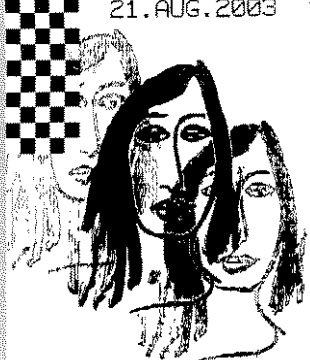


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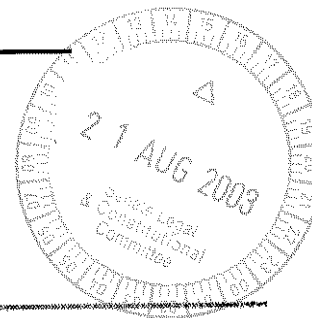
Domestic Violence Advocacy Service

Telephone Advice (02)9637 3741

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Facsimile Cover Sheet



To: **House of Representatives References Committee**

Fax No: (02) 6277 3560

From: **Catherine Carney**

Fax No: (02) 9682 3844

No. of Pages (Including this one): 18

Date: 21 August 2003


Dear Committee Members,

Re: Inquiry into Current Legal Aid and Justice Arrangements

Please find attached the submission from the Domestic Violence Advocacy Service.

Yours faithfully

Domestic Violence Advocacy Service



Per:

Catherine Carney
Principal Solicitor

Please phone (02) 9637 5020 if you have any problems receiving this fax.

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CC:VKC

21 AUGUST 2003

**COMMITTEE SECRETARY
HOUSE OF REPRESENTATIVES REFERENCES COMMITTEE
PARLIAMENT HOUSE
CANBERRA ACT 2600**

Dear Committee Members,

RE: INQUIRY INTO CURRENT LEGAL AID AND JUSTICE ARRANGEMENTS

The Domestic Violence Advocacy Service (DVAS) is a state-wide community legal centre for women operating in New South Wales. The DVAS operates a telephone advice line, provides legal representation in a number of Sydney metropolitan courts (particularly in western Sydney), conducts community legal education and is actively involved in policy work and lobbying for law reform. The DVAS as a direct service provider also plays an important role in the monitoring of the performance of other institutions that offer services to women experiencing domestic violence. The DVAS has been operating for the past sixteen years.

The DVAS is also the auspice body for the NSW Legal Aid Commission Women's Domestic Violence Court Assistance Program Training Resource Unit (WDVCAP TRU). This Unit brings the DVAS into contact with over 33 Local Court Women's Domestic Violence Court Assistance Schemes throughout NSW.

In the 2001-2002 financial year the DVAS had contact with 2485 women seeking advice, referral and legal representation. Additionally, over 900 people accessed the training provided by solicitors from the DVAS and by the WDVCAP TRU. Our submission to the Inquiry is informed by our work with the women of NSW who have experienced domestic violence.

(A) THE PERFORMANCE OF CURRENT ARRANGEMENTS IN ACHIEVING NATIONAL EQUITY AND UNIFORM ACCESS TO JUSTICE ACROSS AUSTRALIA, INCLUDING IN OUTER-METROPOLITAN, REGIONAL, RURAL, AND REMOTE AREAS.

WOMEN'S DOMESTIC VIOLENCE COURT ASSISTANCE SCHEMES (WDVCAS)

33 WDVCAS across NSW provide support for women seeking Apprehended Domestic Violence Orders (ADVOs) at 54 Local Courts. 17 WDVCAS are based in the Sydney metropolitan area and 16 WDVCAS are based in regional, rural or remote areas. The WDVCAS are funded by the NSW Legal Aid Commission's WDVCAAP to provide a holistic service to women seeking ADVOs in NSW Local Courts, including providing support, legal representation, information and appropriate referrals to other services.

In addition to the WDVCAS that are funded by the NSW Legal Aid Commission, there are also unfunded schemes operating across NSW. Although there are some schemes that are unfunded in metropolitan Sydney, most unfunded schemes provide services at Local Courts in rural and remote areas. This creates discrepancies in access and equity to justice in NSW, with women in rural and remote areas not being able to access the greater level of services provided by funded schemes.

