

# CAUSES OF INACTION: Barriers to accessing legal aid services

TRACEY DE SIMONE and ROSEMARY HUNTER

Legal Aid Queensland ('LAQ') has, over the years, adopted a number of specific initiatives to increase access to its services for socially, economically and geographically disadvantaged Queenslanders, such as specific service delivery units for women, Indigenous women and young people, and an access strategy for rural and remote Queenslanders. These initiatives have responded to both recognised legal need and political imperative. Over time and as the political imperative has waned, the purpose and usefulness of these initiatives have been questioned — is this group still disadvantaged and to whom should limited resources best be targeted? These questions have increased in intensity in the current global financial crisis which has negatively affected funding pools while at the same time placed increasing pressure on all social welfare agencies, particularly in relation to employment and tenancy issues. In this environment it is important that the most vulnerable people are able to access the services that they need.

In 2003, LAQ partnered with Professor Rosemary Hunter and successfully applied for funding from the Australian Research Council to undertake a three-year project examining access for disadvantaged women to legal aid services.<sup>1</sup> Some of the project findings compelled the organisation to think about how its processes and policies inadvertently affected its clients. This article examines some of the organisational barriers found in the course of the research. Although the substantive rules governing eligibility for legal aid also acted as barriers and disproportionately excluded particular groups of women,<sup>2</sup> the article focuses on organisational processes rather than substantive rules. This is intended to serve as a reminder to other social justice organisations that, regardless of their specific area of concern or the formal rules governing access to their services, the way in which they operate can in itself exclude the very people they are trying to serve.

The project examined barriers to access to legal aid in Queensland for Indigenous women, women from non-English speaking backgrounds ('NESB'), women with disability, older women (aged 60+), younger women (aged 18-20), and women living in regional and rural areas, with a focus on refusals of and failures to apply for legal aid in the areas of family law, domestic violence, and anti-discrimination law. It aimed to determine:

1. whether refusals of women's applications for legal aid for family or civil law had any adverse impact by reference to age, Aboriginality, ethnicity, disability, or regional location;

2. whether any groups of women with legal needs in the family or civil law areas disproportionately failed to apply for legal aid; and
3. what happened to women with legal needs in these areas who were refused or failed to apply for legal aid, by reference to age, Aboriginality, ethnicity, disability or regional location?

The project took a range of approaches to assist in answering the research questions:

- Statistical analysis of LAQ applications and refusals from 1 July 1997 to 30 June 2005 by gender and target group in family law, domestic violence and anti-discrimination matters, combined with other relevant statistical and demographic data relating to the Brisbane and regional offices of LAQ that were the focus of the study.
- File analysis: 322 women who were refused legal aid funding between 1 July 2001 and 30 June 2003 agreed to have their legal aid files analysed.
- Interviews: 152 of the women who gave permission for us to look at their files were interviewed in relation to their experience of being refused aid, together with 152 lawyers and community workers working with women in the target groups, 19 women representing themselves in court in domestic violence and family law matters, and six LAQ grants officers.

Some of the results were predictable in that they reinforced the findings of previous studies and reports about the problems of restrictive legal aid eligibility rules for women, particularly in the area of family law.<sup>3</sup> But they were also surprising in that they raised concerns about taken-for-granted organisational procedures that had not previously been analysed in terms of creating barriers to access for disadvantaged clients. The following results show some of the barriers that women experienced in attempts to receive assistance from LAQ.

## Barriers to applying for legal aid

The data from service providers, grants officers and self-representing litigants revealed barriers to women accessing legal aid due to:

- lack of awareness of legal rights — a barrier for NESB women, women living in rural areas, and women with an intellectual disability;
- lack of information about LAQ;

## REFERENCES

1. The research was funded by an ARC Linkage Grant, 2003-2006, with LAQ as Industry Partner, Rosemary Hunter as Chief Investigator, and Tracey De Simone and Louise Whitaker as Partner Investigators. We would like to thank our research assistants, Jane Bathgate and Alicia Svensson, and all those who participated in the project as interviewees and who gave us permission to read their Legal Aid files.
2. For a full report of the research findings, see Rosemary Hunter et al., *Women and Legal Aid: Identifying Disadvantage* (2006) <legalaid.qld.gov.au/NR/rdonlyres/C9E18E11-2FD6-4962-9356-0FB4A0BC29E/0/WomenandLegalAidAugust06.pdf> at 12 November 2009.
3. Office of Legal Aid and Family Services, *Gender Bias in Litigation Legal Aid* (1994), Australian Law Reform Commission, *Report No 69, Part 1 – Equality Before the Law: Justice for Women* (1994); Kathryn Rendall, Zoe Rathus and Angela Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family* (2000); Women's Legal Aid, *Gender Equity Report* (2006).

