

Standing Committee on Law and Justice

**Impact of the *Family Law
Amendment (Shared
Parental Responsibility) Act
2006 (Cth)***

Ordered to be printed 28 November 2006 according to
Standing Order 231

New South Wales Parliamentary Library cataloguing-in-publication data:

New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice
Impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) / Standing Committee
on Law and Justice. [Sydney, N.S.W.] : the Committee, 2006. – 93 p. ; 30 cm. (Report ; no. 33)

Chair: Christine Robertson, MLC.

"Ordered to be printed 28 November 2006 according to Standing Order 231".

ISBN 1921286091

1. Australia. *Family Law Amendment (Shared Parental Responsibility) Act 2006*.
 - I. Title
 - II. Robertson, Christine.
 - III. Series: New South Wales. Parliament. Legislative Council. Standing Committee on Law and Justice. Report ; no. 33

346.944015 (DDC22)

How to contact the Committee

Members of the Standing Committee on Law and Justice can be contacted through the Committee Secretariat. Written correspondence and enquiries should be directed to:

The Director

Standing Committee on Law and Justice

Legislative Council

Parliament House, Macquarie Street

Sydney New South Wales 2000

Internet www.parliament.nsw.gov.au

Email lawandjustice@parliament.nsw.gov.au

Telephone 02 9230 3311

Facsimile 02 9230 3371

Terms of Reference

That the Standing Committee on Law and Justice inquire into and report to Parliament by 1 December 2006 on:

- a) The impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) on women and children in NSW; and
- b) The impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) on the operation of court orders that can prevent family violence perpetrators coming into contact with their families.

These terms of reference were referred to the Committee by the Hon Reba Meagher MP, Minister for Community Services and the Hon Bob Debus MP, Attorney General on 19 September 2006.

Committee Membership

The Hon Christine Robertson MLC	Australian Labor Party	<i>Chair</i>
The Hon David Clarke MLC	Liberal Party	<i>Deputy Chair</i>
The Hon Rick Colless MLC	The Nationals	
The Hon Amanda Fazio MLC	Australian Labor Party	
The Hon Greg Donnelly MLC	Australian Labor Party	
Ms Lee Rhiannon MLC	The Greens	

Secretariat

Ms Rachel Callinan, Director
Ms Emma Chandler, Principal Council Officer
Mr Simon Johnston, Principal Council Officer
Ms Dora Oravec, Council Officer Assistant

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Chair's Foreword

I am pleased to present this Report to the Legislative Council.

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) continues the Commonwealth Government's attempt to encourage parents who are separating to use non-court based dispute resolution rather than costly and time-consuming litigation. The majority of family break-ups are already resolved outside the court system, and these amendments will consolidate that trend. While I support the general aim of moving away from litigation in family matters, I am concerned that the unintended effects of these latest amendments to the *Family Law Act 1975* may result in harm to women and children in New South Wales.

The Committee heard evidence from a range of experienced family law practitioners who are concerned about these potential and current impacts, including representatives of the NSW Law Society, the Combined Community Legal Centres Group, the Women's Legal Services NSW, as well as relevant NSW Government agencies such as the Legal Aid Commission of NSW and the NSW Attorney General's Department. The amendments to the *Family Law Act 1975* have only recently come into effect, and while the Committee makes some recommendations that address the more serious implications of the changes, the evidence provided by these witnesses make it clear that the issue should be revisited in the future.

The possibility that these amendments may expose women to family violence and may subordinate the best interest of the child to the interests of the parents is the most concerning element of this Inquiry. The Committee has made recommendations to the NSW Government that will attempt to address these concerns.

The issues addressed in this Inquiry are important and sensitive, and I appreciate the efforts of my fellow Committee members in producing this consensus Report.

Thank you also to Rachel Callinan, Simon Johnston and Dora Oravec of the Secretariat for their work in producing the Report in a short period of time. I particularly thank Emma Chandler, a participant in the 'Working in the Legislative Council' Professional Development Program, for her invaluable contribution to this Report.



Hon Christine Robertson MLC
Committee Chair

Executive Summary

Introduction (Chapter 1)

The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (hereafter, *Shared Parental Responsibility Act*) attempts to continue a cultural shift in the way family separation is managed - away from litigation and towards cooperative parenting.

The NSW Attorney General, the Hon Bob Debus MP, and the Minister for Community Services, the Hon Reba Meagher MP, referred this Inquiry to the Standing Committee on Law and Justice on 19 September 2006. The Committee was required to inquire into and report on the impact of the *Shared Parental Responsibility Act* on women and children in New South Wales, and on the operation of court orders that can prevent family violence perpetrators coming into contact with their families. The pertinent provisions of the *Shared Parental Responsibility Act*, and background on the genesis of those provisions, are outlined in Chapter 2.

The Committee notes that the *Shared Parental Responsibility Act* has only been in force for a short period of time, and the full impact of the changes is not able to be determined at this point. The Committee recommends that the NSW Attorney General instigate a future review, which would allow the full impact of the changes, and relevant research and decisions of the Full Court of the Family Court of Australia, to be considered. However, the Committee believes that it is important that the evidence received during this Inquiry on the potential and current impacts of the amendments is considered and appropriate recommendations made.

Background (Chapter 2)

In Chapter 2, the Committee outlines the background to the *Shared Parental Responsibility Act*, including detail on the three Commonwealth parliamentary inquiries that preceded it, and explains the relevant provisions of the *Family Law Act 1975* (Cth) (hereafter, *Family Law Act*) that have been amended by the *Shared Parental Responsibility Act*.

Family dispute resolution

One of the key amendments is a requirement, from 1 July 2007, that parents attend family dispute resolution and make a genuine effort to resolve the dispute before applying for a Parenting Order through the Family Court of Australia or Federal Magistrates Court. Family dispute resolution is guided, under the *Family Law Act*, toward agreement on a parenting plan, a non-binding written agreement between parents relating to parenting responsibilities post-separation. The requirement to undergo family dispute resolution does not apply where there is family violence or abuse or the risk of family violence or abuse.

