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**Women's Legal Service**  
Victoria

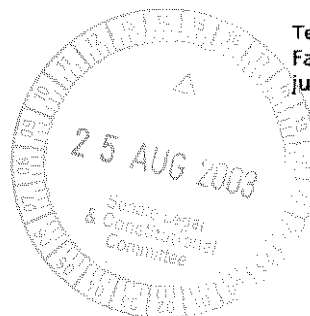
21 August 2003

Senate Inquiry into Legal Aid and Access to Justice  
c/o - The Secretariat  
Senate Legal and Constitutional Committee  
Room S1.61, Parliament House  
Canberra ACT, 2600.

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Dear Committee Members,

## **INQUIRY INTO LEGAL AID AND ACCESS TO JUSTICE**

Women's Legal Service Victoria has been providing free legal advice, information, representation and legal education to women for over 20 years. We now specialise in issues arising from relationship breakdown and violence against women. Our principal areas of work are crimes compensation, family violence and family law. The women we represent in the Family Court have generally exhausted the Legal Aid funds available to them or been denied aid. A significant number of these women are victims of family violence.

The Domestic Violence and Incest Resource Centre (DVIRC) is a Statewide organisation providing professional development and resources to those who work with victims of family violence, including sexual assault. The Centre provides: professional education and training programs, community education strategies and public forums, publications and web-sites, policy-focused research and discussion papers, and advice to government through participation on committees and working groups, a lending library and information service, a referral service, secondary consultations for those working with victims of violence.

The Victorian Women's Refuges and Associated Domestic Violence Services (VWRADVS) is the Victorian peak body for women's domestic violence services. It represents a broad range of services. These include refuges, domestic violence outreach services, family violence networkers, indigenous family violence services and statewide services – Immigrant Women's Domestic Violence Service (IWDVS), the Domestic Violence and Incest Resource Centre (DVIRC) and Women's Domestic Violence Crisis Service (WDVCS). These agencies offer a myriad of services to women experiencing

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domestic violence, including information provision, crisis response, emergency accommodation, support, advocacy and referrals. In addition to these areas they also provide training on social, housing, financial and legal issues relating to domestic violence with an emphasis on responding to women in culturally a sensitive way. As the peak body representing these services, VWDVSA advocates for the right of women and children to live free of violence.

Collectively, our submission deals with Terms of Reference (a), briefly, and (b) and (c) in greater detail. We intend to focus on the current Legal Aid structure with particular emphasis upon its effect on family law litigants and women.

#### WOMEN, VIOLENCE & THE LAW: A CONTEXTUAL BACKGROUND

It may be of use to first explain the unique context in which women entering the legal system may find themselves after relationship breakdown. It is by now well established that a woman's experience of separation is quite different to a man's. Research shows that for "both older and younger groups, women were more likely to be financially disadvantaged than men" after divorce (Smyth and Weston, 2000:8).

When a relationship breakdown occurs in the context of domestic violence and / or sexual assault, the impact upon women can be catastrophic.

It is widely assumed that most estimates of the incidence of domestic violence are underestimates. Even large population surveys cannot provide accurate estimates of the extent of domestic violence in Australia.

This is partly because many victims feel unable to speak out about domestic violence. The pressures of negative community attitudes towards victims, feelings of shame, and fear of retribution from the perpetrator contribute to low levels of disclosure of domestic violence. Also, because domestic violence often occurs in the privacy of the home, there are few outside witnesses. Surveys often require fluency in English, which means that the experience of people from non-English speaking backgrounds may not be adequately represented.

Statistics from public agencies such as police, courts, counselling and accommodation services are another source of information. However, these can only provide information about people who come to public attention - many victims never contact such agencies. Some agencies do not collect statistics on domestic violence, and those that do define and record domestic

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violence in different ways.

However, 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 constitute the majority of victims, while men are the majority of perpetrators.

A national study has shown that in order to escape domestic violence, women often leave the family home in search of alternative accommodation (Chung et al 2000). The decision may spark a downward spiral towards poverty. For instance, women (often with their children) may go into refuge or other transitional housing.

A national census was undertaken over two weeks in 1994 to investigate the demand for women's refuges and other accommodation services funded by the Supported Accommodation Assistance Program (SAAP). In these two weeks, an average of 2,149 women escaping domestic violence were accommodated each night. The number of women seeking refuge who could not be accommodated over the two weeks was 1,956. (SAAP, 1994).

The Women's Domestic Violence Crisis Service of Victoria, which provides services to Victorian women experiencing domestic violence, received 29,818 calls for the period 2000-2001, from callers seeking information, support or emergency accommodation. (Women's Domestic Violence Crisis Service. 2001. *Women's Domestic Violence Crisis Service 2000-2001: a snapshot of our year*).