- misinformation about legal aid circulating by word of mouth in the community — a barrier for NESB women, older women and women living in rural areas;
- limited access to support services that will refer clients to LAQ — a barrier for NESB women, older women, women living in rural areas, and women with a disability, who may also find service providers do not support them to pursue a legal remedy. Service providers also reported police and counselling services deterring women from applying for legal aid;
- limited access to lawyers (in Queensland, private lawyers must be recognised as 'preferred suppliers' by LAQ in order to represent legally aided clients) — a barrier for NESB women in that lawyers do not use interpreters, women living in rural areas, Indigenous women in that lawyers do not necessarily provide culturally appropriate communication and representation, and women with mental health problems in that it is difficult to find lawyers who will take the time to take full instructions and properly represent them. Concerns about preferred suppliers related both to their availability and the quality of service they provided;
- limited access to LAQ offices (transport, childcare, and location difficulties) — a barrier for women in rural/regional areas;
- the application form — a barrier for all women, but particularly those whose first language is not English.

While not all of these barriers are directly attributable to the actions or activities of LAQ, they are at least indirectly related. For example, LAQ's preferred supplier scheme has sought to rationalise the number of law firms handling legal aid cases, but this can make it more difficult for some women to find a lawyer who can cater to their needs. In addition, the scheme often had a significant impact on women in rural and remote communities where there was only one firm in town taking on legal aid matters. Women thought that they could not get legal aid if their partner had already gone to that one firm and did not realise that they could apply for legal aid through another service.

One consistent theme was women being deterred from applying for legal aid by their own previous experience or the misinformation or inaccurate perceptions about legal aid obtained through word of mouth, including positive discouragement from other service providers. In particular, women would hear from family and friends who had been unsuccessful in applying and extrapolate that to their situation. Misinformation about eligibility for legal aid appeared to be rife. For example, one woman we interviewed was representing herself in a domestic violence matter because a friend had told her that domestic violence cases were not eligible for legal aid (clearly incorrect). Another commonly identified misperception was that two parties cannot be funded by legal aid for the same dispute, so if their partner had obtained legal aid for a family law matter, women would assume they would not be eligible for legal aid. Lack of awareness about legal rights, and lack of information, misinformation and lack of referrals to LAQ, point to a need for more

proactive outreach activities in order to communicate with these groups of disadvantaged women, rather than expecting clients to find the organisation using their own or other community resources.

### The application process

Around half of the women interviewed had received legal advice before lodging their legal aid application. The legal advice provided generally encouraged women to apply for legal aid (72 per cent of women who received advice said it influenced their decision to apply and all of the Indigenous women said it influenced their decision to apply), although this did not often extend to the provision of assistance with the legal aid application.

Two thirds of women who were refused legal aid had filled out the legal aid application form themselves, without assistance from a professional advisor. If a person applies for aid through a preferred supplier, the lawyer completes a shortened version of the application form including certifications as to eligibility, and submits it electronically to LAQ where it is usually granted legal aid without detailed scrutiny. Applicants could also receive assistance in completing the form from community legal centres or from legal aid staff — although such assistance appeared to be infrequent in practice. Grants officers and service providers readily agreed that women who completed the application form without assistance were likely to have a lower success rate. Applicants were expected to articulate and advance their case, but applications lodged without assistance tended to include insufficient information, particularly in relation to the details of the legal matter, financial information, and supporting documents, and thus were more likely to be refused.

Around half of the women interviewed said they experienced difficulties in making the legal aid application, both in completing the form (including language difficulties, and their emotional state at the time of the application), and in accessing a Legal Aid office to obtain a form and/or assistance in completing it (including transport and mobility difficulties, cultural barriers, lack of child care, and inadequate assistance from LAQ staff). Of note, four key concerns were identified with the application form — literacy issues, difficulties in understanding the wording of the form, insufficient guidance as to the kind of information required, and the amount of work required in gathering the necessary information and supporting documentation for the application.