Presumption of equal shared parental responsibility

Another significant change in the *Family Law Act* is contained in s 61DA, which requires courts to apply a legal presumption of equal shared parental responsibility whenever a Parenting Order is made. This means that, where possible, both parents will have an equal role in making decisions about major long-term issues involving the children. This presumption does not apply in cases where there are reasonable grounds to believe that there is family violence or abuse.

In addition, s 65DAA of the *Family Law Act* requires the Court to consider whether spending equal time with both parents is practical and in the best interests of the child. If the court finds such arrangements are in the best interests of the child and reasonably practicable, then it must make an order that the child spend equal time with each parent. If the Court does not consider this appropriate, it must instead consider whether they should spend ‘substantial and significant time’ with both parents.

Other relevant amendments

Other amendments addressed in Chapter 2 include s 117AB, which stipulates that the court must order that party to pay some or all of the costs of another or other parties if it determines that a false allegation or statement has knowingly been made in the proceedings, and the ‘friendly parent’ consideration, s 60CC(3)(c), where the court takes into account the willingness and ability of parents to facilitate a relationship between the other parent and the child. The definition of family violence now includes an explanatory note on the meaning of ‘reasonable’ in relation to a person’s reasonable fear of violence, providing for a stricter definition than exists in NSW courts for Apprehended Domestic Violence Orders (ADVOs).

Chapter 2 also includes detail on Division 11 of Part VII of the *Family Law Act*, which addresses the relationship of Family Court orders (such as Parenting Orders) and State family violence orders (ADVOs in NSW).

Impact of the *Shared Parental Responsibility Act 2006* (Cth) on women and children in NSW (Chapter 3)

The amendments contained in the *Shared Parental Responsibility Act* will have a significant impact on the women and children of NSW. Chapter 3 examines these impacts and provides a range of recommendations to mitigate the effects on NSW women and children.

Family dispute resolution and Family Relationship Centres

It is clear from the evidence that there are a number of areas of concern in relation to the family dispute resolution process established by *Shared Parental Responsibility Act* and the Commonwealth’s associated Family Law reform agenda.

Of particular concern is that family violence may go undetected if screening tools used at Family Relationship Centres (FRCs) and by accredited family dispute resolution practitioners are inadequate. A number of submissions to the Inquiry highlighted the power imbalance that may occur in dispute resolution as a result of a failure to identify family violence. The Committee therefore recommends that the NSW Government work with the Commonwealth Government to ensure that staff at FRCs and accredited family dispute resolution practitioners are suitably trained and use appropriate screening tools in order to correctly identify cases involving family violence.

In addition, given that a number of NSW Government agencies are expert in dealing with family violence issues, the Committee considers it would be appropriate for these agencies to establish links or consult with FRCs and accredited family dispute resolution practitioners in order to assist NSW families with family violence issues. The Committee recommends that the NSW Government work with the Commonwealth Government to establish protocols to enable appropriate NSW Government and non-government agencies to assist FRC staff and accredited family dispute resolution practitioners in dealing with cases involving family violence.

Role of NSW Government agencies

Given the serious implications of failing to identify and address family violence, the Committee considers that NSW Government agencies have a responsibility to assist women and children to meet the requirements to prove family violence in cases where it is known to exist. In particular, the Committee recommends 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.

Parties attending FRCs will not be legally represented, nor will staff at FRCs provide legal advice. The Committee believes that legal advice and possibly legal representation during the family dispute resolution process is important to safeguard the best interests of women and children. The Committee therefore considers that steps should be taken by the Commonwealth Government to offer NSW residents the alternative of lawyer assisted mediation. Further, the Committee notes that the alternative dispute resolution service provided by the NSW Legal Aid Commission is an appropriate mediation model. Consequently the Committee believes that the Commonwealth Government should take steps to adopt this model at FRCs in order to ensure satisfactory mediation outcomes for NSW women and children, and has made a recommendation to that effect.

Impact on Aboriginal women and children

It is clear from the evidence that Aboriginal women and children are likely to be particularly affected by the amendments, given the high incidence of family violence in Indigenous communities. As a consequence, Indigenous communities need access to services that are culturally sensitive. The Committee is concerned that the Commonwealth's provision of additional funding for Indigenous services at the Lismore FRC is insufficient to cater to the needs of the State's entire Indigenous population. The Committee therefore recommends that the NSW Government negotiate with the Commonwealth Government in order to secure additional funding for Indigenous services at all FRCs located in areas with significant Indigenous populations.

Number and location of Family Relationship Centres

The Committee notes that there will be a maximum of just 11 FRCs in NSW once the requirements for compulsory dispute resolution take effect in mid 2007, with a further ten FRCs to be provided in 2008-2009. The Committee considers this number is likely to be inadequate to service a population of over 6 million people. Further, the Committee has serious concerns that the small number of FRCs and their sparse distribution across the State will significantly disadvantage rural and regional populations. The Committee is of the view that the Commonwealth Government should adequately resource the infrastructure so that everyone has easy access to FRCs. The Committee also recommends that the NSW Government discuss the appropriateness of the number and location of FRCs with the Commonwealth Government, and request that future decisions about the location of FRCs be made in conjunction with relevant NSW Government agencies to ensure that the decisions are based on accurately identified population and demographic needs.

Community understanding of amendments

A lack of community understanding regarding the implications of the amendments to the *Family Law Act* is another area of concern highlighted in the evidence received by the Committee. The Committee is of the view that NSW individuals within families may be seriously disadvantaged if they undertake mediation without a full appreciation of their rights and responsibilities under the *Family Law Act* 1975.

The Committee considers that a public education campaign needs to be undertaken in NSW to inform parties in divorce and separation proceedings of the impact of the amendments, and makes a recommendation to that effect.

