



1 February 2013

Secretary of the Committee on the Elimination of Discrimination against Women  
Office of the High Commissioner for Human Rights  
Room 1-021, Palais Wilson  
52 Rue des Paquis  
1201 Geneva, Switzerland

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Dear Committee Secretary,

**Submission - General discussion on Access to Justice**

1. Women's Legal Services New South Wales (WLS NSW) is a community legal centre that aims to achieve access to justice and a just legal system for women in the state of New South Wales (NSW), Australia. We seek to promote women's human rights, redress inequalities experienced by women and to foster legal and social change through strategic legal services, community development, community legal education and law and policy reform work. We prioritise women who are disadvantaged by their cultural, social and economic circumstances. We provide specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims compensation, care and protection, human rights and access to justice.
2. We welcome the opportunity to provide a written submission to the Committee on the Elimination of Discrimination against Women on the theme of the general discussion on access to justice. We commend the Committee's determination to elaborate upon the obligation of states under the Convention to respect, protect, promote and fulfil access to justice for women as a human right.
3. While women in Australia face a range of legal, institutional, procedural, social and practical obstacles in their efforts to access justice, this submission focuses primarily on the following matters:
  - gender bias in the application of Australian law;
  - gender bias in the provision of legal aid to women in Australia, with a focus on NSW;
  - the importance of women-only services and Indigenous women's services; and
  - particular barriers faced by Aboriginal and Torres Strait Islander women when seeking access to justice.



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## Gender Bias in the Law

4. As the Committee has remarked upon in its Concept Note, discriminatory social norms and constructions of gender have the capacity to influence and shape the development of justice systems, which in turn may perpetuate gender inequalities. As an organisation that monitors the impact of the legal system in relation to women, we are concerned that a large number of ostensibly gender-neutral legal standards in NSW operate in a manner that disproportionately impacts on women's access to justice.
5. The gendered nature of Australian law, and its impact on women, has been extensively documented elsewhere.<sup>1</sup> To cite one current example as an illustration of the manner in which discriminatory social norms impact on women's access to justice, we would draw the Committee's attention to the operation of the partial defence of provocation in intimate partner homicides, a topic on which the Parliament of NSW recently conducted a legislative Inquiry<sup>2</sup>.
6. In NSW, murder and manslaughter are the two forms of unlawful homicide provided for under s 18 of the *Crimes Act 1900* (NSW). Of the two, murder is the more serious charge, carrying heavier penalties to reflect the increased culpability of the offender. The common law defence of provocation, codified by s 23 of the *Crimes Act*, is one of three partial defences that may reduce a charge of murder to manslaughter.
7. In general terms, the elements of provocation are that (a) a defendant's loss of self control was caused by any act of the deceased that affected the defendant, and (b) the conduct of the deceased could have induced an ordinary person to have lost self control, to the extent that they might have formed an intention to kill or commit grievous bodily harm.
8. It is not incumbent on the defence to prove the elements of provocation. Instead, if evidence is raised that provocation may have occurred, the burden lies with the prosecution to negate provocation as a partial defence.
9. As we submitted to the recent legislative Inquiry, the existence of the partial defence is deeply flawed and anachronistic, reflecting the historical presumption that men were entitled to defend their honour by resorting to 'legitimate' violence. Furthermore, its continuing usage in cases of intimate partner killings must be viewed as nothing less than the law condoning violence against women in cases where men claim to have been 'provoked' by sexual jealousy or a change in relationship.<sup>3</sup>
10. Gendered assumptions held by jurors, police, legal practitioners and the judiciary may also influence the varying success enjoyed by men and women when deploying the partial defence of provocation or the defence of self-defence in criminal trials, be it at a plea bargaining stage or the prosecution of a matter at court.

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<sup>1</sup> See, for example, Regina Graycar and Jenny Morgan (2002) *The Hidden Gender of Law* (2<sup>nd</sup> ed.).

<sup>2</sup> Legislative Council Select Committee on the Partial Defence of Provocation, Inquiries: <http://www.parliament.nsw.gov.au/provocationinquiry>, accessed 25 January 2013.

<sup>3</sup> Women's Legal Services NSW, *Submission in response to the Inquiry into the Partial Defence of Provocation*, <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/03842090E70DF50ECA257A67000DA80A> accessed 30 January 2013.

