



Minister for Education and Training  
Minister for Industrial Relations  
Minister for the Central Coast  
Minister Assisting the Minister for Finance

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29 MAY 2007

LEGISLATIVE  
COUNCIL



Ms Lynn Lovelock  
A/Clerk of the Parliaments  
C/- Legislative Council  
Parliament House  
Macquarie Street  
SYDNEY NSW 2000

Dear Ms Lovelock

I refer to the report of the Standing Committee on Law and Justice, Impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

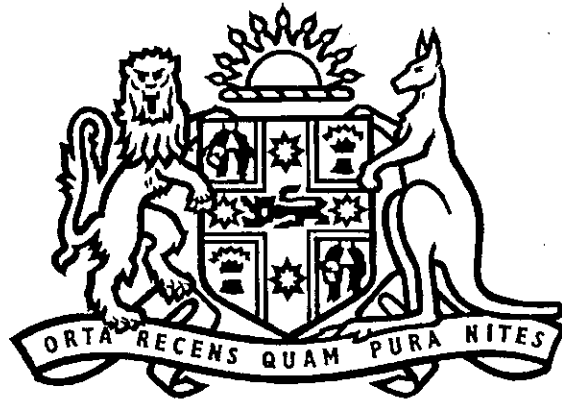
Enclosed is the New South Wales Government's response to the recommendations of the report.

I trust that the Government response will be of assistance to the Committee.

Yours sincerely

John Della Bosca MLC

Received at 12-30pm  
Tuesday 29 May 2007  
Lynn Lovelock  
A/Clerk of the Parliaments



**Inquiry into the Impact of the  
*Family Law Amendment (Shared Parental Responsibility)*  
*Act 2006*  
(Commonwealth)**

**NSW Government response**

**NSW Government response to the Legislative Council Standing Committee on Law and  
Justice Inquiry into the Impact of the *Family Law Amendment (Shared Parental  
Responsibility) Act 2006* (Commonwealth)**

**Recommendation 1**

**That the NSW Attorney General instigate a future review of the impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) on families in New South Wales and on the operation of court orders that can prevent family violence perpetrators coming into contact with their families. The specific date of the future review should be determined to allow consideration of the relevant research of the Australian Institute of Family Studies and the Family Law Council, and decisions of the Family Court of Australia. The NSW Attorney General should decide the appropriate body to conduct the review closer to the date of the review.**

The NSW Government considers that the amended Act has the potential to disadvantage women and children, particularly those who are victims of or at risk of domestic and family violence. In particular, the impact of changes regarding the new definition of family violence, compulsory family dispute resolution between parents and the penalties for false allegations will require close monitoring. Although sections 60I and 60J of the *Family Law Act 1975* now provide that family dispute resolution and pre-action procedures are not necessary if there are reasonable grounds to believe the case involves abuse or family violence, the Government is concerned about the capacity of the new Family Relationship Centres to appropriately identify and deal with such matters, and to address relevant matters in a culturally sensitive fashion.

As noted by those giving evidence to the Inquiry and by those who made submissions, the full impact of the legislation will not be able to be determined until the amended Act has been in effect for some time. A further review of the impact of the amendments on families in New South Wales and the impact of the operation of court orders that can prevent family violence perpetrators from coming into contact with their families is therefore warranted.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* commenced on 1 July 2006, but the compulsory mediation provisions do not commence until 1 July 2007. To ensure that any review is not premature, the Attorney General will instigate a review after 1 July 2009.

In regard to the research to be considered ahead of the next review, the Government understands that the research by the Australian Institute of Family Studies has been completed, and that the Family Law Council research is ongoing. The Government submits that this ongoing research should include a specific component on the effect of family violence orders (Apprehended Domestic Violence Orders) and Family Court proceedings on Indigenous people.