Proving family violence

Increased difficulties of proving the existence of family violence is also a significant impact of the new family law legislation. The Committee notes that the combination of the stricter definition of family violence, penalties for false accusations and the ‘friendly parent’ consideration is likely to act as a significant deterrent to women disclosing the existence of family violence during divorce or separation proceedings.

Impact of the *Shared Parental Responsibility Act* on the operation of court orders to prevent family violence perpetrators from coming into contact with their family (Chapter 4)

Chapter 4 provides an analysis of the impact of the *Shared Parental Responsibility Act* on the operation of court orders to prevent family violence perpetrators coming into contact with their families.

Impact of amendments on Apprehended Domestic Violence Orders

The Committee notes the suggestion of many Inquiry participants that the *Shared Parental Responsibility Act*, which states that only contested or final ADVOs are considered in the determination of parental responsibility, may lead to an increased number of applications for ADVOs, and an increase in the number of ADVOs that are defended, with consequences for local court resources. The Committee believes it is important that the NSW Government monitor the impact of these amendments on the incidence of ADVOs and associated resourcing issues, for State courts and support services such as the Women’s Domestic Violence Court Assistance Program. The Committee therefore recommends that the NSW Attorney General’s Department monitor the incidence of ADVO applications and the incidence of defended ADVO applications and conduct research to determine the relationship between the amendments to the *Family Law Act* contained in the *Shared Parental Responsibility Act* and any change in incidence. This research should be used to inform resourcing decisions for State courts and associated support services in relation to ADVO applications.

It is clear from the evidence that there is some scepticism about the effectiveness of the changes to Division 11 of Part VII of the *Family Law Act*, which covers those situations where there is a conflict between Family Court orders and family violence orders such as ADVOs. There is scepticism in particular about the likelihood that State courts will use the powers they have under the *Family Law Act* to vary Family Court orders. The Committee is concerned that unless magistrates and police prosecutors can confidently use these powers, situations may arise where women and children are at risk of family violence. The Committee therefore recommends 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*. The information contained in the Practice Note should also form the basis of training provided to NSW Police prosecutors.

Incidence of false allegations and misuse of ADVOs

The *Shared Parental Responsibility Act* contains a number of provisions that are intended to address the perception that false allegations are common, and that ADVOs are being used strategically for

advantage in family law matters. This perception does not appear to be supported by any substantive evidence, but the Committee notes that the Australian Institute of Family Studies is currently undertaking research that should provide definitive information to address these concerns.

Availability of Legal Aid

The issue of the provision of Legal aid to defendants in ADVO proceedings is also examined in Chapter 4. The Committee acknowledges that there is a limited budget for Legal Aid and it is therefore necessary to make priority-based decisions on where funding is directed. The Committee found that the principle that the most vulnerable members of society should receive Legal Aid is worthy and self-evident. In a situation where funding must be prioritised, it is appropriate that Legal Aid is provided to actual or potential victims of domestic violence, who are mostly women.

Other Issues (Chapter 5)

In Chapter 5, the Committee examines a number of other issues, including the enforcement of Family Court orders and the impact of the changes on child support.

Enforcement of Family Court orders

Ideally, Family Court orders require co-operation between parents who have been through a stressful and possibly acrimonious court proceeding. The Committee sympathises with those parents, mothers or fathers, who feel frustrated when Family Court orders are not followed. However, the Committee believes that the existing Family Court based mechanisms for enforcing Family Court orders, and the extent of the involvement of NSW Police, are adequate and appropriate for the resolution of disputes over Family Court orders.

The Committee believes that a focus on preventing domestic violence and ensuring the safety of children is an appropriate priority, and further believes that the enforcement of Family Court orders in relation to access and communication are more appropriately resolved through the mechanisms laid out in the *Family Law Act* than addressed through the application of NSW Police resources. The Committee accepts, however, that there may be a lack of understanding amongst police officers, and even among family law practitioners, of the police role and powers to enforce Family Court orders and therefore believes it is important that the training received by police adequately addresses these issues.

The Committee therefore recommends 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.

Impact on child support

The Committee believes that the concept of shared parental responsibility encompasses the need to provide materially for children. The intentions explicit in the amendments to the *Family Law Act* to bring about a more 'meaningful relationship' between children and both parents may paradoxically result in less material assistance for children, unless parenting plans and Family Court orders are formulated to ensure this does not occur. The Committee believes that this issue is worthy of further investigation by an appropriately resourced and experienced research body. It is therefore

recommended 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 *Shared Parental Responsibility Act* on the material circumstances of children subject to Family Court orders.

Summary of Recommendations

- Recommendation 1** 4
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.
- Recommendation 2** 28
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.
- Recommendation 3** 28
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.
- Recommendation 4** 28
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.
- Recommendation 5** 29
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.
- Recommendation 6** 29
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.
- Recommendation 7** 32
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.

Recommendation 8

37

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.

Recommendation 9

37

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.

Recommendation 10

44

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.

Recommendation 11

49

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.

Recommendation 12

51

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.

Recommendation 13

56

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.

Recommendation 14

59

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.

Glossary of Terms

Family violence order – term used in the *Family Law Act 1975* (Cth) to refer to State or Territory court orders to prevent family violence. In NSW, family violence orders are Apprehended Domestic Violence Orders (ADVOs), issued under the *Crimes Act 1900* (NSW).

Family Court order – term used by NSW Government submission to this Inquiry and throughout this Report to mean an order of the Family Court of Australia or Federal Magistrates Court under the *Family Law Act 1975* (Cth). Family Court orders include Parenting Orders, recovery orders and injunctions, however the most common form of Family Court order is the Parenting Order.

Family Court – In this Report, the term Family Court is used to refer to the Family Court of Australia and the Federal Magistrates Court of Australia, which can also hear family law matters.

State court – in the context of this Inquiry, a State court is one where an ADVO can be sought – most commonly a magistrate’s court (local court).

Family dispute resolution – term used in the *Family Law Act 1975* (Cth) to describe a process (other than a judicial process) in which a family dispute resolution practitioner helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other. The practitioner is independent of all of the parties involved in the process. Family dispute resolution services can be provided by Family Relationship Centres and accredited family dispute resolution practitioners.