LEGAL REPRESENTATION

In NSW, women can either apply for an ADVO through their local Police or through the Chamber Magistrate at their Local Court (often called "private applications"). If the Police initiate an ADVO on behalf of a woman in need protection, the Police Prosecutor represents the woman at any mention or hearing of the matter.

Ten of the WDVCAS are currently receiving extra funding by the NSW Legal Aid Commission to provide a Domestic Violence Solicitor Scheme (DVSS) for private applicants. Nine of these WDVCAS are based in the Sydney metropolitan area and the other WDVCAS is based in the Illawarra region. Further details of procedures of the DVSS are attached and marked "A". The NSW Legal Aid Commission provides funding of up to \$500 per day for an approved private solicitor to represent women applicants for no fee at ADVO list days (mentions of ADVO matters). Women do not need to satisfy the legal aid means test or other policies on ADVO list days to receive representation. Furthermore the DVSS solicitors must undertake a certain quota of pro bono hearings, when women are ineligible for legal aid grant.

Although the NSW Legal Aid Commission has indicated an intention to expand the DVSS scheme to other WDVCAS, including to WDVCAS in remote and rural areas, there has been no confirmation of this expansion to date. The remaining 22 WDVCAS rely on other arrangements, particularly on solicitors from Community Legal Centres (CLCs) or from local private practices attending ADVO list days to represent women for no fee. There are benefits in having solicitors from local CLCs and from local private practice assisting women on ADVO list days - such as building local networks and community ties, and providing legal advice and appropriate referrals to local services.

However, for other WDVCS in rural or remote areas, who do not have access to solicitors from CLCs or from private practice, the WDVCS often rely on the goodwill of the Police Prosecutor to represent all women at mentions of ADVO matters. If the matter proceeds to a hearing, the women will need to arrange for a solicitor or they will need to represent themselves. Legal aid is only available in some circumstances (see below) and costs for a private solicitor at a hearing usually range between \$2,000.00 to \$4,000.00 per party.

NSW LEGAL AID COMMISSION'S POLICY FOR ADVOS

The NSW Legal Aid Commission's Policy for ADVOs was last amended on 31 May 2002. A copy of the policy is attached and marked "B". Legal Aid is available to applicants at ADVO hearings as follows:

Legal aid is available for an applicant at an ADVO hearing who satisfies the appropriate means test and who:-

- Is or has been married to the defendant; or
- Has or has had a de facto relationship within the meaning of the Property (Relationships) Act 1984 with the defendant; or
- Has or has had an intimate relationship with the defendant, whether or not the relationship involves or has involved a relationship of a sexual nature; or
- Is living or has lived in the same household or other residential facility as the defendant, *but only if exceptional circumstances exist*; or
- Has or has had a relationship involving his or her dependence on ongoing paid or unpaid care of the defendant, *but only if exceptional circumstances exist*; or
- Is or has been a relative of the defendant, *but only if exceptional circumstances exist*.

Exceptional circumstances include matters where the applicant has a physical, psychiatric or intellectual disability and other options for resolving the matter have been unsuccessful or inappropriate. For all defendants in ADVO matters, including defendants in cross applications, legal aid is only available if exceptional circumstances exist.

It is our submission that legal aid should be available to all women who satisfy the means test in ADVO matters and whose applications are not vexatious or frivolous or have no possible prospects of success. The exceptional circumstances test is too discretionary. Many women who have been victims of domestic violence are stressed at not knowing whether they will be successful in their application for legal aid. If their application is denied and they cannot obtain a pro bono solicitor, many women are unable to afford the fees of a private solicitor, and end up representing themselves or withdrawing the application.

(B) THE IMPLICATIONS OF CURRENT ARRANGEMENTS IN PARTICULAR TYPES OF MATTERS, INCLUDING CRIMINAL LAW MATTERS, FAMILY LAW MATTERS AND CIVIL LAW MATTERS.

Since the commencement of the WDVCA¹ program in 1996, a number of outcomes have been achieved. They include¹:

1. Improved integrated responses from Local Courts, legal practitioners, Police Prosecutors and community services.
2. A decrease in the number of women withdrawing ADVO applications.
3. ADVOs are better tailored to individual needs.
4. Women are provided with appropriate support and information.
5. Court processes have been improved.
6. Women have an increased feeling of safety and safety is enhanced.