With the support of family, friends or social workers, a woman will eventually try to set herself up in permanent accommodation with the hope of rebuilding her life. She may need to start from scratch: acquiring all of the essentials for a new home (furniture, food, clothing). In addition, there are the large initial outlays necessary to secure a private rental where public housing is not available.

When coupled with the fact that "children usually live with the mother after marital separation and mothers typically have a lower earning capacity than fathers" (Smyth and Weston, 2000:19), one can imagine that the psychological and financial strain of separation / divorce can be enormous for women. Of course, if violence is a factor, she will also be struggling with the reality of being a victim of crime.

The last thing she needs is a Court case; and then, one begins.

**WOMEN & THE LEGAL SYSTEM: SOME OBSERVATIONS ABOUT LEGAL AID**

In our experience, women regularly have multiple legal issues following separation / divorce. They may require an intervention order to protect themselves and / or their children if they have experienced violence, are threatened with violence, or are the victims of harassment (s.4(1), *Crimes (Family Violence) Act 1987* [Victoria]). There may also be a need for urgent Family Court Orders to protect or recover the children, restrain the estranged husband from disposing of joint property, or for immediate financial support from the husband. This is then usually followed by ongoing litigation in the Family Court to finalise the issues surrounding the children, and the marital property.

Lawyers and support workers often involve themselves in multiple and simultaneous causes of action to try and establish immediate social, legal and financial protection for a woman. Access to Legal Aid can be imperative in securing such protection.

In our view, the current Legal Aid arrangements do not provide for sufficient and / or nationally uniform access to justice for women. For example, research has shown that there is a "higher reported incidence of domestic and family violence in rural and remote communities than in metropolitan areas" (WESNET, 2000:3). Rural and regional areas typically have lower funding levels than metropolitan areas; there is a real potential for women in such areas to be denied access to essential legal services.

For a variety of reasons, we believe that the current legal aid funding arrangements are inadequate, especially in relation to family law. For reasons that will be explained more fully below, we also believe that there is a gender disparity in the current arrangements.

In Victoria, individual litigants seeking legal aid assistance in family law matters are subject to a \$10,000 funding maximum (or "cap"). We note that the Family Law cap has not been raised for some time. The most current statistics available from Victoria Legal Aid show that in the year 2001-2002, 3620 males were granted aid in family law matters as opposed to 6722 females.

Whilst one may conclude that women are at some advantage to men in receiving assistance, we would submit that women are more likely to receive aid because of their disproportionate financial situation following separation / divorce. It is likely that men are more likely to have a capacity

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to afford private representation because of their resources post-separation / divorce.

Of all women who receive aid, 51% of those receive it for family law matters (VLA Annual Report 2002: Table 7). This is compared with the statistics for men, only 16% of whom require aid in family law matters, with the balance of men receiving aid in criminal (and some civil) matters (*ibid*).

The gendered effects of Legal Aid funding become clear when one examines the funding for criminal matters. Unlike family law matters (with the \$10,000 cap), criminal law matters have a minimum available cap of \$15,000 and a maximum cap of \$60,000. Legal Aid statistics show that men are far more likely to receive grants of aid for criminal law matters. Of all men who receive grants of aid, 77% of those are for criminal law matters. In the year 2001-2002, 17,918 Victorian men were granted legal aid for criminal matters.

There are therefore two significant points to be made about the gendered nature of legal aid funding:

1. Men are granted legal aid in more cases than women. In the 2001-2002 year, the total funding by gender was:

Men - 23,218 grants of aid  
Women - 13,201 grants of aid

2. When granted aid, because it is more likely that men will be receiving a criminal law grant as opposed to a family law grant, men are more likely to have access to a larger amount of money.

The reason that more grants of aid are available in criminal cases is simple.

In the High Court decision of *Dietrich v R* (1992) 177 CLR 292, it was 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 if the accused cannot afford or does not have legal representation, a stay of the proceedings MUST be ordered.

By virtue of s.360A of the *Crimes Act 1958 (Vic.)*, a Court has the power to order Victoria Legal Aid to provide representation if the Court believes that without it, the accused may not obtain a fair trial.

As a result of the special position of criminal law matters, Victoria Legal Aid will more often grant aid for a criminal matter than a family law or civil law matter. The statistics from 2001-2002 show that 60.8% of all criminal

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applications received were approved, as opposed to 28.41% of all family law applications.

In our view, however, the current position is unrealistic. 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*.

Whilst we concede that the potential sanctions involved in a criminal prosecution can indeed be "serious", it should also be recognised that the potential consequences of family law proceedings can also be "serious". Often they are serious enough to warrant legal representation.