Chapter 1 Introduction

This Chapter gives an overview of the inquiry process, including the methods the Committee used to encourage participation by members of the public, government agencies and relevant organisations. It also includes an outline of the report's contents, and discusses the timeliness and appropriateness of this Inquiry.

Inquiry terms of reference

- 1.1 The terms of reference for the Inquiry were referred to the Committee by the Hon Reba Meagher MP, Minister for Community Services and the Hon Bob Debus MP, Attorney General on 19 September 2006. The terms of reference are reproduced on page iv.

Conduct of the Inquiry

Submissions

- 1.2 The Committee called for submissions through advertisements placed in the *Sydney Morning Herald* and the *Daily Telegraph* in late September 2006 and by writing to relevant government agencies, organisations and individuals. Submissions were received from individuals, community legal organisations, community advocacy groups and the NSW Government. The submissions, listed at Appendix 1, have been published on the Committee's website: www.parliament.nsw.gov.au/lawandjustice.

Public hearing

- 1.3 The Committee held a public hearing at Parliament House on 31 October 2006. The Committee heard from witnesses with professional knowledge of the legal implications of the amendments, including representatives of government agencies, representatives of community and state legal organisations. A list of witnesses is reproduced as Appendix 2. The transcript of the hearing is available on the Committee's website.
- 1.4 The Committee thanks all the individuals and organisations that made a submission or gave evidence during the Inquiry. Given the tight timeframe for the Inquiry, it was not possible to hear in person from all those who made submissions, but the Committee gave full consideration to the submissions it received.

Report structure

- 1.5 **Chapter 2** provides background information on the changes to the *Family Law Act 1976* (Cth) as a result of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (hereafter, *Shared Parental Responsibility Act*). The Committee outlines Australia's family law system and the roles of the Family Court of Australia and the Federal Magistrates Court. The Committee discusses the origins and aims of the *Shared Parental Responsibility Act*, including the

Commonwealth parliamentary inquiries that preceded the legislation's enactment. The provisions of the *Shared Parental Responsibility Act* are examined, particularly those provisions that relate to Family Court orders and NSW Apprehended Domestic Violence Orders.

- 1.6** **Chapter 3** examines specific issues arising from the amendments to the *Family Law Act 1975* (Cth) (hereafter *Family Law Act*) as they pertain to women and children in NSW.
- 1.7** **Chapter 4** examines the inter-relationship between Apprehended Domestic Violence Orders issued in New South Wales and Family Court orders issued by the Family Court or Federal Magistrates Court. The impact of the recent amendments to the *Family Law Act* on the operation of those court orders is examined in detail.
- 1.8** **Chapter 5** examines the issue of enforcing Family Court orders and the impact of the new provisions of the *Family Law Act* that are intended to make child-related proceedings less adversarial. The impact of the amendments on the system of child support payments is also examined.

Timing of the Inquiry

- 1.9** The amendments to the *Family Law Act* came into effect on 22 May 2006. Most participants in this Inquiry commented that it was too early to fully gauge the impact of the changes on women and children in New South Wales, and on the operation of court orders that can prevent family violence perpetrators coming into contact with their families.
- 1.10** Ms Janet Loughman, Principal Solicitor, Women's Legal Services, NSW, commented that the full impact of the amendments could be better assessed after a Full Family Court decision had been reached, 'particularly about how the meaningful relationship with both parents and the protection from harm provisions will be balanced'.¹
- 1.11** Mr Rod Best, Director, Legal Services, NSW Department of Community Services, in evidence to the Committee suggested that a fuller understanding of the impact of the amendments would be possible in mid 2008:

Most matters in the Family Court are taking somewhere between 15 to 18 months to conclude, so I would have thought that to actually see what is coming out from the Family Court orders you would be looking at something like two years before that occurred. The number of family relationships centres that have rolled out at this stage is still quite small so, again, we have not really seen the impacts of that across a range of communities in New South Wales.²

- 1.12** Ms Judith Walker, Director, Family Law, NSW Legal Aid Commission, agreed that it was too early to fully appreciate the impact of the changes because the significance of many of the sections would be determined by decisions of the Full Court (of the Family Court), a number of which are currently pending:

¹ Ms Janet Loughman, Principal Solicitor, Women's Legal Services New South Wales, Evidence, 31 October 2006, p33

² Mr Rod Best, Director, Legal Services, NSW Department of Community Services, Evidence, 31 October 2006, p45

You need more time to see how the appeal court will deal with quite complex legislation that may well have unintended consequences.³

- 1.13** Ms Walker also commented that given the limited number of Family Relationship Centres and the fact that the certificate scheme (explained in Chapter 2) would not commence until July 2007, it was ‘quite easy’ for her to say it was ‘too early’ for this Inquiry:

Simply in terms of numerical, quantitative matters, four family relationships centres for the whole of New South Wales with another seven, and the certification provisions of the Act not cutting in until July 2007, it is quite easy for me to say it is too early.⁴

- 1.14** Mr Glenn Thompson, Member, Family Issues Committee of the NSW Law Society, confirmed that the decisions of the appeal court would provide direction on the legislation and further noted that as some of the amendments to the *Family Law Act* will not take effect until July 2007 further time is required to consider their impact:

... the best estimate that we can come up with is one to two years. Certainly, we need the appellate decisions on the current parts of the legislation in force but also when the July 2007 amendments come into force or into play then there will need to be a time lag from that to get, firstly, your first instance decisions and then any appropriate appellate authority on the interpretation and effect. That is why we hesitate a bit between one to two years.⁵

- 1.15** Mr John Longworth, Member, Family Issues Committee, NSW Law Society, told the Committee that there were two types of impacts that would arise from the introduction of the amendments. The first is ‘the practical on-the-ground change’, elements of which are described in the comments of witnesses above, but the second is ‘the shift in society as to how people approach these issues’ – a shift away from the court system. Mr Longworth commented that the timeframe for observing the status of that societal shift would be harder to determine than the effects of the legislative changes in relation to the presumption of shared parenting.⁶