Some women in remote and rural areas in NSW may withdraw their ADVO applications because they have no support through the legal process. Access to support, legal representation and appropriate referrals to other services from a professionally trained and funded scheme such as the WDVCA, may prevent withdrawals in such circumstances.

Since legal aid is not available to some applicants at the hearing of ADVO matters unless exceptional circumstances exist, some women applicants must self represent because they cannot afford a solicitor. Some women are withdrawing their application for an ADVO because they are not eligible for legal aid and are overwhelmed by the prospect of representing themselves.

However, it is acknowledged that the currently policies of the NSW Legal Aid Commission prioritise funding going to complainants in ADVO matters. We applaud this policy and recommend that it is continued. However, we also note there is an increasing number of cross applications being made by male defendants. That is, when a woman has made an application either through the Police or a private application, a defendant can seek ADVO proceedings to be commenced against the woman. The Chamber Magistrate cannot refuse to issue such an application, even if the cross application is vexatious or frivolous. Police Prosecutors generally do not represent women in cross applications, even if they are representing the women in the original application. Current NSW Legal Aid Commission policies require such women to show exceptional circumstances as to why they should receive a grant of legal aid in the cross application. This is too onerous a policy. Exceptional circumstances should not be required to be shown by a defendant to a cross application.

¹ Jane Mulrone, *Women's Domestic Violence Court Assistance Program: Support Workers' Kit* (Second Edition) (Sydney: TRU, DVAS, 2002), pp 5-6.

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(C) THE IMPACT OF CURRENT ARRANGEMENTS ON THE WIDER COMMUNITY, INCLUDING COMMUNITY LEGAL SERVICES, PRO BONO LEGAL SERVICES, COURT AND TRIBUNAL SERVICES AND LEVELS OF SELF-REPRESENTATION.

For those court assistance schemes that are unfunded, women are often left with little support or legal assistance unless they have the economic means to arrange for such services themselves. Those who cannot afford such assistance, often turn to court staff and family and friends for assistance. This results in extra demands being placed on court staff and the wider community. The WDVCS should be funded to assist women seeking ADVOS at all Local Courts in NSW. Furthermore, the WDVCS should be funded to have more paid workers. The WDVCS currently have paid workers, as well as workers seconded from other organisations (such as from Centrelink, Family Support Services and local refuges) and volunteers. There are high turn over rates in the numbers of seconded workers and volunteers leaving WDVCS. By having paid workers, the WDVCS can provide a more sustained and enhanced service to women experiencing domestic violence.

Where there are "gaps" in WDVCS and in NSW Legal Aid Commission funding and policies, CLCs, Police Prosecutors, Court Staff and benevolent organisations often step in and attempt to fill in the gaps. Although this coincides with some of the service delivery areas of CLCs, it does not coincide with other services who assist women who experience domestic violence and sometimes results in women being denied access and equity to justice. It also creates unrealistic expectations on individual services and workers.

If you wish to discuss the issues raised in this submission further, please feel free to contact Catherine Carney on (02) 9749 7700 or Monica Neville on (02) 9637 5020 (ext. 229).

Yours faithfully
Domestic Violence Advocacy Service

Per:
Catherine Carney
Principal Solicitor



FAX 96823844

"A"

Procedures for the Domestic Violence Solicitor Scheme

Updated April 2003

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1. The Scheme

At the establishment of a new DVSS the Legal Aid Commission (Legal Aid) will select the practitioners eligible to participate in the Domestic Violence Duty Solicitor Scheme (DVSS Scheme) from those practitioners who have expressed an interest in participating.

Legal Aid will delegate to each practitioner the power to determine applications for legal aid by protected persons for list day appearances in apprehended domestic violence order matters.

Legal Aid will allocate each practitioner to the DVSS Scheme for a specific court or courts.

Legal Aid will provide a list of DVSS Scheme participants to the coordinator of the Women's Domestic Violence Court Assistance Scheme (DVCAS) for the relevant court.

1.1 Maintenance

Once the scheme is operating, the WDVCAS Coordinator is responsible for maintaining a list of practitioners.