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## **Recommendation 2**

**That the NSW Government work with the Commonwealth Government to ensure that staff at Family Relationship Centres and accredited family dispute resolution practitioners are suitably trained and use appropriate screening tools in order to correctly identify cases involving family violence.**

Accurate screening for family violence is vital, and staff (including mediators) will require specialised training in identifying and properly dealing with domestic and family violence issues. This is particularly important given that mediation is now compulsory, except in cases where there is family or domestic violence or child abuse. This requirement assumes that family separation situations involving violence can be easily identified, which is not necessarily the case. Further, parties will not be able to 'self-select' out of mediation but will be screened regarding their eligibility for the mediation process.

At the Community and Disability Services Ministers' Advisory Council in March 2007, members from other State and Territory jurisdictions noted anecdotal reports about Family Relationship Centres forcing women who had experienced domestic violence to be involved in mediation with the perpetrators. Other anecdotal reports related to abused children being required to have contact with the perpetrators of the abuse. If there is substance to these reports, this raises serious concerns about the training of staff at Family Relationship Centres and the effectiveness of the screening tools being used.

A further concern is that the rollout of additional centres may result in a serious depletion of the pool of people with appropriate qualifications and experience. This may have an impact on staffing not just the additional Centres but also the entire sector.

The Commonwealth is responsible for ensuring that staff at Family Relationship Centres and accredited family dispute resolution practitioners are suitably trained, and that they use appropriate screening tools. Screening for domestic and family violence requires a capacity to identify all forms of violence – physical, sexual, emotional and financial abuse, stalking and intimidation. Cross-cultural training (including in relation to Indigenous clients) should also be mandatory, and will have a flow-on effect in enabling staff to better detect family violence in cases involving Indigenous families.

In training Family Relationship Centre staff, use should be made of specialised training such as that provided by the Domestic Violence and Incest Resource Centre (Victoria), the Education Centre Against Violence (NSW Health) and the Australian Institute of Social Relations, a division of Relationships Australia South Australia which offers a Graduate Diploma in Domestic and Family Violence.

Given the importance of accurately identifying family violence, the NSW Government is particularly concerned with the lack of information provided by the Commonwealth to date about the procedures used by Family Relationship Centre staff when dealing with family violence. States and Territories have had no involvement in the establishment or operation of Family Relationship Centres.

Nonetheless, the NSW Government is committed to ensuring victims of family and domestic violence are assisted in an appropriate and compassionate manner. NSW already has a number of initiatives in place which could be employed to assist in the identification of family violence. For example, the NSW Health Routine Screening for Domestic Violence Program provides a simple tool for identifying domestic violence for women patients accessing specific health services.

Further, in the Northern Rivers and Albury/Wagga legal services regions, collaboration is occurring between the local Women's Domestic Violence Court Assistance Schemes (a Legal Aid NSW initiative), community legal centres and Family Relationship Centres to develop appropriate policies and procedures to assist the proper identification and handling of domestic and family violence matters. These local-level initiatives have largely been brought about by domestic violence service providers themselves, without any assistance or involvement from the Commonwealth Government.

The goal should be for Family Relationship Centre and NSW agency tools to be complementary, to ensure seamless interactions and consistency of service. This will only be possible if the Commonwealth provides more detailed information about the screening and assessment tools being used in the Centres, and about the advice being given to clients, and takes into account existing mechanisms employed in NSW.

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### **Recommendation 3**

**That the NSW Government work with the Commonwealth Government to establish protocols to enable appropriate NSW Government and non-government agencies to assist Family Relationship Centre staff and accredited family dispute resolution practitioners in dealing with cases involving family violence.**

The NSW Government supports efforts to reduce or halt family violence, and recognises that clients of Family Relationship Centres who have experienced family violence may require additional support. The NSW Government is willing to work with the Commonwealth Government on this issue.

However, the Government is concerned that, in implementing the family law reforms, the Commonwealth has assumed that State assistance and support services will be automatically available to clients of Family Relationship Centres, without regard to NSW eligibility requirements or the increased demand on NSW services that will result from the reforms. The Government has requested further information from the Commonwealth to enable accurate assessment of the impact of the reforms on State services, and is seeking to engage the Commonwealth on how the cost of increased demand will be met.