- 1.16** The Committee notes that the Australian Institute of Family Studies is conducting relevant research on how allegations of family violence and child abuse are raised and addressed in the family law system, and the Family Law Council will be conducting longitudinal research into the ‘effectiveness of the Government’s reforms across the family law system’.⁷

³ Ms Judith Walker, Director, Family Law, NSW Legal Aid Commission, Evidence, 31 October 2006, p4

⁴ Ms Walker, Evidence, 31 October 2006, p4

⁵ Mr Glenn Thompson, Member, Family Issues Committee, New South Wales Law Society, Evidence, 31 October 2006, pp51-52

⁶ Mr John Longworth, Member, Family Issues Committee, New South Wales Law Society, Evidence, 31 October 2006, p52

⁷ Australian Government, *Family Law Violence Strategy*, Attorney-General’s Department, February 2006. Available at: <[www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/\(03995EABC73F94816C2AF4AA2645824B\)~FamilyLawViolenceStrategy.pdf/\\$file/FamilyLawViolenceStrategy.pdf](http://www.ag.gov.au/agd/WWW/rwpattach.nsf/VAP/(03995EABC73F94816C2AF4AA2645824B)~FamilyLawViolenceStrategy.pdf/$file/FamilyLawViolenceStrategy.pdf)> (accessed 7 November 2006), p3

Committee comment

- 1.17** The Committee agrees with Inquiry participants that it is too early to ascertain the full impact of the recent amendments to the *Family Law Act*. It is clear that the amendments are significant, and are intended to change the culture of post-separation parenting arrangements, but it is not clear exactly how that intention will be given effect by these changes.
- 1.18** The Committee therefore recommends that the NSW Attorney General instigate a further review of the impact of the *Shared Parental Responsibility Act* at an appropriate future date. The Committee, on the basis of evidence provided to it by witnesses during this Inquiry, suggests that mid to late 2008 is likely to provide sufficient time for the impact of the amendments to be more comprehensively understood.
- 1.19** The future review will be able to take advantage of the significant information collected during this Inquiry, and should be timed to allow the review to refer to the research of the Family Law Council and the Australian Institute of Family Studies which is currently being conducted.
- 1.20** The review format should be decided by the Attorney General closer to the suggested time of mid to late 2008. Options include referral to an appropriate parliamentary committee, or a review conducted or oversighted by the NSW Attorney General's Department.
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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.

- 1.21** Despite the relatively recent commencement of the amendments to the *Family Law Act*, the Committee heard important evidence from witnesses relating to their current and potential impact.
- 1.22** Ms Sara Blazey, Solicitor, Combined Community Legal Centres Group told the Committee that the impacts of the amended legislation are already being felt, particularly in relation to community misapprehension about the effect of the amendments. Ms Blazey commented that the impact 'has been coming all year',⁸ since publicity about the amendments commenced.
- 1.23** Ms Loughman also commented that the impact of the legislation was being felt before it had even been enacted:

⁸ Ms Sara Blazey, Solicitor, Combined Community Legal Centres Group, Evidence, 31 October 2006, p22

There was a lot of build-up to the changes and a lot of uncertainty in the community about what the changes would be. A lot of our work has been trying to clarify that with the community. So even before the legislation was active there was a strong perception in the community that these changes meant a presumption of equal time.⁹

- 1.24** The Committee believes that, notwithstanding the fact that the amendments have only been in effect for a short time, it is important that the evidence received during this Inquiry that highlights current and potential impacts of the amendments is examined and recommendations made where relevant. This is particularly important given the potential vulnerability of many of those women and children that may be affected by the amendments.

Appropriateness of the Inquiry

- 1.25** During the course of the Inquiry, the Committee invited a submission from the Commonwealth Attorney-General's Department. No submission was received before the public hearing held on 31 October 2006. Accordingly the Committee resolved to write to the Commonwealth Attorney-General requesting a response to questions, pertinent to the Attorney-General's Department, that were raised during the hearing and in submissions to the Inquiry. A letter dated 1 November 2006 was sent from the Chair of the Committee to the Attorney-General containing questions and providing background information on the Inquiry and evidence received during the public hearing.
- 1.26** On 7 November 2006, the Commonwealth Attorney-General, the Hon Philip Ruddock MP, wrote to the Chair to decline the invitation to provide a formal submission, and to provide copies of information relevant to the Committee's Inquiry. In the letter the Attorney-General labelled the Committee's Inquiry 'premature and inappropriate'¹⁰ and suggested that the terms of reference were outside the legislative competence of the NSW Parliament as they required the Committee to analyse Commonwealth legislation. Despite this response, a subsequent letter from the Attorney-General, received 13 November 2006, provided responses to the questions contained in the Chair's letter of 1 November 2006.
- 1.27** The Committee does not agree that the terms of reference require it to engage in "analysing laws", but rather require it to inquire into the impact of Commonwealth laws on the people of New South Wales. The responsibility of State parliamentary committees to investigate and report on issues that impact on their populations is well established. The Inquiry terms of reference focus on the impact of the legislation on women and children of NSW, and on court orders regarding family violence, not on the legislation itself. The Chair of this Committee wrote to the Commonwealth Attorney-General on 15 November 2006 to convey the Committee's thanks for information provided, and to assert the appropriateness of the current Inquiry.

⁹ Ms Loughman, Evidence, 31 October 2006, p33

¹⁰ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 7 November 2006, p1

Chapter 2 Background

This chapter provides an overview of the family law system in Australia, describes the genesis of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and summarises the main changes resulting from the legislation. The NSW based Apprehended Domestic Violence Order system is also described.

This descriptive information sets the scene for the remainder of the report, in which the Committee examines the written and oral evidence it received on the impact of *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) on the women and children of NSW and on the operation of court orders that can prevent family violence perpetrators coming into contact with their families.

