

Legal Information vs Legal Advice



This fact sheet summarises the Ask LOIS webinar on this topic, presented by Janet Loughman, Principal Solicitor, Women's Legal Services NSW, on 30 September 2014.

This webinar can be viewed for free at www.asklois.org.au/webinars/past-webinars.

This fact sheet covers:

- Legal and non-legal issues
- What is legal information?
- What is legal advice?
- How to identify an urgent legal problem
- Getting it right – liability
- Referral pathways

Legal vs non-legal issues

- There is a need for community workers to be able to identify client's legal issues and for lawyers to be able to identify client's legal issues
- It is especially important for non-legal services to be able to make legal referrals where legal advice is necessary as they're usually the first port of call for people with legal needs
- 'Justice Made to Measure', a 2006 NSW study by the Law & Justice Foundation found that only 51% of disadvantaged participants sought legal help for their legal problems

Family violence can affect every area of their lives. A holistic, integrated approach that meets the client's legal and non-legal needs is the best approach. A woman experiencing or escaping violence may have the following issues:

LEGAL ISSUES



NON-LEGAL ISSUES



Legal information vs legal advice

The boundaries between what is legal information and what is legal advice can be blurred. Many frontline workers can pass on 'legal information' but cannot give 'legal advice'

Legal information

- General information about the law, legal processes and procedures
- Legal information is not meant to involve a consideration of the specific facts of the individual client's problem or an assessment of the application of the law in their case

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This factsheet is not intended to take the place of legal advice given by a qualified legal practitioner familiar with the individual case or subject matter. No responsibility is taken for any loss suffered as a result of the information presented.



Case study: Maria

Maria recently separated from her husband and wants to know how to get a divorce.

You could help Maria by providing her with legal information from:

- Family law courts website information on divorce
- Divorce chapter from Women and Family Law
- Ask LOIS divorce factsheet
- Other Ask LOIS resources under 'Children, Family and Relationships' section

Legal advice

- Legal advice involves applying the law to the person's issues, presenting the options, the pros and cons and allowing the client space to decide for themselves
- For lawyers, this is called getting instructions – decision about to proceed must be made with informed consent
- However, it is never anyone's job (even a lawyers) to tell people what to do or make a choice for a client

Case study: Maria

Maria wants to get a divorce. She separated from her husband 15 months ago but got back together again for 4 months and then separated again.

For the first 2 months she and her husband still lived in the same house.

Maria wants to know if her period of separation means she is eligible to apply for a divorce. She needs advice on how the Family Law Act and case law applies to her particular separation.

What's the difference? Specificity!

- **Information:** being general and only discussing the issue in broad terms that apply generally to the client's circumstances because of the particular subject matter
- **Advice:** being more specific and considering the client's circumstances and what particular problem they need to resolve. The more background information you gather from a client, the more likely it is that the help you provide will be advice, or seen as advice by the client

Daisy: Information or Advice?

Daisy and her ex-partner Dave are arguing about the children.

Dave sent 25 messages and emails over the past 3 days including comments about Daisy being a lousy mother and threatening to call Community Services.

She is afraid that if she gives Dave the children, he won't bring them back. She went to the police but they wouldn't apply for an AVO.

She wants to know what to do...

Question 1

You tell Daisy about private ADVOs and the role of the registrar and the risk of costs against her if the application is considered frivolous or vexatious. Is this information or advice?

Answer: This is legal information.

**For a full discussion, please view the Ask LOIS webinar.*

Question 2

You tell Daisy that she doesn't have grounds to get an AVO and if she applied and lost she would get a costs order against her. Is this information or advice?

Answer: This is legal advice.

**For a full discussion, please view the Ask LOIS webinar.*



Aleena: Information or Advice?

The police applied for an ADVO on behalf of Aleena. The police have told her that she doesn't have to be at court on the next occasion but her ex has been driving up and down the street and she's afraid to go out.

You tell Aleena she can apply to change the orders on her ADVO to stop her ex driving up and down the road. You tell her in order to do this she needs to go to court on the next occasion, even though the police have told her she doesn't need to go.

Is this information or advice?

Answer: This is legal advice.

**For a full discussion, please view the Ask LOIS webinar.*

Examples of legal information

- Giving brochures, pamphlets, factsheets etc.
- Reading to the client section of the Law Handbook about the issues the client wants help with
- Telling a client what happens at court; how to enter the courtroom; how to address the Magistrate
- Explaining the general availability of Victims Support

Examples of legal advice

- Telling a client what you think the court would decide in their matter
- Helping a client to choose between options for resolving their legal issue
- Telling a client about their legal liability in their matter
- Discussing with a client the likely outcome or results of a course of action
- Helping a client to complete some application forms or drafting letters or statements

How to tell if you're giving legal advice or legal information

Gauge your responses!

