Family Court told the Committee of a pilot program involving a less adversarial approach which has commenced in Parramatta and Sydney (discussed further in Chapter 10). The Chief Justice noted that such an approach may help solve some of the problems associated with PDR processes:

> We are very conscious of domestic violence issues and we are very conscious of power imbalances. We are hopeful that this approach may assist the judge to deal with those power imbalances better than can be done now. One of the features of it is that, for example, the configuration of a courtroom is very much in the hands of the judge, so if you have a case that

88 *Committee Hansard*, 13 November 2003, pp. 39 & 40.

89 *Submission 86*, pp. 19-20.

90 ibid, p. 20.

91 *Committee Hansard*, 12 November 2003, p. 57.

> does involve violence he or she will probably sit in a conventional courtroom. If it is a less fierce type of contest, the judge may well sit in a conference room type of format. There are factors that we hope we have built in to consider that, but we felt we could not exclude cases where allegations of violence were made, because that would give you a skewed result in terms of how effective this process was. The other thing is that the judge is empowered to prevent cross-examination at any time, so if, for example, you have an overbearing person who is in effect adopting a threatening position the judge will simply say, 'All right, that's enough; I'm not hearing any more of that,' and can do it much more readily.[92]

4.81 Mr Tony Parsons of Victoria Legal Aid also told the Committee about a new PDR service it proposed to introduce in Victoria in January 2004:

> We have called this roundtable dispute management. Victoria Legal Aid has been one of the slowest commissions to pick up an in-house, effective PDR service for family law clients. Every other legal aid commission in Australia provides primary dispute resolution to one extent or another. [Victoria Legal Aid], for philosophical and financial reasons, has been slow to pick up that program but now we recognise that we have the money and why should the Victorian community be deprived of that kind of service if we are able to provide it? So we are implementing the service. The Commonwealth Attorney-General thinks it is a wonderful service on paper; we propose to make it a wonderful service in reality. It will consume those Commonwealth reserves over the next three to four years.[93]

*Committee view*

4.82 The Committee considers that extreme caution should be exercised in relation to the use of PDR in matters involving domestic violence. The Committee does not believe that PDR should be a prerequisite to obtaining legal aid assistance in such matters. The Committee is of the view that better processes need to be developed in order to deal with family violence and child abuse cases. The Family Court's new inquisitorial pilot program may go some way towards achieving better outcomes for women who have experienced domestic violence. However, the Committee believes that other guidelines and procedures may need to be developed in relation to grants of legal aid for women whose circumstances are not conducive to participating in PDR.

**Recommendation 19**

**4.83 The Committee recommends that victims of domestic violence not be required by legal aid commissions to participate in primary dispute resolution processes as a condition of access to legal aid.**

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92 *Committee Hansard*, 10 March 2004, p. 2.

93 *Committee Hansard*, 12 November 2003, p. 36.

**Recommendation 20**

**4.84 The Committee recommends that the Commonwealth Government adopt appropriate guidelines and procedures in relation to grants of legal aid for women whose circumstances are not suitable for participation in primary dispute resolution.**

***Funding for child representatives***

4.85 The Committee received evidence that the increasing proportion of legal aid funding expended on appointing child representatives has added to the pressures and difficulties of funding parties in family law cases. Legal Aid Queensland argued that:

> There has been an exponential increase in the appointments of child representatives by courts exercising family law jurisdiction in recent years. The Commonwealth Guidelines and policy of Legal Aid Queensland is to fund the appointment of child representatives where the criteria of *Re: K (1994) FLC 92-461* are met. In recent times the appointment of child representatives has been closely scrutinised, because of the increasing proportion of legal aid funds that are expended in this area. On occasion where a child representative has been re-appointed and there has been significant funding provided to the child representative previously, further funding of a child representative has been declined by Legal Aid Queensland.
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> … The new guidelines for child representatives issued by the Family Court of Australia may also have the consequence of increasing the unit cost of cases. There is only one fund in relation to family law matters, so the more that is expended on child representatives, the less that is available for parties seeking assistance for representation in family law proceedings.