For example, one Indigenous woman bluntly noted:

There's a lot of illiterate people out there that wouldn't understand half the crap they put in there. They should put on the form — if you need help ... this person will help you fill it in. I did ring but got switched to two different people. I hung up. It's all a confidence thing. You don't know who to go to for help.

It was identified that it was difficult for women with intellectual disabilities to articulate what happened, and that they may struggle to tell their story in a way that demonstrates merit.

*Another commonly identified misperception was that two parties cannot be funded by legal aid for the same dispute, so if their partner had obtained legal aid for a family law matter, women would assume they would not be eligible for legal aid.*

For a number of women the added burden of providing additional supporting information caused frustration. For example for one woman it was clarifying the actual separation date and supplying the police reports that made the process difficult. An Indigenous woman described the most difficult part as getting a financial statement from the bank, while another said she was means tested to the point of being grilled. Service providers also pointed out that some women may not have access to a photocopier to copy documents.

Eight out of 21 NESB women interviewed described language difficulties in the application process including:

- a lack of confidence, particularly in dealing with unfamiliar institutional structures; the need for an interpreter when required (one woman said her need for an interpreter varied with the situation);
- a lack of good writing skills that would have assisted the process of completing the application form;
- difficulties in understanding legal advice (including difficulties with legal language) and articulating their needs, particularly if they were being rushed or stressed.

According to the grants officers, women from a NESB did not know or understand what information was required, had difficulty accessing interpreters to complete the application form and were unable to clearly articulate their case. Consequently, they might be unsuccessful in applying for aid.

Some women also observed that the stress of their presenting legal situation impacted adversely on their ability to apply for aid. A number of sources of stress were identified such as the impact of the separation and/or associated domestic violence, pre-existing chronic mental health conditions, lack of child care and lack of money. In this situation, other difficulties such as problems filling out the form, interacting with legal aid staff, financial concerns and finding child care were magnified.

### The refusal process

For those women who made applications, the research identified several issues with the process for considering and refusing them. One in particular related to the perverse incentives created by managerial targets and performance measures. Grants officers worked towards a key performance indicator ('KPI') to make 95 per cent of their decisions on legal aid applications within five days of receipt. This tended to result in refusals of applications arriving with insufficient information. Rather than leaving the file open and

attempting to follow up with the client — which could take considerable time — grants officers would refuse the application within the five day target, and advise that the application would be reconsidered if the applicant provided further specified information. Our reading of refusal files and interviews revealed that few women actually provided the further information specified, and this was generally because they did not understand the refusal letter.

In addition, the way that grants budgets were managed appeared to give rise to arbitrary, opaque and inconsistent decision-making. The statistical analysis demonstrated a clear inequity between women living in the Brisbane metropolitan area and those living in the regional areas studied, which was related to the way legal aid budgets were distributed within LAQ. The annual grants budgets for LAQ regional offices were fixed by reference to historical relativities, regardless of changes in population or levels of demand in different regional areas over time. As a result, the approval rates in all regional offices and in all areas of law were lower than the approval rates in Brisbane. The organisational budget distribution model thus systematically disadvantaged women living in non-metropolitan areas.

Inconsistencies also emerged between regional offices where local decision-making cultures thrived with little central oversight beyond the measurement of performance by means of a handful of KPIs. Some of these local cultures proved hostile to women. For example the Southport, Toowoomba and Townsville offices of LAQ refused women's applications for legal aid for family law matters at a higher rate than men's applications for family law matters during the period of the study, while the Cairns office of LAQ refused Indigenous women's applications for legal aid for domestic violence matters at a higher rate than men's applications for domestic violence matters, and also refused NESB women's applications for domestic violence matters at a high rate. Given general patterns of experience of domestic violence, and of eligibility for legal aid, these results must give rise to concern. Further, progress against annual spending targets was monitored monthly and managed by means of periodical directives, which resulted in the 'tap being turned on and off' frequently and unpredictably over time.

The refusal and appeal process also appeared to be incomprehensible to most interviewees. Over 60 per cent of the women refused legal aid did not understand the reason why they were refused. This was especially the case for women with a disability, and refusals

based on guidelines (which are complex and technical), although older women and women refused on the basis of means were more likely to understand the reasons for refusal. Women who did not understand the reason/s for refusal said they found the refusal letter hard to understand, and relayed a litany of misconceptions about legal aid and why they were refused. The letters were expressed in very formal, complex and forbidding language, difficult sometimes even for the researchers to comprehend.