- **Information responses** – directing a client to available information or making referrals.
 - E.g. *'it sounds like you need some help with child support, why don't I get you in contact with the Legal Aid Child Support Service'*
- **Advice response** – taking full instructions and discussing their situation. Talking about other issues you think may be relevant to the client tailored to their circumstances outside what they have asked you about.
 - E.g. *'now we've talked about the AVO, let's discuss your kids and the different options for parenting arrangements'*
- It doesn't matter if you preface a sentence with "I'm not a solicitor" and advise the client to seek legal advice. If you offer any "information" about possible actions/defences you have given legal advice
- If you're giving information or advice – it's very tempting to tell clients what we would do in their position, especially if they're asking – 'but what would you do?' or 'what do you think I should do?' – if you're giving legal information, avoid answering these questions
- It's best, even when giving legal advice, to present a client with all of their options and help them to figure out what best fits their situation. Remind clients that it is their life so they must make their own choices

What about when a legal matter is urgent?

- It's important to get referrals right when the problem is urgent
- Referrals to information only services aren't appropriate if a legal problem is urgent
- Warm referrals to legal services may be a good option in urgent situations



- A warm referral is where you contact another services on the client's behalf (with their consent) and ask for their assistance in the matter. This is helpful for client's who have high needs, may not have access to phone credit or are unlikely to make that call themselves

How to tell if the need for legal advice is urgent:

- Client has a court date soon
- Client has been served with a summons or subpoena
- Client is fearful for safety
- Client's child has been taken and not returned, especially if child will be at risk
- Time limits usually apply to assert civil rights in court or appeal court decisions – it's important to know the date the problem arose so that rights are not lost
 - Most legal actions have a limitation date. This means that someone has a time limit in which to start or respond to a legal action
 - You do not need to know all of these relevant time limits as a lawyer should but it is important that you are aware that there maybe time limits and to tell your clients this, so that they don't delay seeking help

So why does all of this matter?

- Clients receiving legal advice from lawyers have client-lawyer privilege (different to confidentiality).
 - In contrast, many community workers are mandatory reports.
- Legal services may give basic 'legal information' without needing to do a conflict of interest check.
- You may inadvertently give the incorrect advice.
- Your liability!
 - If you are not a lawyer or someone who has been designated to give advice because of their specialist knowledge it can be very risky to give advice.
 - Not only may incorrect advice be given but the person may rely on the 'advice' they receive and take certain actions.

Getting it right – liability

Duty of care

Liability arises if:

- There is a duty of care
- There is a breach of that duty
- The client suffers a loss or an injury as a result (that was reasonably foreseeable)
- It is possible for liability to arise in relation to information and advice – whichever it is it needs to be correct. Otherwise, you're at risk of civil actions being brought against you.
- If you give legal advice and do not have a practicing certificate and hold yourself out to be a lawyer, this is a breach of the Legal Profession Act.
- There is likely to be more liability risk with advice because it is tailored to a client's circumstances and if they follow your wrong advice they may suffer a loss or injury.

Who can give legal advice?

- Legal Profession Act regulates the work of lawyers
- Can only 'engage in legal practice' if you have a current practicing certificate entitling you to practice as a solicitor or barrister (maximum penalty of 200 penalty units, \$220,000)
- There is compulsory insurance to cover mistakes – called profession indemnity insurance



Who else gives advice?

Specialist community workers give advice and sometimes this is about the law, e.g.:

- Tenants advocates advise about tenancy law
- Domestic violence advocates such as Women's Domestic Violence Court Advocacy Service (WDVCAS) advise about AVOs

Know the limits

- Really important to know your own limits
- This includes knowing the difference between information and advice
- What is your organisation's policy on your role? Are you expected **not** to give advice?
- Context is important e.g. if you are a non-lawyer working in a CLC and you give advice risk you may be seen to be 'holding yourself out' to be a lawyer
- Whether it's legal information or legal advice, either way it needs to be right! When in doubt, refer!

Referrals for legal advice

**View the Ask LOIS webinar/factsheet on 'where to refer clients for legal advice' at www.asklois.org.au/webinars/past-webinars#referrals*

- LawAccess NSW 1300 888 529
- Local CLC
- Women's Legal Services advice lines (or email LOIS)
- Legal Aid

Where to find legal information

For plain English publications from a range of sources see:

- Legal Information Access Centre (Legal Answers Online)
 - www.legalanswers.sl.nsw.gov.au
- Ask LOIS resource library
 - www.asklois.org.au/resources

Referrals for non-legal advice

- DV line (accommodation/counselling) - 1800 65 64 63
- 1800 RESPECT (referrals/counselling)
- Victims Support (financial support/counselling) - 1800 633 063
- Lifeline - 13 11 14
- Free Financial Counselling - 1800 007 007
- www.speakup.org.au - a comprehensive list of legal and on-legal services for women escaping violence. This is searchable via suburb and is nationwide