The NSW Government is concerned that the Commonwealth has released an evaluation framework for the family law reforms without providing States and Territories the opportunity to have meaningful input into the framework's design. As a result, the

framework does not provide for any specific assessment of the impact of the reforms on State and Territory services, for example data on the volume and type of referrals being made by Family Relationship Centres. The Government considers provision of these data to be a first step to cooperation on the development of Commonwealth-State protocols. Data should include a breakdown by Indigenous status.

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#### **Recommendation 4**

**That the NSW Government contact the Commonwealth Government to discuss the option of adopting the NSW Legal Aid Commission's alternative dispute resolution model at Family Relationship Centres so that NSW residents have the alternative of lawyer assisted mediation.**

There are a range of dispute resolution options which may be suitable in different circumstances. In many matters the Family Relationship Centre mediation model, which uses neutral chairpersons but does not involve direct assistance from a lawyer at the mediation, may be suitable. However, as noted in the NSW Government's original submission to the Inquiry, victims of family violence may agree to participate in mediation services without disclosing past violence or the risk of violence. This may occur for various reasons, including fear of the other party. Without the benefit of legal advice, agreements may be reached through coercion or intimidation which do not reflect the best interests of (normally) the woman who has been the victim of violence, or most importantly the best interests of the child.

The Government agrees that some clients will benefit from the assistance at mediation of a lawyer who is able to provide advice about the legal implications of different options, reality test different proposals with a client, help address power imbalances and draft consent orders or a hybrid consent order/parenting plan document. The Government will therefore raise the Standing Committee's recommendation with the Commonwealth.

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#### **Recommendation 5**

**That the NSW Government negotiate with the Commonwealth Government in order to secure additional funding for Indigenous services at all Family Relationship Centres located in areas with significant Indigenous populations.**

The NSW Government understands that a significant number of the Family Relationship Centres planned for NSW will be in areas with high Indigenous populations. The Government is therefore pleased that the *Operational Framework for Family Relationship Centres* developed by the Commonwealth commits to the provision of additional funding for Indigenous services. The Government will monitor this commitment, noting the importance of ensuring adequate Indigenous services exist at all Family Relationship Centres, not just those in areas with high Indigenous populations.

It is noted that none of the Key Performance Indicators in the operational framework relates directly to specialised Indigenous services (such as those that are used for the Department of Community Services' Early Intervention Program). It is suggested that the Centres could benefit by including such indicators.

In adding Indigenous components to the work of the Centres, consideration needs to be given to the following issues.

- Indigenous women and families are likely to face multi-faceted problems, and family law issues may relate to only a limited part of the complex issues involved.
- The Centres should not duplicate existing State services. For example, NSW Community Justice Centres have developed a program which provides dispute resolution across the range of issues which are likely to impact on Indigenous families. The Commonwealth should consider the needs of families attending programs like this before determining to add Indigenous-specific services to the work of the Centres.
- The operation of Family Relationship Centres should complement the work of Indigenous agencies currently delivering services to Indigenous women and families in NSW. These include the Commonwealth-funded Family Violence Prevention Legal Services, the State-funded Wirringa Baiya Indigenous Women's Legal Service and Dubbo Family Violence Program, and Aboriginal specialist workers employed by Women's Domestic Violence Court Assistance Schemes.

To be effective for all parties, the Family Relationship Centres and the process of compulsory mediation must be culturally sensitive. Compulsory mediation does not have a strong history in Indigenous Australian culture, and there are very few Indigenous family counsellors and no Indigenous family mediators who deal with family disputes. Commonwealth funding for enhanced Indigenous services at Family Relationship Centres may help redress this situation. A more explicit link between the Centres and the Department of Family and Community Services and Indigenous Affairs' Office of Indigenous Policy Coordination would also be beneficial.