If a practitioner is no longer able to participate on the list the coordinator will select the practitioners eligible to participate in the Domestic Violence Solicitor Scheme (DVSS Scheme) from those practitioners who have expressed an interest in participating. Coordinators will be responsible for interviewing via the panel selection process and informing legal aid of new solicitors on the roster.

Legal Aid will delegate to each practitioner the power to determine applications for legal aid by protected persons for list day appearances in apprehended domestic violence order matters.

2. The roster

The WDVCAS coordinator will be responsible for maintaining a roster of DVSS Scheme participants to provide a duty service on each domestic violence list day. The roster may include private practitioners, Legal Aid employed solicitors and community legal centre solicitors. The WDVCAS coordinator will endeavour to roster practitioners on a rotating basis.

Some allowance may need to be made for periods when practitioners are unavailable. The WDVCAS coordinator will ensure that, as far as possible, in any roster period all practitioners are rostered to attend on an equal number of list days. The WDVCAS coordinator will provide a copy of the roster to all practitioners.

Practitioners must advise the WDVCAS coordinator as soon as possible of any list days when they will be unavailable.

3. List days

3.1 Attendance

Practitioners must attend court on their rostered list days.

Practitioners must advise the WDV CAS coordinator as soon as possible if they will be unavailable to attend on a rostered list day. The coordinator will arrange for another practitioner in the scheme to attend on the list day.

If a practitioner is unavailable to attend court on his or her rostered list days on an excessive number of occasions, Legal Aid will ask the practitioner to provide an explanation. If Legal Aid is not satisfied that the practitioner will be available to participate fully in the roster, Legal Aid may terminate the practitioner's participation in the DVSS Scheme.

3.2 Representation

On rostered list days practitioners must provide advice and representation to any woman who requests assistance and is:

- applying for an apprehended domestic violence order (ADVO) and who is eligible for assistance under the WDV CAS, or
- defending an application for an ADVO, and who is eligible for assistance under the WDV CAS.

Representation is not limited to a client's first appearance.

3.3 Conflict of interest

If the practitioner is unable to represent a client due to a conflict of interest, he/she must advise the WDV CAS coordinator as soon as possible.

If a conflict of interest arises that prevents a practitioner from acting the WDV CAS coordinator will arrange alternative representation for applicants.

3.4 Liaison with the WDV CAS coordinator

The WDV CAS coordinator will identify to the practitioner women who qualify for assistance under the DVSS Scheme.

The practitioner must consult with the WDV CAS coordinator at the completion of the list and provide any information about the outcome of matters that the coordinator requests.

3.5 Payment of fees

Practitioners will be paid at the Legal Aid fee rate for Local Court criminal matters, currently \$110 per hour.

After each list day the practitioner must submit a completed blue "Tax Invoice" form (tab E) to the Grants Division of Legal Aid.

3.6 Legal aid application forms

The practitioner must ensure that all applicants complete an application for legal aid prior to their court appearance using the "Application for Legal Aid Duty Lawyer and Advice" form (tab D).

The practitioner must enter details of the outcome of the proceedings onto each application form.

After each list day the practitioner must forward all application forms to the Coordinator of the Women's Domestic Violence Court Assistance Program at Legal Aid.

3.7 Adjournments

If a matter is adjourned to a later date, either for further mention or for hearing, the practitioner must follow the procedures set out in the following section.

4. Adjournments for further mention

Where a matter is adjourned for further mention, the practitioner must seek to have the matter adjourned to another DVSS Scheme list day, if possible. The client will continue to be represented as part of the DVSS Scheme.

If the matter is adjourned to a day that is not covered by the DVSS Scheme list day, the WDVCAS coordinator will try and arrange representation for that day.

5. Defended hearings

5.1 Legally aided client

Where a matter is listed for defended hearing and the client is granted legal aid, she may nominate the DVSS Scheme practitioner who represented her on the list day as her solicitor. If so, the DVSS Scheme practitioner must represent the client unless unable to do so because of conflict or unavailability.

If the client nominates another practitioner as her solicitor, the grant will be assigned as though the matter is listed in a court which is not serviced by a DVSS Scheme.