There was a low rate of appeals against the refusals of aid in the file sample, especially for refusals based on means and those for domestic violence applications. LAQ tended to interpret failure to appeal as simply a matter of individual 'choice'; however our findings indicated several structural barriers to launching an appeal. Reasons given by our interviewees for not appealing included lack of faith in the appeal system, lack of knowledge about the appeal process, lack of time, and lack of emotional capacity to deal with the matter further. Older women, NESB women and women with a disability were also inclined to accept the decision as an authoritative one which they would not question. The refusal letter did not clearly explain the appeal process and positively discouraged appeals. Thus, it was clear that there were several ways in which LAQ could have made the appeal process more accessible and user-friendly.

Service providers expressed mixed views about the appeal process. While some thought it worked well, others had little confidence in it, and some said they would prefer to use internal contacts to have the matter reconsidered if they could. Service providers thought that women needed assistance to prepare appeals, particularly those with literacy or language problems who could not write letters, and also needed to be given sufficient time to get an appeal together.

### Repeated dealings

One of the striking features of the file data was that 87 per cent of applicants had had other dealings with LAQ — whether in the form of seeking legal advice (19 per cent), or making another application (or applications) for legal aid (7 per cent), or both (61 per cent) — prior or subsequent to the matter for which they were refused aid in our file sample.

Women in the file sample had an average of 4.2 previous dealings and 2.2 subsequent dealings with LAQ. 27 per cent had other dealings with LAQ only prior to the matter for which they were refused aid, 10 per cent had other dealings only subsequent to that matter, while 50 per cent had dealings with LAQ both prior and subsequent to the relevant matter. These women's LAQ history involved family law matters in 93 per cent of cases, civil law matters in 53 per cent of cases, and criminal law matters in 16 per cent of cases. Two thirds of previous or subsequent civil matters involved domestic violence, and in 88 per cent of these cases the applicant was the aggrieved party. Few previous or subsequent civil matters involved child protection proceedings (9 per cent), but a very wide

range of other civil matters were mentioned, including crimes compensation, debt, motor vehicle accidents, employment issues, wills, and so on. All of the NESB women whose files we read had a history of seeking legal advice and/or applying for aid for family law matters, and almost all (92 per cent) had a history in relation to domestic violence.

Clearly, these women did not fall into the category of those who did not apply for legal aid, but they often did encounter the barriers experienced by those applying for legal aid without assistance, including the need for different kinds of information to be provided in relation to different matters, the need for an interpreter, and the level of stress they were experiencing at the time of the application. The phenomenon of the 'tap being turned on and off' may have accounted for previous success with one application, followed by later failure with a subsequent application. And having been refused legal aid, they all encountered the barriers identified in understanding the refusal letter and accessing the appeals process. With few other resources available, though, they had little option but to again seek advice and/or attempt another legal aid application when further legal problems arose.

Indeed, the data on repeated dealings is consistent with the findings of a series of 'legal needs' studies undertaken both in Australia and overseas,<sup>4</sup> that disadvantaged clients tend to experience a complex web of related and recurrent legal problems, in these instances with family law and domestic violence issues at the core. But this, in turn, raised a further source of exclusion. Even where these clients received grants of legal aid, those grants were limited to a discrete matter, and often (in the case of family and anti-discrimination law) to a single stage of the matter, and were clearly not effective in solving the clients' interrelated problems. This suggests that rather than applications being dealt with discretely, clients and their problems should be treated holistically. Thus, for example, broader attention should be paid to an applicant's legal aid history, and the possible implications of that history, when deciding individual grant applications.

### The consequences of not having legal aid

Almost 40 per cent of the women refused legal aid whom we interviewed went on to handle their matter alone. Twenty-eight per cent paid for a lawyer, while 22 per cent did not pursue the matter further. NESB women were most likely to handle their matter alone, while Indigenous women were least likely to pay for a lawyer and most likely to not pursue their matter any further. Not pursuing the matter is often not a neutral option, but one that has negative consequences as problems persist or worsen. Service providers commented that women who chose not to pursue their matters after being refused legal aid often returned at a later date with their problems having become worse. This is also not an option for women who are responding to applications against them, who have to keep going as best they can.