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#### **Recommendation 6**

**That the NSW Government discuss the appropriateness of the number and location of Family Relationship Centres with the Commonwealth Government, and request that future decisions about the location of Family Relationship Centres be made in conjunction with relevant NSW Government agencies to ensure that the decisions are based on accurately identified population and demographic needs.**

As noted under Recommendation 2, the NSW Government is concerned about the Commonwealth's lack of consultation to date on the establishment and operation of Family Relationship Centres. The Government understands that the locations and opening dates for the remaining Family Relationship Centres have already been determined and publicly released, without reference to State and Territory Governments, and is disappointed about the lack of any coordinated strategic approach by the Commonwealth.

State and Territory involvement in this process would have provided an opportunity to co-locate certain State services with the new Family Relationship Centres, ensure Centres were established within areas of disadvantage, or complement efforts in areas where State and Territory Governments are focusing resources.

The Government notes in particular the lack of Family Relationship Centres planned for Western NSW and other rural areas. This is likely to have a disproportionate impact on Indigenous families, and this consideration should be taken into account in determining locations for any Family Relationship Centres beyond the 65 Centres currently planned.

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### **Recommendation 7**

**That the NSW Government develop a public education strategy to ensure that NSW residents experiencing divorce or separation are fully informed of their rights and responsibilities and understand the consequences of the changes outlined in s 61DA of the *Family Law Act 1975* (Cth). The strategy should aim to assist families to get the best outcomes from the family dispute resolution process. Where possible, this strategy should be developed in conjunction with the Commonwealth Government.**

It is vital that people accessing services are provided with accurate advice and information, and a public education campaign is the first step in ensuring this occurs. However, it is the Commonwealth Government's responsibility to ensure the public is informed about Commonwealth legislation. Any education campaign should be presented in a culturally sensitive manner.

At present, there appear to be some misconceptions surrounding the changes brought about by the amendments to the Family Law Act. Of particular concern is the misconception that 'shared parental responsibility' means there is now a presumption of equal time for both parents. Also of significance is that the principle does not apply if there are reasonable grounds to believe that a parent (or someone who lives with a parent) has engaged in abuse or family violence. There is a risk that parties to mediation will be disadvantaged if they do not have a full appreciation of their rights and responsibilities under the Act.

NSW already provides legal information and advice to parties to family disputes, including through Registrars of the Court, Legal Aid NSW and LawAccess. A Commonwealth-funded public education scheme would significantly supplement the information already available, and, should the Commonwealth develop such a program, the Government would welcome the opportunity to provide input.



### Recommendation 8

**That the NSW Government develop protocols for the involvement of the Department of Community Services to assist individuals within families in satisfying the requirements to prove family violence where it is known to exist.**

The proposal is beyond the scope of the Department of Community Services' responsibilities.

The responsibilities of the Department under the *Children and Young Persons (Care & Protection) Act 1998* are not to 'prove' family violence but rather to "promote and safeguard the safety, welfare and well-being of a child or young person" (section 17). To assume the task of obtaining evidentiary proof of family violence would shift the focus of the Department and create difficulties, arising from the application of privacy legislation, with the exchange of information for child protection purposes.

This recommendation shifts the burden of proof from a party to the litigation to a third party. "Proving" the burden could require substantial investigation and input from a caseworker, when the Department is not even a party to proceedings. Further, the reference to violence that is "known to exist" assumes that there has been an investigation and a positive finding, whereas in some matters the Department may receive allegations where (for a range of reasons) no further action is taken. In those cases there may be a history of allegations, but no positive finding of abuse.

Mr Roderick Best, Director, Legal Services, Department of Community Services, appeared before the Inquiry and provided a range of evidence to the Committee as to the impact on the Department should it be required to provide assistance as outlined in this recommendation. Mr Best stated:

One of the concerns is that not only will we be receiving subpoenas to access that information but we will be actually asked to give evidence in terms of what that information might mean, how we might assess it, whether in fact we have properly intervened or whether we should have made a different decision. So the concern is that we are going to have our caseworkers being asked to come along and give evidence on these matters where they previously would not be in those proceedings at all.