11. As we noted in our submission to the Inquiry, a review of the case law demonstrates gender bias in the law operating in two directions. Firstly, men who kill their intimate partners often have a murder charge reduced to manslaughter because they are able to persuade a jury that an 'ordinary person' in their position would lose control and resort to violence due to jealousy or so called 'loss of honour'. Secondly, women who kill their male partners who have experienced long-term and serious domestic violence are often convicted of murder or plead guilty to manslaughter due to an inability to persuade a jury that killing their partner is an act of self-defence.
12. In part, the reason for this is an underlying community assumption that the female victims of domestic violence should simply leave a relationship. However, this assumption reflects a general lack of community understanding of the fact that female victims of domestic violence are at the greatest risk of death at the hands of their partner when they attempt to leave a relationship.
13. The continuing existence of the partial defence of provocation in its current form enshrines a gendered bias towards women both as defendants and as victims of violence. From a broader perspective, it demonstrates how ostensibly gender neutral legal standards may continue to embody outdated and inappropriate attitudes regarding violence against women, and be disproportionately deployed for the legal protection of male perpetrators, rather than female victims, of violence.

### **Gender Bias in the Provision of Legal Aid**

14. Australia has a federal system of government, where law-making powers are divided between the State and Commonwealth parliaments. Although some areas of law, including family law, are federal law and apply uniformly across Australia, grants of legal aid are made on a state and territory wide basis, and policies and practices vary between states. For this reason, our submission focuses primarily on legal aid in NSW.
15. The existence of gender bias in the provision of legal aid in Australia has been formally recognised for nearly 20 years. In 1994, the federal Office for Legal Aid and Family Services reported that at a national level, women received only 37% of net legal aid expenditure on representation services in the period 1992-1993.<sup>4</sup>
16. In determining eligibility for legal aid, Legal Aid NSW generally applies three tests to client applications. The first, a means test, is designed to determine whether an applicant's income and assets make them eligible to receive legal aid. The second, a merit test, is designed to determine whether the applicant's case has reasonable prospects of success. Finally, Legal Aid NSW may assess the availability of funds for particular kinds of legal matters.
17. Legal Aid NSW provides an essential service to men, women and children in NSW who could not otherwise afford legal representation. Although we do not believe that Legal Aid NSW overtly discriminates in the allocation of funding as between men and women, budgetary allocations to particular practice areas along with application of the three tests described above do lead to disproportionate funding as between men and women in NSW.

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<sup>4</sup> Office for Legal Aid and Family Services (1994) *Gender Bias in Litigation Legal Aid*, cited in Emily Grabham (ed.) (2009) *Intersectionality and Beyond: Power and the Politics of Location*, 161.

18. For example, publicly available data from Legal Aid NSW's Annual Reports demonstrates that due to the relative funding priorities given to criminal matters over family and civil matters, the vast majority of Legal Aid clients<sup>5</sup> are men. According to its 2011-2012 Annual Report, 49.4% of Legal Aid's budget was spent on its Criminal Law practice, an area in which only 19.5% of clients are female. In contrast, 26.3% of the overall budget was spent on Family Law, the only practice area in which female clients are in the majority, at 61.9% of total clients. Finally, Civil Law, a practice area in which women make up almost half (45.4%) of total clients, attracted only 12.7% of Legal Aid's total budget.<sup>6</sup>
19. Overall, in the period 2011-2012, only 26% of Legal Aid clients in NSW were female,<sup>7</sup> a figure relatively consistent with those from previous years.<sup>8</sup> While we understand that Legal Aid NSW is required to make necessary policy decisions in relation to how to spend a limited pool of government funding, the practical result of these decisions is that women may find it far more difficult to receive advice and assistance for the legal issues that they are, statistically, more likely to face: in particular, family law matters.
20. Furthermore, a number of our clients have expressed concerns that the limitations on access to legal aid have been exacerbated by the practical application of the merit test in cases of family violence. In particular, a number of our clients have had difficulties meeting Legal Aid's merit criteria where they have sought to limit the time the other parent spends with children due to concerns of ongoing family violence issues.
21. In our view, this is because until recently the *Family Law Act 1975* (Cth) enshrines the principle that children should, where possible, have a relationship with both of their parents. As a result, applications for sole parental responsibility where it is proposed that children have no contact with one parent have, historically, had slim prospects of success. Given that it is more common that fathers are alleged to be the violent and/or abusive parent, it follows that women are more likely than men to be refused grants of legal aid under these circumstances.
22. In June 2012 changes to the *Family Law Act* came into effect that require courts to give greater weight to the need to protect children from family violence, over the principle that the child should have a meaningful relationship with both parents.<sup>9</sup> While we are hopeful that this amendment will make it more likely that women seeking orders of 'no time' will be granted legal aid, it is nevertheless concerning that this appears to have been a longstanding practice preventing such women from gaining access to legal advice and assistance.
23. The effect of this on women's access to justice in family law issues is seriously concerning. We acknowledge that funding for criminal law is important because of the loss of liberty consequences. We also acknowledge the High Court of Australia decision of *Dietrich and R* (1992) 177 CLR 292, that a person's right to a fair trial may require the state to provide legal representation in a trial for a serious criminal offence. However, we submit that the

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<sup>5</sup> 'Client' includes those allocated resources through both Case Grants and In-House Duty Services.