Australian Family Law

- 2.1 Pursuant to s 51 of the *Commonwealth of Australia Constitution Act 1900* (Cth), the power to make laws regarding marriage, divorce, parental rights and the custody and guardianship of children falls within the exclusive power of the Commonwealth.
- 2.2 The *Family Law Act 1975* (Cth) is the principal legislation in Australia pertaining to divorce, property settlement after marriage, spousal maintenance (between married couples) and issues relating to children's arrangements after separation.¹¹
- 2.3 All issues relating to children's arrangements after separation are covered by the *Family Law Act 1975* (Cth) regardless of whether the child's parents were married.¹²
- 2.4 In Australia the Family Court of Australia and the Federal Magistrates Court deal with family law matters. The Family Court of Australia was established in 1975 under the *Family Law Act 1975* (Cth). It deals with all matters involving divorce, child arrangements post separation, property settlement after marriage and spousal maintenance (between married couples). It has offices in every state and territory except Western Australia, which has its own Family Court.
- 2.5 Since July 2000 the Federal Magistrates Court has also dealt with all family law matters except adoption and applications concerning nullity or validity of marriage. The Federal Magistrates Court is intended to provide a quicker and cheaper service than the Family Court of Australia.¹³
- 2.6 As the Family Court of Australia and the Federal Magistrates Court share jurisdiction, there are arrangements in the legislation for the transfer of matters between the courts. The

¹¹ Family Court of Australia website, <www.familycourt.gov.au/presence/connect/www/home/guide/before/basics/step_before_basics_laws> (accessed 10 October 2006)

¹² Family Court of Australia website, <www.familycourt.gov.au/presence/connect/www/home/guide/before/basics/step_before_basics_laws> (accessed 10 October 2006)

¹³ Family Court of Australia website, <www.familycourt.gov.au/presence/connect/www/home/guide/before/basics/step_before_basics_courts> (accessed 10 October 2006)

arrangements enable a matter to be transferred to the court that is the most appropriate having regard to the complexity of the legal issues involved or the evidence in the matter.¹⁴ Generally the more complicated cases are referred to the Family Court of Australia from the Federal Magistrates Court.

Genesis of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

- 2.7 The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (hereafter, *Shared Parental Responsibility Act*) was enacted following three Commonwealth parliamentary inquiries into the issue of child custody arrangements after marriage or relationship breakdown. It should be noted that the terms of reference for these inquiries did not specifically address issues relating to women and children in NSW or the impact of the legislation on NSW court orders relating to family violence.
- 2.8 The first steps taken by the Commonwealth Government to shift family law towards cooperative parenting and away from litigation came with the introduction of the *Family Law Reform Act 1995* (Cth). The primary objective of this Act was to effect an attitudinal shift so that, where possible, both parents remained involved in the care of their children after separation and shared parenting responsibilities.¹⁵ Other objectives included:
- Reducing parental disputes by removing the proprietary notion of children inherent in custody battles
 - Directing attention to the rights and interests of children rather than the needs and concerns of parents
 - Encouraging parents to make private agreements regarding the care of their children rather than enter into litigation
 - Ensuring that there would not be a greater exposure to violence because of inconsistencies between contact orders and family violence orders
 - Ensuring that evidence of family violence was taken into account when making Parenting Orders.¹⁶
- 2.9 In December 2003 the Australian House of Representatives Standing Committee on Family and Community Affairs held an inquiry to examine child custody arrangements in the event of family separation. The Committee's report, *Every picture tells a story*, strongly advocated the concept of shared parental responsibility, within the context of preserving the best interests of the child. The Committee considered the concept of 50/50 shared residence (equal time) and concluded that the goal for the majority of families should be one of equality of care and responsibility along with substantially shared parenting time. However, the Committee did not

¹⁴ Federal Magistrates Court of Australia website, <www.fmc.gov.au/html/introduction.html> (accessed 12 October 2006)

¹⁵ Rhoades H, Graycar R, Harrison M, *The Family Law Reform Act 1995: the First Three Years*, 2000, University of Sydney and Family Court of Australia, p14

¹⁶ Rhoades H, Graycar R, Harrison M, *The Family Law Reform Act 1995: the First Three Years*, 2000, University of Sydney and Family Court of Australia, pp14-15

support forcing this outcome in potentially inappropriate circumstances by legislating a presumption (rebuttable or not) that children will spend equal time with each parent.¹⁷

2.10 1716 submissions were received by the Standing Committee on Family and Community Affairs, among the highest number ever received by a House of Representatives Committee. The large number of submissions highlights the concern that this issue generates in the community.

2.11 As part of its response to this report, the Commonwealth Government outlined substantial changes to the family law system including significant amendments to the *Family Law Act 1975* (Cth). These changes were encompassed in an exposure draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Shared Parental Responsibility Bill) that was referred to the House of Representatives Standing Committee on Legal and Constitutional Affairs on 23 June 2005.¹⁸

2.12 In examining the Exposure Draft, the Standing Committee on Legal and Constitutional Affairs was asked to focus on whether the draft did the following:

- Encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where this was appropriate.
- Promote the benefit to the child of both parents having a meaningful role in their lives.
- Recognise the need to protect children from family violence and abuse.
- Ensure that the court process is easier to navigate and less traumatic for the parties and the children.¹⁹

The Committee was specifically directed not to re-open discussions on policy issues such as the rejection of the proposal for 50/50 shared residence in favour of the approach of sharing of parental responsibility.²⁰

2.13 The Committee received 88 submissions, the majority of which came from community and legal groups representing the concerns of fathers or mothers.²¹ In general, the views expressed in these submissions tended to be polarised between fathers groups advocating for greater

¹⁷ Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Family and Community Affairs *Every picture tells a story*, December 2003, Chapter 2. Available at: <www.aph.gov.au/house/committee/fca/childcustody/report.htm>(accessed 12 October 2006)

¹⁸ Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Report on the Exposure Draft)*, August 2005, pvii. Available at: <www.aph.gov.au/house/committee/laca/familylaw/report.htm> (accessed 12 October 2006)

¹⁹ Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft*, pxi

²⁰ Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft*, pxi

²¹ Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft*, pp225-229

contact with their children and mothers groups concerned about the potentially negative consequences of increased paternal contact. The Committee tabled its report in August 2005.