The Department's Early Intervention and Child Protection programs do provide assistance and support to families where family violence presents a risk of harm to children within the family, but it is not the job of the Department to prove that an offence has in fact occurred.

Given that dispute resolution is intended to occur before a matter reaches Court, the timing of when the Department would be requested to assist is an important consideration. In the absence of a subpoena there may be no lawful authority to disclose particular information. Even where proceedings have commenced and a subpoena has been issued, the Department must comply with provisions of the *Children and Young Persons (Care and Protection) Act 1998* which prevent disclosure of details that may identify a reporter in a child protection matter.

Additionally, section 69ZK (2)(c) of the *Family Law Act 1975* specifies that the Act cannot override the operation of a child welfare law in relation to a child. Schedule 5 of the Act lists

the *Children and Young Persons (Care and Protection) Act 1998* as such a law. Under section 29(d) of the *Children and Young Persons (Care and Protection) Act 1998*, a risk-of-harm report, or evidence of its contents, is not admissible in proceedings. Therefore, if the only evidence of family violence held by the Department is contained within a report, the details may not be available to the Court. It would also be unlikely that a caseworker's evidence could assist in proving family violence before a Court, as the caseworker is unlikely to have witnessed any family violence incidents.

Other NSW Government agencies such as the NSW Police Force and NSW Health provide more specific assistance in identifying and addressing family violence. For example, in accordance with *PD2005\_593 NSW Health Privacy Manual (version 2)*, women may access their health records to assist in satisfying the requirements to prove the existence of domestic violence. Additionally, Legal Aid NSW can provide legal advice to women involved in court proceedings - the Women's Domestic Violence Court Assistance Program is a major service provider to women in need of legal protection as a result of domestic violence. The state-wide network of 33 services provides on average 32,000 services each year to women and children experiencing domestic and family violence. Non-governmental organisations such as women's legal services may also be able to assist.

The development of greater understanding by the Family and Federal Magistrates Courts, and the legal profession operating in those Courts, of concepts used by the Department of Community Services such as 'substantiated risk of harm' and 'in need of care and protection', may also be beneficial in improving the identification of family violence.

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#### **Recommendation 9**

**That the Department of Community Services monitor the workload implications arising from the involvement of its caseworkers in providing assistance in family law matters to prove the existence of family violence.**

For the reasons discussed under Recommendation 8, the NSW Government considers the development of protocols for the involvement of the Department of Community Services to assist individuals to prove family violence to be inappropriate.

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### **Recommendation 10**

**That the NSW Attorney General's Department monitor the incidence of Apprehended Domestic Violence Order applications and the incidence of defended Apprehended Domestic Violence Order applications and conduct research to determine the relationship between the amendments to the *Family Law Act 1975* (Cth) contained in the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and any change in incidence. This research should be used to inform resourcing decisions for State courts and associated support services in relation to Apprehended Domestic Violence Order applications.**

In its original submission to the Inquiry, the NSW Government expressed concern about a potentially significant increase in applications for orders resulting from the amended Act's emphasis on Apprehended Violence Orders as evidence of family violence. The Government understands that a greater number of Apprehended Violence Orders are being contested by defendants, rather than being consented to with no admission. This is possibly because of concern that the order will be taken into account in family law proceedings. These changes have resourcing implications for the NSW Police Force, State Courts and Legal Aid NSW.

There could be some benefit, therefore, in conducting formal research into any changes in the use of Apprehended Violence Orders resulting from the Commonwealth's family law amendments. The NSW Attorney General's Department will give consideration to commissioning independent research on this issue. It is noted, however, that such research would need to have regard to the data capabilities of the Local Court to identify changes in incidences of applications.