<sup>6</sup> Legal Aid NSW (2012) *Annual Report 2011-2012*, 18-20.

<sup>7</sup> Legal Aid NSW (2012) *Annual Report 2011-2012*, 10.

<sup>8</sup> In the period 2010-2011, for example, females made up 25.8% of the Legal Aid NSW Client Profile based on Total Case Grants and In-House Duty Services: Legal Aid NSW (2011) *Annual Report 2010-2011*, 6.

<sup>9</sup> *Family Law Act 1975* (Cth), s 60CC(2A).

lack of funding for women who have experienced family violence has similar human rights implications. Such violence is a violation of the rights to life, to equality, to liberty and security of person, to the highest standard attainable of physical and mental health, to just and favourable conditions of work and not to be subjected to torture and other cruel, inhuman, or degrading treatment or punishment.<sup>10</sup>

24. Additionally, Graycar and Morgan, in their article that discusses the gendered impact of the *Dietrich and R* decision, refer to comments in a Family Court judgment which highlight the need for legal aid funding in the family law context:

*Issues concerning the welfare of children are no less important in a civilized legal system than issues concerning liberty of the subject. Provision of proper legal representation in matters concerning liberty of the subject has been seen by the High Court of Australia to be essential to the administration of justice (Dietrich v R. (1993) 67 ALJR 1). The provision of appropriate legal assistance in children's custody cases is equally as vital.*<sup>11</sup>

25. We are not advocating a decrease in funding for criminal law but rather an overall increase in legal aid funding and a greater awareness of and need to address gender bias in the provision of legal aid.
26. We also advocate that Legal Aid NSW should continually review its policy with respect to grants of legal aid to women alleging a history of family violence in parenting proceedings. Furthermore, all decisions made with respect to grants of legal aid should be conducted with transparency, and the specific reasons behind merit-based refusals should be made available to the applicant.

### **Resourcing Women's Legal Services**

27. As noted in General Recommendation No 28 of the CEDAW Committee,<sup>12</sup> a core obligation of states is 'to financially support independent women's legal resource associations and centres in their work to educate women about their rights to equality and to assist them in pursuing remedies for discrimination'.<sup>13</sup> In this respect, we commend the support provided by state and federal governments to fund the work of Community Legal Centres, including specialist legal services for women and specialist legal services for Aboriginal women.
28. Specialist legal services for women understand the nature and dynamic of domestic and family violence and why such violence is primarily perpetrated against women and children. These services are important for empowering women who are victims/survivors of violence.
29. Furthermore, we note that women facing intersectional discrimination, including women with disabilities, Culturally and Linguistically Diverse women, LGTBI women and

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<sup>10</sup> CEDAW Committee General Comment No 19, para 7. See also: *International Covenant on Civil and Political Rights (ICCPR)*, Articles 2, 3, 7 and 26; *International Covenant on Economic, Social and Cultural Rights (ICESCR)* Articles 3 and 10.

<sup>11</sup> *McOwan v McOwan* (1994) FLC 92-451 cited in R Graycar & J Morgan, *Disabling Citizenship: Civil Death for Women in the 1990s*, *Adel LR* (1995), 62.

<sup>12</sup> General Recommendation No. 28 on the core obligations of States Parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, forty-seventh session, 2010.

<sup>13</sup> *Ibid*, para 34.

Aboriginal and Torres Strait Islander women frequently face challenges in accessing legal services that are appropriate for their particular needs.