4.86 The NNWLS stated that one of the effects of the decision of *Re K*[94] has been to reduce the monies available from LACs to fund parents in family law matters. A significant problem is created because child representatives are appointed by the Family Court and the Federal Magistrates Court, not LACs. This effectively removes control over some aspects of family law funding from LACs.[95]

4.87 The NNWLS agreed with Legal Aid Queensland, arguing that the new Family Court guidelines for child representatives introduced by the Family Court in 2003:

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94 In *Re K*, the Full Court of the Family Court set out clear guidelines for when a child representative should be appointed. This includes cases involving allegations of child abuse; intractable conflict between the parents; issues of cultural or religious difference affecting the child; and issues of significant medical, psychiatric or psychological illness or personality disorder in relation to the child or persons significant to the child.

95 *Submission 86*, pp. 6-7.

> … could mean that child representatives are required to undertake more work in some cases. While this may benefit children and produce better case outcomes, it will also place a further strain on legal aid budgets.[96]

*Committee view*

4.88 The Committee acknowledges the problems with the separate pool of funding for child representatives and the impact this appears to have on general funding for family law matters. The Committee recommends that the Family Court and LACs closely monitor the new Family Court guidelines on child representatives to determine their fiscal impact. The Committee also believes that a separate pool of funding for child representatives should ultimately be established so that legal aid grants for parents in family law proceedings are not unduly affected.

**Recommendation 21**

**4.89 The Committee recommends that the Family Court and legal aid commissions closely monitor the new Family Court guidelines on child representatives to determine what impact, if any, they have on legal aid budgets for family law matters generally.**

**Recommendation 22**

**4.90 The Committee recommends that a separate pool of funding for child representation ultimately be established so that decisions made by the Family Court and/or the Federal Magistrates Court to appoint child representatives do not impact on the availability of legal aid funds for parents in family law proceedings.**

***Self-representation in court proceedings***

4.91 Evidence presented to the Committee suggests there are serious problems with the availability of legal aid for representation in family law matters, resulting in many women being left unrepresented in Family Court proceedings and in state domestic violence matters.[97] Current data on self-representation in the Family Court indicates that nearly half of the litigants are self-represented at some stage during their case,[98] as is discussed in more detail in Chapter 10.

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96 ibid, p. 7.

97 National Network of Women's Legal Services, *Submission 86*, p. 13; Women's Legal Service SA Inc, *Submission 72*, p. 4; Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 55.

98 National Network of Women's Legal Services, *Submission 86*, p. 13, quoting R Hunter, A Genovese, A Chranowski and C Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, 2002, p. 41.

4.92 Ms Zoe Rathus from NNWLS noted that the number of self-representing women in the Family Court is increasing. This also has adverse flow-on effects on the provision of services generally:

> Quite frequently, particularly with the women's legal services based in capital cities, where family law becomes so much of our workload, we end up spending our time assisting women who are representing themselves in the Family Court. This means we do not have an opportunity to develop other areas of expertise; we do not have the capacity to assist women with other legal problems; and we are engaged in the very bizarre process that the chief justice was describing of the unbundling of legal services, where you do bits and pieces for clients. If we took on individual clients fully we simply would not be able to meet the kinds of performance targets expected of us in terms of number of clients assisted. So we end up grappling with very difficult decisions.[99]

4.93 The NCSMC argued that victims of violence need legal representation in order to effectively participate in the legal system since exposure to violence can have serious long-term consequences which might impair a victim's capacity to represent themselves.[100] The extreme difficulties experienced by women and children in accessing and achieving safety and due process through the legal system seem to be directly attributable to the fact that they are often unable to obtain legal representation.[101] The serious shortage of legal aid funding for family law and domestic violence issues, along with the "cap" on funding for family law matters, means that women are often in a situation where they do not have a lawyer who is willing to act for them.[102]