In particular, where parents are litigating over residency and / or contact of children, the ramifications for the child can be life-changing, or even life-threatening. In cases where physical, sexual or psychological abuse is alleged, it is imperative that all parties be represented.

Research by Clarke *et al* (1999) provides an excellent insight into the effect of Legal Aid funding upon women. Several actual case studies demonstrate the effects of the Legal Aid system upon individual litigants, and we strongly encourage the Committee to direct its mind to that publication in the context of this Inquiry.

Within the system, inroads have been made, in that the appointment of child representatives is now commonplace in the family law jurisdiction. Legal Aid should be congratulated for its willingness to fund child representatives, up to a maximum total of \$15,000.

However, the problem is not alleviated by the appointment of child representatives alone.

Often, women or men may be ineligible for aid, or will have exceeded their family law "cap". If an individual cannot afford to fund a private solicitor, they will inevitably begin to self-represent. In our submission, it is highly undesirable that women deal with a self-represented former partner in cases where there is a history of domestic violence and / or sexual assault. It is even less desirable that they be subject to the trauma of cross-examination at the hands of the perpetrator of such violence.

In our submission, it would be a progressive step forward to consider the enactment of a provision in the *Family Law Act 1975* (Cth) that is in similar terms to s.360A of the *Crimes Act 1958* (Vic.). The Court may consider ordering legal aid to be provided for one or both parties where, for

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example, aid caps have already been exceeded, but the nature of the case is sufficiently serious to warrant separate representation for the parties.

Such a case may be one where serious allegations of child abuse have been raised. It is often these matters where a \$10,000 cap is not sufficient to cover what is likely to be a protracted and bitterly contested case. In our view, where a woman who is a party to the proceedings is also a victim of domestic violence, such a mechanism would be entirely appropriate.

We note that the Magellan Project was introduced into the Melbourne and Dandenong Registries of the Family Court between 1998 and 2000. The Project was an initiative of the Family Court, and it sought to deal with cases of alleged child abuse. At least one comprehensive report regarding the Pilot Project found that the initiative was a resounding success (Brown *et al* 2001:104). We note that the Project is now being established in all Australian states and territories (with the exception of Western Australia, which has its own experimental Program - Project Columbus). One of the initiatives of Magellan was an alteration to some of the normal Legal Aid guidelines in cases of alleged child abuse, so that, for instance, child representatives be involved regardless of the parents' financial position.

We propose the adoption of a similar, more flexible approach, in matters involving domestic violence.

One must also bear in mind that the family law system is difficult to navigate without legal knowledge or representation. It is an area that is constantly changing. Many private law firms have ceased to take on legal aid family law matters, probably due to the combination of a low "cap" and the complexity of the system. It is well recognised that private law firms will often allocate legal aid clients on the more junior, less experienced solicitors, because it is cost-effective for the firm to have them run the cases.

In our view, the inherent disincentive for senior solicitors / partners to be involved in what are often the messiest and most complex cases should be removed. This can only be done by convincing private law firms that it can be cost effective for them to get involved; the family law "cap" should be increased.

The flow-on effect of private law firms pulling out of legal aid should also be recognised. Whilst a reduced number of firms are bearing the great bulk of legally-aided family law matters, it is the pro bono and community sectors which also feel the strain. There is a greater pressure on community legal centres to act for clients in the absence of other representation being available. Often, the resources to handle such cases are not available; at the

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very least they are finite. Accordingly, if clients are turned away, they may self-represent. In many cases, however, we have seen women who "choose" to sign consent orders finalising their claim which they otherwise would not have signed but for a legal representative being unavailable. This is often the case when legal aid funding runs out.

Parties who sign consent orders that are not satisfactory will almost certainly return to the Family Court system again; one party or another will eventually bring a fresh application to vary (or even revoke) those previous orders. The long-term economic impact may well be greater than if the original case had been resolved adequately (if possible). A further drain on Legal Aid and / or the Family Court could potentially have been avoided if more money had had been invested in the first instance.

Unfortunately, women we see do not always head back to the Family Court because of inadequate results the first time around. Often, their former partner will be a serial, or "vexatious" litigant. All Courts have the power to declare someone as a "vexatious" litigant. The consequence of being declared a vexatious litigant is that an individual is prohibited from bringing any further legal proceedings without special leave (or permission) of the Court.

The problem is that an individual must have brought many applications in a Court before they may even be considered for declaration as "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. The types of applications which might be brought would include: applications for contravention of a Family Court order where the woman delivers children for contact a few minutes late, or where a woman has failed to deliver a hammer, or some books, in circumstances where a Family Court property settlement contemplated that such items would be handed over.