- 2.14** The Shared Parental Responsibility Bill was then introduced into the Australian House of Representatives on 8 December 2005 by the Attorney-General, the Hon Philip Ruddock MP.²²
- 2.15** On 8 February 2006, the Senate referred the Bill to its Legal and Constitutional Legislation Committee.²³ The Committee generally confined itself to addressing new issues or areas in which the bill differed from the findings and recommendations of the earlier reports.²⁴ The Committee received 212 submissions. A large number of submissions were received from divorced fathers advocating the desire for increased contact with their children. As with the earlier House of Representatives inquiry however, the ideas expressed across the spectrum of submissions contained strongly polarised views on the issue of shared parental responsibility and contact.
- 2.16** The Senate Legal and Constitutional Legislation Committee tabled its report on 27 March 2006. The majority of recommendations suggested in the report were incorporated into the Bill as amendments. The Bill was passed on 10 May 2006. The Act received Royal Assent on 22 May 2006.

Summary of the main provisions of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

- 2.17** According to the Commonwealth Attorney-General, the Hon Philip Ruddock MP, the amendments ‘represent the most significant changes to the *Family Law Act 1975* since its inception 30 years ago’.²⁵ The Explanatory Memorandum states that the amendments are part of the Commonwealth Government’s reform agenda representing a ‘generational change in family law and aim to bring about a cultural shift in how family separation is managed; away from litigation towards cooperative parenting’.²⁶ These legislative changes form part of, and are underpinned by, the Commonwealth’s Family Violence Strategy, released in February 2006, which aims to streamline the handling of family violence and child abuse issues within the family law system.²⁷ The legislation also responds to concerns from some parts of the community regarding the operation of child custody arrangements following marriage breakdown and separation.

²² Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, The Senate Legal and Constitutional Legislation Committee, March 2006, p1

²³ Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, The Senate Legal and Constitutional Legislation Committee, March 2006, p1

²⁴ Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, The Senate Legal and Constitutional Legislation Committee, March 2006, p2

²⁵ Hon. Philip Ruddock MP, Family Law Amendment (Shared Parental Responsibility) Bill 2005: Second Reading, House of Representatives Official Hansard, No. 21 8 December 2005.

²⁶ Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p1

²⁷ Submission 23, NSW Government, p4

2.18 Hereafter, where specific provisions are referred to, they will be sections of the *Family Law Act* as amended by the *Shared Parental Responsibility Act*.

Family dispute resolution and parenting plans

2.19 The attempt to move family law issues out of an adversarial and litigious environment is one of the major elements of the *Shared Parental Responsibility Act*.

2.20 From 1 July 2007, s 60I of the *Family Law Act* requires parents to attend family dispute resolution and make a genuine effort to resolve the dispute before applying for a Parenting Order through the Family Court of Australia or Federal Magistrates Court. The courts must not hear an application for a Parenting Order unless the applicant files a certificate from a family dispute resolution practitioner. This requirement does not apply where there is family violence or abuse or the risk of family violence or abuse.

2.21 There are four certificates which a family dispute practitioner may give those attending dispute resolution:

- A certificate stating that the party did not attend dispute resolution as a result of the refusal or failure of other parties to the proceedings to attend.
- A certificate stating that the person did not attend dispute resolution because the practitioner considered that it would not be appropriate to conduct the proposed dispute resolution.
- A certificate stating that the person attended with the other parties to the proceedings and all attendees made a genuine effort to resolve the dispute.
- A certificate stating that the person attended with the other parties to the proceedings but that the person, or other parties, did not make a genuine effort to resolve the dispute.²⁸

2.22 Parenting plans are described in Division 4 of Part VII of the *Family Law Act*. They are non-binding written agreements between parents relating to parenting responsibilities post-separation. The *Family Law Act* sets out guidelines for advisers providing advice to parents following a breakdown in their relationship. Section 63DA requires the adviser to inform the parents that they ‘could consider’ the option of an equal time arrangement if it was reasonably practicable and in the best interests of the child.²⁹ Parenting plans, while not legally binding agreements, will over-ride existing Family Court orders if they are entered into subsequent to those Family Court orders. Family dispute resolution is guided, under the *Family Law Act*, toward agreement on a parenting plan.

2.23 To assist the family dispute resolution process the Commonwealth Government will establish 65 Family Relationship Centres (FRCs) across Australia over the next four years. The FRCs are not established by the Act, however they form the centrepiece of implementing the Federal Government’s new family law system. There are currently four operational FRCs in

²⁸ *Family Law Act 1975* (Cth), s 60I(8)

²⁹ *Family Law Act 1975* (Cth), s 63DA

New South Wales, in Lismore, Penrith, Sutherland and Wollongong. A further seven centres will open in July 2007 with another ten commencing operation the following year.³⁰

2.24 This amendment and the commitment to establish 65 FRCs reflects the Commonwealth Government's desire to promote agreements outside the court system. In Chapter 3, the Committee examines issues associated with the operation of FRCs and family dispute resolution.

2.25 Accredited providers can also provide family dispute resolution services outside of the FRC system. The Commonwealth Attorney-General's Department is currently developing a scheme under which providers of family dispute resolution will be accredited.

Determining the child's best interests

2.26 According to section 60CA the child's best interests remain the paramount consideration when making a Parenting Order. Section 60CC sets out how a court is to determine what is in a child's best interest and introduces the concept of primary and additional considerations.

2.27 The primary considerations are:

- the benefit to the child of having a meaningful relationship with both of the child's parents, and
- the need to protect the child from physical or psychological harm[,] from being subjected to, or exposed to, abuse, neglect or family violence.³¹

2.28 A number of additional considerations are also listed in section 60CC, and include:

- the views expressed by the child
- the willingness and ability of each of the child's parents to facilitate and encourage a close relationship between the child and the other parent
- any family violence
- any family violence order if final or contested
- the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture.³²

2.29 The tension between the two primary considerations and the impact of the two-tier system of considerations is examined in Chapter 3.