4.94 Research commissioned by National Legal Aid (NLA) to examine the relationship between the limited availability of legal aid funds for family law matters and self-representing litigants in the Family Court concluded that there was an extensive relationship, as is discussed in more detail in Chapter 10:

> That relationship is found not just in legal aid rejections of terminations, but also in non-applications for legal aid. [The results] also show that in some cases, litigants may appear unrepresented even while holding a grant of legal aid.[103]

4.95 It has been argued that this is due to current legal aid policies:

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99 *Committee Hansard*, 10 March 2004, p. 10. "Unbundling" is discussed further in Chapter 10.

100 National Council of Single Mothers and their Children, *Submission 19*, p. 2.

101 Sole Parents Union, *Submission 20*, pp. 6-7.

102 National Council of Single Mothers and their Children, *Submission 19*, p. 4.

103 ibid, pp. 13 & 14, quoting R Hunter, A Genovese, A Chranowski and C Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia*, Law and Justice Foundation of NSW, 2002, p. 33.

> … which tend to leave parties unrepresented or under represented at early stages of their proceedings – often when critical legal and strategic decisions are made. Then when the situation has become unworkable and the parties are locked in traumatic litigation, aid is granted for along the road to a contested trial … (F)unding some clients for court proceedings early may be a preferable course to take. This would enable the preparation of a meaningful affidavit of evidence in chief and perhaps the subpoenaing of critical independent material.[104]

4.96 The Women's Legal Service SA argued that women often withdraw from proceedings by accepting unsuitable consent orders that are not in their best interests rather than proceed unrepresented.[105] This often means that they are unable or unwilling to comply with the orders out of concern for the welfare of their children:

> … we will see women who have signed consent orders—often potentially very disadvantageous consent orders for them—because they know their legal aid is about to run out and if they do not reach a settlement they are going to be self-representing. So it results in consent orders, which potentially six months later are unworkable or are being abused in some ways, that have been signed in a hurry and under pressure. That is the reality.[106]

4.97 Women may then 'find themselves the subject of further Family Court proceedings for enforcement of these orders, and often receive penalties as they are again without legal representation.'[107] This not only creates an unfortunate situation for the women, but also has a significant impact on Family Court resources.

4.98 Problems are also created when women are forced to deal directly with a self-represented former partner in cases where there is a history of domestic violence. Women may be subjected to the trauma of cross-examination by the perpetrator of the violence.[108] Self-represented victims of violence may:

> … have to question and be questioned by a person who has terrorized and violated and degraded them. Some women have been so traumatized that they are unable to attend the court, with the consequence that they are excluded from access to the law.[109]

4.99 Women may also find themselves having to cross-examine other witnesses:

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104 ibid, p. 22.

105 *Submission 72*, p. 4.

106 Ms Sarah Vessali, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 57.

107 Women's Legal Service SA Inc, *Submission 72*, p. 4.

108 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 6.

109 National Council of Single Women and their Children, *Submission 19*, p. 2.

> In one case we saw a woman whose legal aid funding was exhausted during a trial in the Family Court. On day 5 of a 21-day trial her legal aid funds ran out. On day 6 she turned up to represent herself, having to cross-examine witnesses, including expert witnesses.[110]

*Committee view*

4.100 The Committee shares the concerns of a number of witnesses in relation to the high levels of self-representing women in family law matters. In particular, the Committee considers that where violence has taken place, legal representation is needed to ensure that women can participate effectively in the legal system. The Committee agrees that lack of legal representation has a direct effect on the difficulties experienced by women and children in achieving due process. While the incidence and impact of self-representation is considered in more detail in Chapter 10, the Committee considers it crucial that legal representation is provided in cases involving violence or abuse.