5.2 *Pro bono representation*

The practitioners must represent DVSS Scheme clients at defended hearings on a pro bono basis in accordance with the following guidelines.

The practitioner may be required to provide pro bono representation at one defended hearing of up to 5 hours for every three attendances at court on list days as a rostered domestic violence duty solicitor.

Clients eligible for pro bono representation as part of the DVSS Scheme are those clients who

- are not eligible for legal aid, and
- have been represented by a rostered DVSS Scheme solicitor on a list day, or have requested the WDV CAS coordinator to arrange representation under the DVSS Scheme.

Matters to be conducted pro bono will be allocated to the practitioner by the WDV CAS coordinator.

If a defended hearing is estimated to take in excess of five hours, the practitioner may decline to accept the matter on a pro bono basis. The WDV CAP coordinator may negotiate with the practitioner to provide representation and allow it to be counted as two pro bono matters.

The practitioner should decline to provide pro bono representation for a defended hearing if he/she is satisfied that the application is frivolous or vexatious or has no possible prospects of success. If the practitioner declines to represent a client he/she must inform the WDV CAS coordinator of his/her decision and the reason for it.

After each hearing the practitioner must, with the consent of the client, provide a written report of the outcome of the hearing to the WDV CAS coordinator.

6. Termination

6.1 *By the practitioner*

The practitioner may terminate his/her participation in the DVSS Scheme upon giving three months notice in writing to Legal Aid.

6.2 *By Legal Aid*

If Legal Aid is has any concerns about the practitioner's conduct while participating in the DVSS Scheme, the practitioner will be advised in writing of those concerns, and asked to provide a response. If Legal Aid is satisfied that it is not reasonable for the practitioner to continue to participate in the Scheme, Legal Aid may terminate the practitioner's participation in the Scheme upon giving the practitioner one month's notice in writing.

POLICY BULLETIN NO. 1/02

31 May 2002

State criminal law matters

- **Apprehended domestic violence orders**

Amended Policy – Apprehended domestic violence order proceedings

The Board has resolved to adopt a new policy on eligibility for legal aid for apprehended domestic violence order (ADVO) proceedings in the Local Court.

Legal aid continues to be available to applicants applying for an ADVO against their current or former spouse or de facto partner, or any other person with whom they have or have had an intimate personal relationship.

The major changes to the existing policy are:

- Legal aid will now only be available for ADVO proceedings against a relative in exceptional circumstances.
- Legal aid will be available for ADVO proceedings against a person residing in the same household or other residential facility, but only in exceptional circumstances.
- Legal aid will be available for ADVO proceedings against carers, but only in exceptional circumstances.
- Exceptional circumstances include matters where the applicant has a physical, psychiatric or intellectual disability and other options for resolving the matter have been unsuccessful or are inappropriate.
- Legal aid will now be available to defend a cross-application, but aid will not be available to the cross-applicant unless exceptional circumstances exist.
- The new policy clarifies that aid is available to the original applicant for the ADVO for variation or revocation proceedings, and not to the original defendant.

- The new policy incorporates the existing policy for apprehended personal violence order (APVO) proceedings, which are currently included in the policy on summons matters.

Commencement date

This amendment applies to legal aid applications determined on or after 1 June 2002.

Attachments

The new policy is attached, together with a table setting out the main provisions of the new policy in an easy to read format.

Updates

This policy amendment will be included in the next update of the Legal Aid Policies Booklet.

Further information

For further information about this amendment please contact Sally McAtee, Senior Solicitor, Legal Policy Unit on 9219 5034.

Issued by

Legal Policy Unit

Level 8

Head Office

9219 5882

Apprehended violence order policy

for applications determined on or after 1 June 2002

Legal aid is available for state criminal law proceedings subject to:-

- exclusions (see 6.2); and
- general guidelines (see 6.3)

as follows:-

(a) In a local court, subject to Means Test B but not Merit Test A or Merit Test B, for:-

(i) - (vi) ...