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### **Recommendation 11**

**That the NSW Attorney General's Department work with the Chief Magistrate to develop and implement a Practice Note to provide guidance to NSW magistrates on the application of Division 11 of Part VII of the *Family Law Act (1975)* (Cth). The information contained in the Practice Note should also form the basis of training provided to NSW Police prosecutors.**

The Government acknowledges that Family Court orders may be inconsistent with Apprehended Domestic Violence Orders made by NSW Courts. However, Practice Notes are initiated and developed by the Court, without the assistance of the Government. The matter of whether a Practice Note should be developed as suggested in this recommendation is therefore one for the Chief Magistrate to consider. The Government will bring this recommendation to the Chief Magistrate's attention.

With respect to training, the Local Court of New South Wales provides significant levels of legal education to Magistrates, and education in relation to domestic violence/family law issues is an integral part of the ongoing training.

The Local Court Bench book will be updated to reflect the legislative changes in the family law jurisdiction. The section of the Bench book on Apprehended Domestic Violence Orders

informs Magistrates as to what requirements to consider when dealing with the issue of parental contact with children.

The issue of police training is addressed under Recommendation 13.

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### **Recommendation 12**

**That the NSW Attorney General's Department investigate the feasibility and desirability of establishing a duty solicitor scheme for defendants in Apprehended Domestic Violence Order matters.**

As the report notes, a duty solicitor scheme at relevant courts could assist defendants in Apprehended Domestic Violence Order matters who would otherwise be unrepresented.

There is a need to advise defendants about procedures in relation to Apprehended Domestic Violence Orders, and about the implications of consenting to an Apprehended Domestic Violence Order with or without admissions. For instance, many of the defendants that Legal Aid NSW advises in relation to Apprehended Domestic Violence Order proceedings are not aware of the automatic suspension of both a security licence and a firearms licence that follows the making of an Apprehended Domestic Violence Order.

The Attorney General's Department, through Legal Aid NSW, will therefore investigate the feasibility of establishing a duty solicitor scheme.

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### **Recommendation 13**

**That NSW Police review the training provided to police officers in relation to their role in enforcing Family Court orders, to determine whether current training needs to be supplemented. Any additional training provided should ensure officers understand their role when a party to a Family Court order seeks the assistance of police, including the appropriate action to take when the complex nature of a family dispute prevents officers from effecting compliance with an order.**

The Government acknowledges the role of the NSW Police Force in enforcing Family Court orders - for example, where the Court has made orders relating to parental contact with children, and one party is hindering contact by the other party in contravention of the order. It is therefore appropriate that police receive adequate training on issues relating to the enforcement of such orders in the new legal environment created by the Commonwealth's reforms.

The allocation of resources for additional training of police, particularly domestic violence liaison officers and prosecutors, is an issue for the NSW Police Force in responding to the introduction of the Commonwealth's family law reforms. Additional resource demands on the NSW Police Force are likely to arise from:

- the increase in reporting to the police as a result of the proposed referral arrangements from Family Relationship Centres and the Advice Line, whereby the NSW Police Force is likely to be a referral agency in cases of crisis or emergency situations; and
- the increased emphasis on Apprehended Violence Orders as evidence of family violence, which may involve increased demands on the NSW Police Force to ensure that the Court is provided with evidence of existing Apprehended Violence Orders (including interim orders) and histories of police attendance.

The NSW Police Force is currently progressing a number of initiatives around domestic and family violence, arising from the Ombudsman's 2006 review *Domestic violence: improving police practice* and the Government's 2007 election policy document *Stopping Domestic Violence*, as well as from the Commonwealth reforms. Training and education of police will be undertaken as part of these initiatives, and funding will be met within existing agency resources.

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#### **Recommendation 14**

**That the NSW Attorney General request that the Commonwealth Attorney-General expand the terms of reference of research currently being conducted by the Australian Institute of Family Studies to include the impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* on the material circumstances of children subject to Family Court orders.**

While an extension of the Australian Institute of Family Studies terms of reference as outlined in this recommendation would be useful, the Government understands that the relevant research has already been completed.