4.101 The Committee notes the Commonwealth Government's Budget 2004-2005 statement relating to increased funding for legal aid which will include a component to provide a new duty lawyer service for self-representing litigants in family law matters before the Family Court and the Federal Magistrates Court. The Attorney-General has stated that he 'will be inviting legal aid commissions to provide the new service.'[111] The new funding also contains a component to assist LACs to pay a minimum rate of $120 (GST exclusive) per hour to solicitors undertaking Commonwealth family law matters.

**Recommendation 23**

**4.102 The Committee strongly recommends that the Commonwealth Government provide legal funding to enable legal representation to be available to all parties in family law disputes where there are allegations of domestic violence or child abuse, or other serious allegations.**

***Lack of coordinated services to deal with domestic violence***

4.103 At the Port Augusta hearing, Ms Marilyn Wright from the Women's Legal Service SA suggested that in most areas there needs to be 'a coordinated response as far as legal services, health services and counselling services are concerned, because they all cross over.'[112] Often, lawyers and support workers are involved in 'multiple and simultaneous causes of action to try and establish immediate social, legal and

110 Ms Kathryn Seear, Women's Legal Service Victoria, *Committee Hansard*, 12 November 2003, p. 55.

111 The Hon Philip Ruddock MP, Attorney-General, *Media release*, 'More Money for Legal Aid', 11 May 2004.

112 *Committee Hansard*, 11 November 2003, p. 56.

financial protection for a woman.'[113] Therefore, a coordinated response is important to achieve the best possible outcome for women facing separation and divorce. It is particularly important in cases of domestic violence.

4.104 In SA there is currently no coordinated service in the Magistrates Courts to support, advise, and represent women who are seeking restraining orders. Such services are established in the eastern states and are effective in reducing barriers to women seeking protection from domestic violence through the court system. Support services in SA are limited to support for women at court and running programs for perpetrators outside court but do not provide ongoing advocacy and support for women beyond court. Similarly there is no service to provide support for women who have experienced domestic violence as they negotiate their way through the Family Court.[114]

4.105 In its submission to the Committee, the Women's Legal Service SA noted the achievements of the coordinated domestic violence scheme in NSW.[115] At the Port Augusta hearing Ms Marilyn Wright also stated that the ACT's collaborative response to domestic violence was particularly good:

> It has a duty solicitor at the Magistrates Court. It has women's shelters in different areas of the ACT. It has a Domestic Violence Crisis Service that is well funded and it is a 24-hour service. It provides court support as well. Their workers attend with police on victims when there is a domestic violence call-out. There is a domestic violence coordinator, who is based at the Magistrates Court.[116]

4.106 It appears that when seeking advice and support women prefer to see other women who can better understand the issues they face. However, the stigma often associated with domestic violence may mean that there are difficulties getting women to attend even those services provided exclusively by other women:

> Women tend to call us after we have left the area. They feel more comfortable doing that than approaching us directly where other people could possibly see that they had sought assistance from us. There seems to be a culture that it is not acceptable to discuss what happens within the private sphere. That is pretty prevalent amongst all the different groups.[117]

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113 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 4.

114 Women's Legal Service SA Inc, *Submission 72*, p. 3.

115 ibid. Some of these achievements include: improved integrated responses from Local Courts, legal practitioners, police prosecutors and community services; a decrease in the number of women withdrawing Aggravated Domestic Violence Order applications; women are provided with appropriate support and information; an increased feeling of safety for women; and an actual enhancement of safety for women.

116 *Committee Hansard*, 11 November 2003, p. 58.

117 Ms Zita Adut Ngor, *Committee Hansard*, 11 November 2003, p. 60.

*Committee view*

4.107 The Committee considers that a coordinated, properly funded approach is essential if women are to be provided adequate access to justice. The Committee agrees that a number of different services are often required in situations where women experience domestic violence and that many of these services overlap. Such services include the provision of legal advice, information/education, crisis response, accommodation, counselling, support and referrals.