4. Christine Coumarelos, Zhigang Wei and Albert Z Zhou, *Justice Made to Measure: NSW legal needs survey in disadvantaged areas* (2006); Hazel Genn, *Paths to Justice: What people do and think about going to law* (1999); Hazel Genn and Alan Paterson, *Paths to Justice Scotland: What people in Scotland think and do about going to law* (2001); Pascoe Pleasence et al, *Causes of Action: Civil Law and Social Justice* (2004); Alexy Buck, Nigel Balmer and Pascoe Pleasence, 'Social Exclusion and Civil Law: Experience of Civil Justice Problems among Vulnerable Groups' (2005) 39 *Social Policy and Administration* 302; Pascoe Pleasence, with Nigel Balmer and Alexy Buck, *Causes of Action: Civil Law and Social Justice* (2nd ed, 2006).

*The statistical analysis demonstrated a clear inequity between women living in the Brisbane metropolitan area and those living in the regional areas studied, which was related to the way legal aid budgets were distributed within LAQ.*

Overall, the ultimate outcomes achieved by our interviewees were not encouraging. In around one quarter of the family law cases, the matter was still ongoing. Among those whose matters had finalised, the majority received a negative outcome. This included all of the anti-discrimination complainants, and the majority of those with family law matters. In the latter cases, either an unsatisfactory status quo was maintained, the situation became worse or court orders were made that were contrary to the woman's interests.

Women with domestic violence matters and women who paid for a lawyer to represent them were most likely to achieve positive outcomes. The fact that women were more able to achieve positive outcomes in domestic violence than in family law or anti-discrimination matters no doubt reflects the quicker court process and the lower cost of representation for domestic violence protection orders, but it also suggests that other court support services (such as police or domestic violence workers) may be effective advocates in the domestic violence area. The value of legal representation in family law matters was particularly evident, but in this area, a number of women identified downsides of the positive outcomes they achieved, such as the long-term financial burden of having paid for their own lawyer.

### Barriers to overcoming barriers

In any bureaucracy, entrenched institutional practices and logics are difficult to dislodge. Organisational change requires commitment and leadership, and in the absence of these, responses to identified problems tend to be filtered through existing structures, which may strip them of meaning and result in formalistic, piecemeal adjustments, while the 'bigger picture' disappears from view. Thus, for example, LAQ has instituted the following changes to its processes in response to our report:

- the legal aid application form has been redrafted in consultation with plain English consultants, and counter staff have been directed to assist clients to complete the form where requested or necessary;
- grants officers have been directed to follow up self-applicants to obtain further information rather than issuing a refusal;
- 150 grants letters have been rewritten;
- 20 debt recovery letters have been rewritten;
- 160 letters from in-house lawyers have been rewritten;

- 1100 clause codes (the language used to tell people about their grant of aid) have been rewritten and are still being implemented;
- the Automated Document Generation ('ADG') system letters have been changed, using a question and answer format to make information clear and more accessible. Some of these changes have been implemented;
- the grants function in the organisation is slowly being centralised, with training and resources being delivered centrally.

While these changes address some of the barriers to access, there has been no change in relation to more fundamental issues such as outreach strategies, preferred suppliers, KPIs, budget management and distribution, and the appeals process. In particular, the recommendation that clients and their problems be treated holistically, which would require a significant rethinking of how the grants function operates, has not been pursued.

It is also clear, however, that the barriers identified in our study are not unique to LAQ. How do your potential clients know about the services offered by your organisation? How accessible are your premises? How do clients cope with your letters, publications and processes? What assistance is available for those who may have difficulties? What might be the unintended consequences of your targets and KPIs? Which groups might be inadvertently excluded by the way you do business? And what forms of institutional inertia inhibit changes that might enhance access for disadvantaged groups? These are questions that all agencies with a social justice remit should remember to ask themselves on a regular basis.

**TRACEY DE SIMONE** is the Strategic Policy Coordinator at Legal Aid Queensland, currently on secondment to the Department of Justice. **ROSEMARY HUNTER** was at Griffith University when the research was conducted, and is now at the University of Kent, UK. The views expressed in this article are those of the authors alone.

© 2009 Tracey de Simone and Rosemary Hunter