30. For example, in NSW both our service and Wirringa Baiya Aboriginal Women's Legal Centre provide specific services targeted to the needs of Aboriginal and Torres Strait Islander women. However, it is important that in all areas of NSW, including rural, regional and remote areas, Aboriginal and Torres Strait Islander women have a choice between culturally specific services and mainstream legal service providers.
31. Furthermore, the fact that Aboriginal and Torres Strait Islander women's legal services often provide a range of practical services and assistance to clients which may go beyond the strict provision of legal advice should be better recognised and provided for in their funding arrangements.
32. With regards to funding, it is also important that there not be an over reliance upon one-off grants, for example, to fund pilot programs. Guaranteed ongoing funding is essential.
33. It is of concern that, in spite of a government commitment to the CEDAW Committee in 2010 to fund an Aboriginal and Torres Strait Islander Women's Alliance,<sup>14</sup> no funded representational organisation for Aboriginal women's legal services currently exists. The lack of such a representative body makes strategic policy development and law reform work a considerable challenge. Additionally, Australia's *NGO Follow-Up Report to the United Nations Committee on the Elimination of Discrimination Against Women* refers to the need for better resourcing and expansion of Aboriginal and Torres Strait Islander Women's Legal Services.<sup>15</sup>
34. While Aboriginal Legal Services also provide state-wide advice and assistance, their primary focus on criminal law means that a disproportionate proportion of their services are provided to men. Furthermore, given the gendered nature of crimes such as domestic and family violence, it is not always appropriate that women who are victims of such crimes should attend gender-neutral legal services.
35. To provide effective access to justice for women, a range of services is required, providing women with choice, including women's services; Aboriginal and Torres Strait Islander women's services, or in the alternative Aboriginal and Torres Strait Islander women workers and targeted Aboriginal and Torres Strait Islander positions, Culturally and Linguistically Diverse specific services, and services that are accessible to women with disabilities and LGBTBI women. Services must be well resourced and workers must be properly trained with ongoing mandatory training on a yearly basis. Services should be provided face-to-face, particularly for Aboriginal and Torres Strait Islander women.

### **Barriers Faced by Aboriginal and Torres Strait Islander Women**

36. In addition to the matters mentioned above in relation to the availability of culturally appropriate legal services, Aboriginal and Torres Strait Islander women face a number of further barriers when accessing the Australian justice system.

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<sup>14</sup> CEDAW Committee, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Australia*, 30 July 2010, Un Doc. CEDAW/C/Aus/Co/7, [10].

<sup>15</sup> Australia's NGO Follow-Up Report to the United Nations Committee on the Elimination of Discrimination Against Women, 2012 at 16-17, <http://awava.org.au/resources-2/convention-on-the-elimination-of-discrimination-against-women-cedaw/ngos-follow-up-report-to-cedaw/> accessed on 1 February 2013

37. Our experience highlights that most Aboriginal women's experience of the legal system has been a negative, confusing and disempowering one which arises from their experiences of dispossession and treatment in the legal system.<sup>16</sup> Many women choose not to engage with the Family Law system as they are concerned that the child welfare authority then will be involved and take their children away. Additionally, in our experience, Local Magistrates in rural and metropolitan areas are often not knowledgeable in Family Law matters, or unwilling to exercise jurisdiction or make orders that do not take account of violence, are culturally inappropriate or impractical.<sup>17</sup>
38. Among a range of other issues, a current matter of grave concern to WLS NSW is the over-incarceration of Aboriginal and Torres Strait Islander women. According to the Australian Bureau of Statistics' report *Prisoners in Australia*<sup>18</sup> there was an increase of 20% in Aboriginal and Torres Strait Islander female prisoners over the period June 2011- June 2012, compared to a 3% increase for non-Indigenous female prisoners in the same period.
39. Based on the experiences of our clients, it is our conclusion that the dramatic rise of incarcerated Aboriginal and Torres Strait Islander is closely correlated with over-policing in Indigenous communities, and a failure to pursue non-custodial sentencing options for Indigenous women in contact with the criminal justice system.<sup>19</sup>

## Conclusion

40. Once again, we commend the CEDAW Committee for its proposed General Recommendation on Women's Access to Justice. We hope the issues raised in the submission help inform your important discussions and we anticipate eagerly future developments towards its finalisation.
41. If you would like to discuss any aspect of this submission, please contact Julia Mansour, Solicitor or me on +61 2 8745 6900.

Yours faithfully,

Janet Loughman  
Principal Solicitor

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<sup>16</sup> See further, WLS NSW, *Submission to the Family Law Council on Aboriginal and Torres Strait Islander clients and the Family Law System*, accessed on 9 April 2012 at:

[http://www.womenslegalnsw.asn.au/downloads/law-reform/2011WLSNSW\\_FLC\\_ATSIWomenAndFamilyLaw.pdf](http://www.womenslegalnsw.asn.au/downloads/law-reform/2011WLSNSW_FLC_ATSIWomenAndFamilyLaw.pdf)

<sup>17</sup> See WLS NSW, *Submission to the Family Law Council*, Note 16, Case Studies 1, 2.

<sup>18</sup> Australian Bureau of Statistics (2012) *Prisoners in Australia*, Report 4517.0.

<sup>19</sup> See also Australia's NGO Follow-Up Report to the United Nations Committee on the Elimination of Discrimination Against Women, 2012 at 16-17, Note 14.