4.108 The Committee has heard evidence that some states/territories have developed particularly effective coordinated domestic violence schemes. However, in some states, such as SA, these schemes do not exist. The Committee is of the view that where such schemes do not exist, there is an immediate need for appropriate services to be implemented. This includes the provision of ongoing support services for women in the Family Court.

4.109 There would also be value in expanding the existing arrangements so that they are better able to accommodate the growing number of women who have experienced domestic violence. This would necessarily involve financial commitment by the Commonwealth Government and state/territory governments. Such an expansion should include a greater emphasis on community education with the aim of removing the stigma often associated with domestic violence.

**Recommendation 24**

**4.110 The Committee recommends that appropriate coordinated schemes to deal with domestic violence be implemented in those states and territories where they do not presently exist, as well as in the Family Court, and that such schemes be modelled on successful schemes already in place. The Committee also considers that current schemes could be usefully expanded to include a greater emphasis on community education with the aim of removing the stigma often associated with domestic violence.**

***Inadequacy and inaccessibility of services in rural, regional and remote areas***

4.111 There is a clear indication that legal services in rural, regional and remote (RRR) areas are especially inadequate and inaccessible for women. Research has shown that there is a higher reported incidence of domestic violence in RRR communities than in metropolitan areas but as funding levels are generally lower, women in such areas are often denied access to essential legal services.[118] While women-only advice and information may be available in some areas, there is still a significant gap in service delivery due to a severe lack of funding.[119]

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118 Women's Legal Service Victoria Inc (in conjunction with Domestic Violence and Incest Resource Centre; Victorian Women's Refuges and Associated Domestic Violence Services), *Submission 27*, p. 4.

119 Northern Rivers Community Legal Centre, *Submission 22*, pp. 8-9.

4.112 In rural and remote areas, it can be extremely difficult for women to access the services they need. Rural outreach programs are limited because they do not have the funding to go on all the court circuits, which is seen as being critical in certain areas.[120] The Rural Women's Outreach Program, Port Augusta and the Women's Legal Service SA gave evidence at the Port Augusta hearing that women in isolated towns do not have facilities such as women's shelters or safe houses. Although there might be shelters in the major regional areas, the cost of transportation to those shelters is a significant issue for many women, especially if they are living in very remote areas.[121] In some areas it may be impossible for women to get police to attend domestic violence incidents, or even talk directly to police in their local area.[122]

4.113 It is important that women have access to services in the areas in which they live. It is not practicable for women in rural and remote communities to have their solicitor living in towns or cities that are large distances away from them. As Ms Marilyn Wright of the Women's Legal Service SA stated in evidence to the Committee:

> I think there is a core base already, with community legal centres, women's legal services and legal service commissions. Again, I think there needs to be some kind of cooperative way of working. The Legal Services Commission and community legal centres are Commonwealth funded, but we have instances where we work with women who, as I said, may be eligible for legal aid because English is not their first language, but they do not want to have their solicitor in Adelaide when they are in Port Augusta. Aboriginal women may not have a telephone or a vehicle, so it suits them to come into the office in Port Augusta to give instructions and for the solicitor to take instructions. It is very important to have that service in that area.[123]

4.114 The Northern Rivers Community Legal Centre also raised a number of barriers to justice which are experienced by women in RRR areas. For example, the low number of private practitioners in rural areas increases the risk of client conflict of interest in family law matters, often with the woman losing access to the solicitor rather than the full-cost paying male client. Rural women are also less mobile than

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120 Ms Marilyn Wright, *Committee Hansard*, 11 November 2003, p. 57.

121 ibid.

122 For example, '… calls to the police station in Cooper Pedy after eight o'clock get diverted to Port Augusta, which is a six-hour drive away. If any domestic violence occurs after eight o'clock you have very little chance of getting police to attend the scene, which causes quite a lot of trouble for women…': Ms Zita Adut Ngor, *Committee Hansard*, 11 November 2003, p. 57. Some women in rural and remote communities (even in regional centres such as Port Augusta) may not have telephones to call for police attendance in the first place: Ms Marilyn Wright, *Committee Hansard*, 11 November 2003, p. 57.