(vii) apprehended domestic violence order proceedings under part 15A of the *Crimes Act 1900* to a person in need of protection who:-

- is or has been married to the defendant
- has or has had a de facto relationship within the meaning of the *Property (Relationships) Act 1984* with the defendant
- has or has had an intimate relationship with the defendant, whether or not the intimate relationship involves or has involved a relationship of a sexual nature
- is living or has lived in the same household or other residential facility as the defendant, but only if exceptional circumstances exist
- has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the defendant, but only if exceptional circumstances exist
- is or has been a relative of the defendant, but only if exceptional circumstances exist.

"Cross-applications"

If the person seeking aid to apply for an apprehended domestic violence order is also a defendant in associated apprehended violence proceedings, aid is only available for their application where exceptional circumstances exist.

Legal aid is not available where:-

- the application for an order is made by a police officer, or
- the Commission is satisfied that the application for an order is frivolous or vexatious or has no possible prospects of success.

A person in need of protection is to be represented by

- a rostered domestic violence duty solicitor if available, or
- an in-house Commission solicitor unless also unavailable.

Note: Definitions of key terms appear at the end of paragraph (viii)

(viii) apprehended domestic violence order proceedings and apprehended personal violence order proceedings under Part 15A of the *Crimes Act 1900* to defendants where

- the defendant is a person in need of protection in associated apprehended domestic violence order proceedings, or
- exceptional circumstances exist.

It will be a condition of a grant of aid to defend a cross-application that the legally assisted person seek an order for costs against the cross-applicant, where appropriate.

Definitions

- *Apprehended domestic violence order proceedings and apprehended personal violence order proceedings* include variation or revocation proceedings.
- A *person in need of protection* is a person for whose protection an apprehended violence order is made or sought.
- A *defendant* is a person against whom an apprehended violence order is made or sought.
- *Associated apprehended domestic violence order proceedings* are current proceedings involving the same parties including proceedings concluded within the previous 3 months.
- *Exceptional circumstances* include matters where the applicant has a physical, psychiatric or intellectual disability and other options for resolving the matter have been unsuccessful or are inappropriate.
- A *relative* is a relative within the meaning of section 4(6) of the *Crimes Act 1900*.

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Availability of legal aid in ADVO and APVO matters Applications determined on or after 1 June 2002	
person in need of protection (and cross-defendant)	defendant (and cross-applicant)
<p>Aid available for ADVO proceedings (but not APVO proceedings) in certain circumstances</p> <p>Aid is available for ADVO proceedings (including variation or revocation proceedings) if</p> <ul style="list-style-type: none"> • the parties are or have been married or in a de facto relationship • the parties have or have had an intimate personal relationship • the parties live or have lived in the same household or residential facility, only if exceptional circumstances exist (see below) • the applicant is or has been dependant on the defendant/cross-applicant for care, but only if exceptional circumstances exist (see below) • the parties are or have been relatives, but only if exceptional circumstances exist (see below) 	<p>Aid not generally available for ADVO proceedings and APVO proceedings</p> <p>Aid is available for ADVO proceedings and APVO proceedings (including variation or revocation proceedings), but only if exceptional circumstances exist (see below)</p>
<p>Exceptional circumstances</p> <p>Exceptional circumstances include matters where the applicant has a physical, psychiatric or intellectual disability and other options for resolving the matter have been unsuccessful or are inappropriate</p>	<p>Exceptional circumstances</p> <p>Exceptional circumstances include matters where the applicant has a physical, psychiatric or intellectual disability and other options for resolving the matter have been unsuccessful or are inappropriate</p>
<p>Application made by police</p> <p>Aid is not available for an application where the application for an order is made by a police officer</p>	
<p>Frivolous and vexatious application</p> <p>Aid is not available if the Commission is satisfied that the application for an order is frivolous or vexatious or has no possible prospects of success</p>	
<p>Obligation on cross-defendant to seek an order for costs</p> <p>It will be a condition of a grant of aid to defend a cross-application that the legally assisted person seek an order for costs against the cross-applicant, where appropriate</p>	
<p>Representation</p> <p>The applicant is to be represented by</p> <ul style="list-style-type: none"> • a rostered DV duty solicitor, if available, or • an in-house Commission solicitor, unless also unavailable 	<p>Representation</p> <p>The matter is to be conducted by an in-house solicitor unless exceptional circumstances exist</p>