Unlike other jurisdictions, the Family Court may be even more reluctant to declare someone a vexatious litigant. This is because the individual would be effectively denied the opportunity to bring further applications in regard to their children. It is likely that the Court would regard this as a fairly extreme measure; one which should be reserved for the most exceptional cases only.

A family law cap of \$10,000 can be quickly exhausted when parties have been to Court for more than one proceeding. However when a contravention application is issued, the consequences for the defendant can be more serious. Contravention proceedings are of a *quasi-criminal nature*;



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if found guilty of contravening a Court order, a woman could be exposed to criminal sanctions, including a term of imprisonment. Legal Aid should be congratulated in that it recognises the seriousness of contravention applications and will often approve funding.

However, in cases where funding is not approved, or a defendant has previously exceeded their cap, a woman may be forced to self-represent. When one considers that she is in no different a position than a defendant to a criminal proceeding, it is highly inappropriate that the *Dietrich* rules may not apply to her.

Furthermore, even if she were to get aid, she will be subject to the Family Law cap, rather than the much higher criminal law cap, even though she may be sent to prison if her defence is unsuccessful. The quality of representation she is afforded may suffer; alternatively, she may be one of the unlucky ones whose lawyers pull out of the case midway through the final hearing (as we have seen happen in at least one contested residence/contact case) because they were told that the Legal Aid cap had been reached. She may suddenly find herself (as did one of our clients) representing herself, and cross-examining witnesses, in the middle of a case.

Whilst we commend Victoria Legal Aid for its flexibility and common sense in dealing with these cases, it is often the case that budget constraints restrict their capacity to fund what may be seen as the "less meritorious cases". For example, the more "minor" issues, such as applications to relocate interstate (and away from the perpetrator of domestic violence, to a place where she can have the support of family or friends to raise children) are often refused funding.

Similarly, injunction applications for sole use and occupancy of the matrimonial home rarely receive funding. In contrast, as Southwell points out (2002:48), funding to defend such applications will often be granted if the Order would "curtail an important right" of an individual, such as the right to live in their own home. Thus, a man defending an injunction application to remove him from his home might receive aid, whereas a woman trying to secure a stable living environment for herself and/or her children may not.

Similarly, a woman seeking an Intervention Order against her estranged partner under the relevant state legislation (which could potentially have the same effect as a sole use and occupancy order) will not be granted aid to run the application unless she can establish, in advance of the hearing, that he will defend the application. Unfortunately, this is often impossible given that there is no formal, mandatory requirement for him to advise her that

he will be contesting the application. This means that one often does not know until the day of the Hearing.

If she must then ask for the matter to be adjourned pending a Legal Aid application, she could have a costs Order made against her as a penalty for being under-prepared in her own application.

For women, the alternative to sole use and occupancy is often refuge. As one woman has put it:

*"Why do we women live in refuges when the perpetrators live in the comfort to which they are accustomed? Why must we three eke out a living on a pension of \$330 per week of which \$130 goes in rent while my husband lives on his salary of \$750 per week of which \$85 goes on the mortgage and lives in a four bedroom, two bathroom house?"*  
(Chung et al 2001:24)

Other matters that are typically not funded by Legal Aid include applications for spousal maintenance and small property settlements. In our view, there are cases where such applications ought to be funded.

We see cases where women may technically have their name on the title of a property, or as a partner in a business and yet, in reality, they have little or no access to financial resources of their own. Their "apparent" financial position may render them ineligible for Legal Aid, despite the fact that it is unlikely they can afford a private solicitor of their own.

Victoria Legal Aid should be commended for the many advances it has made over time. It produces some excellent publications on Family Law and these are now available in a variety of different languages. Our clients regularly utilize these publications and they are well received. In addition, free telephone advice lines (including a multilingual service) are available. We also wish to commend Legal Aid for this service.

## CONCLUSION

It is important to recognize that the Family Court system is not easy to navigate as a self-represented person. The rules and procedures are complex and ever changing. Unfortunately, by virtue of the very nature of Family Law proceedings, it is likely that orders will need to be altered at least once during a child's lifetime, so as to accommodate changes in life circumstances. It must also be recognized that in many of the more difficult cases, negotiation is not always possible. The available pool of monies must be

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raised in order to assist people to achieve workable outcomes for themselves and their children.

Yours faithfully,



Kate Seear  
Community Lawyer on behalf of  
**WOMEN'S LEGAL SERVICE VICTORIA INC**

*Authorised by Sarah Vessali, Principal Lawyer, Women's Legal Service Victoria*

in conjunction with:

**DOMESTIC VIOLENCE AND INCEST RESOURCE CENTRE**

and

**VICTORIAN WOMEN'S REFUGES AND ASSOCIATED DOMESTIC VIOLENCE SERVICES**

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