123 Ms Marilyn Wright, *Committee Hansard*, 11 November 2003, p. 61.

women living in metropolitan areas, often having limited access to transport to attend legal services in distant towns, and there are fewer female lawyers in rural areas.[124]

4.115 The Committee also heard evidence in relation to the difficulties experienced by women in RRR areas who work in the field of legal and related services:

> The kind of work that people do in remote and regional community legal centres is really quite extraordinary, particularly in the women's legal services and Indigenous women's legal services, where you have single women workers who travel to remote areas, often travelling hundreds of kilometres at times. There is often not sufficient recompense for the expense of doing that and for the expense of having the family looked after while engaged in such activities.[125]

*Committee view*

4.116 The Committee acknowledges the overwhelming evidence presented to it in relation to the limited and inadequate access to services in RRR areas and, in particular, the specific difficulties faced by women in these areas. The Committee considers it unacceptable that women living in RRR areas should be disadvantaged and denied basic services and the right to access justice simply because of where they live.

4.117 General issues arising in RRR areas are discussed in more detail in Chapter 6. However, the Committee considers it important that the particular needs of women in such areas are given special attention.

**Recommendation 25**

**4.118 The Committee recommends that the Commonwealth Government commission research to determine the particular needs of women living in rural, regional and remote areas of Australia in recognition of the fact that improved and coordinated services to women living in those areas are urgently required.**

***Other areas of law affecting women inadequately funded by legal aid***

4.119 The NNWLS stated in its submission to the Committee that legal aid has not been readily available for a number of years for many civil law, administrative law and human rights law matters. The NNWLS submitted that it is a concern that certain areas of law have been deemed to fall outside the domain of legal aid when alternative services are not adequately funded. It submitted that this is particularly the case in immigration law matters:

> The CLCs working in this area cannot possibly meet demand and staff are often overwhelmed by huge and emotionally draining case loads of their

124 Northern Rivers Community Legal Centre, *Submission 22*, p. 8.

125 Ms Zoe Rathus, National Network of Women's Legal Services, *Committee Hansard*, 10 March 2004, p. 9.

> clients. For many women, immigration law, family law and domestic violence intersect and some women pay a high price if they are unable to obtain timely and accurate immigration or refugee advice.[126]

4.120 In their submission, Professor Rosemary Hunter and Associate Professor Jeff Giddings made note of the very limited availability of legal aid for civil proceedings which potentially disadvantage women who might wish to bring claims for personal injury, crimes compensation, sex discrimination, or domestic violence restraining orders.[127]

4.121 Further, a group of women who are often overlooked in discussions about legal aid are women prisoners. It has been submitted that women prisoners throughout Australian do not have satisfactory access to legal services:

> There is no systematic approach to providing legal services to women prisoners. Some LACs provide services related to the offences with which the women have been charged, but for many women prisoners their legal problems relate to family law issues, care and protection, access to their children, credit and debt and a range of internal correctional issues. This group of Australians is almost ignored by the legal aid radar. [128]

*Committee view*

4.122 In its submission to the Committee, the NNWLS recommended research be conducted, and service delivery and community education be improved for women in relation to immigration and refugee law, human rights law, civil law, administrative law, and women in prison. The Committee supports the view that research be carried out with the aim of improving service delivery and community education for women in these areas of law, and for women in prison.

**Recommendation 26**

**4.123 The Committee recommends that the Commonwealth Government commission research in relation to the delivery of legal services and community education for women in areas other than family law, such as immigration and refugee law, human rights law, civil law and administrative law, and in relation to women prisoners, with a view to improving the delivery of services and education.**

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126 National Network of Women's Legal Services, *Submission 86*, p. 32.

127 *Submission 24*, p. 3.

128 National Network of Women's Legal Services, *Submission 86*, pp. 32-33.