³⁰ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p2

³¹ *Family Law Act 1975* (Cth), s 60CC

³² *Family Law Act 1975* (Cth), s 60CC (3) (a)-(m)

Shared parental responsibility and equal time with both parents

- 2.30** The most significant change in the Act is contained in s 61DA, which requires courts to apply a legal presumption of equal shared parental responsibility whenever a Parenting Order is made. This means that, where possible, both parents will have an equal role in making decisions about major long-term issues involving the children. Section 61DA(2) provides that the presumption does not apply in cases where there are reasonable grounds to believe that there is family violence or abuse. Section 61DA(4) provides that the presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.
- 2.31** In addition, s 65DAA of the Act requires the Court to consider whether spending equal time with both parents is practical and in the best interests of the child. If the court finds such arrangements are in the best interests of the child and reasonably practicable, then it must make an order that the child spend equal time with each parent. If the Court does not consider this appropriate, it must instead consider whether they should spend 'substantial and significant time' with both parents.
- 2.32** Shared parental responsibility is not synonymous with equal parenting time (or 50/50 parenting). In Chapter 3, the Committee examines the extent of community misapprehension about the significance of shared parental responsibility, and the impact of that misapprehension.

Enforcement of Family Court orders

- 2.33** The new Division 13A of the Act establishes an enforcement regime for Family Court orders. The new regime gives courts more options for dealing with people who have breached Family Court orders according to the severity of the contravention. The four types of contravention set out in the Act are:
- contravention alleged but not established
 - contravention established but reasonable excuse for contravention
 - contravention without reasonable excuse (less serious contravention)
 - contravention without reasonable excuse (more serious contravention).³³
- 2.34** In Chapter 5 the Committee examines the issue of enforcement of Family Court orders.

Definition of family violence

- 2.35** The definition of family violence in the *Family Law Act* has been changed to include and define the term 'reasonable' in relation to fear or apprehension of violence. The new definition is as follows:

family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any

³³ *Family Law Act 1975* (Cth), Division 13A, subdivisions C-F

other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.³⁴

- 2.36** This note to the definition states that a victim of family violence must prove that his or her fear is reasonable. Prior to the change in the definition it was sufficient to assert a subjective fear of violence without having to prove it was reasonable. The implications of this new definition of family violence are examined in Chapter 3.

Payment of costs if a false allegation is made

- 2.37** If during the course of determining a Parenting Order the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings, s 117AB stipulates that the court must order that party to pay some or all of the costs of another or other parties.
- 2.38** The implications of s 117AB are examined in Chapter 3.

Child-related proceedings

- 2.39** The new Division 12A of the Act introduces a number of amendments relating to the conduct of child-related proceedings, including five principles to ensure that child-related proceedings in Court will be less adversarial³⁵ and that the rules of evidence do not apply unless the court decides otherwise.³⁶
- 2.40** Section 68L provides that the court may, where it is satisfied that the child's interests in the proceedings ought to be independently represented by a lawyer, appoint an 'independent children's lawyer'. The role of the independent children's lawyer according to s 68LA is to form an independent view on the evidence available of what is in the best interests of the child and inform the court of that view and, in relation to the proceedings, act in the best interests of the child. The independent children's lawyer is not the child's legal representative and is not obliged to act on the instructions of the child.
- 2.41** Issues associated with child-related proceedings are examined in Chapter 5.

³⁴ *Family Law Act 1975* (Cth), s 4

³⁵ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), s 69ZN

³⁶ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), s 69ZT

Court orders to prevent family violence perpetrators coming into contact with their families

2.42 NSW residents can apply for three types of court orders in order to prevent family violence perpetrators coming into contact with their families as follows:

- Apprehended Domestic Violence Orders (ADVOs) – These orders are prescribed in the *Crimes Act 1900* (NSW) and are administered through NSW courts. ADVOs are referred to as family violence orders in the *Family Law Act*.
- Care Order – These orders are prescribed in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and are administered through the NSW Children’s Court. Care Orders specifically relate to the care and protection of children in NSW.
- Parenting Orders – These orders are prescribed in the Commonwealth *Family Law Act 1975* and are primarily administered through the Family Court of Australia and the Federal Magistrates Court.

Apprehended Domestic Violence Orders

2.43 In NSW, the *Crimes Act 1900* includes provisions for court orders, known as Apprehended Domestic Violence Orders (ADVOs). ADVOs relate specifically to people who are related, living together or in an intimate relationship or have been in this situation earlier. They are legally enforceable and place restrictions on a violent person in order to prevent them from harassing their victim. A typical ADVO will specify that a defendant cannot assault, harass, threaten, stalk or intimidate the complainant. It may also state that the defendant is prohibited from going within a certain distance of the complainant’s home or workplace.³⁷

2.44 A person who fears violence or harassment can apply for an ADVO either through the NSW police or the Chamber Magistrate at any local court.³⁸ Under s 562AE(1) of the *Crimes Act 1900*, there is a requirement that the court be satisfied, on balance of probabilities, that a person has reasonable grounds to fear, and in fact fears, the actions or potential actions of another person.

2.45 The *Crimes Amendment (Apprehended Violence) Act 2006* (NSW) (hereafter, *Apprehended Violence Act*) was assented on 17 October 2006. The purpose of this Act is to amend a number of provisions in the *Crimes Act 1900* (NSW) relating to Apprehended Domestic Violence Orders and Apprehended Personal Violence Orders to ensure:

... that a clear message is sent to those who are perpetrators of violent actions that such behaviour will not be tolerated. The Bill also aims to provide women and children with the confidence that they have the full support of the legal system behind them when they courageously take the steps to break the cycle of abuse.³⁹

³⁷ NSW Legal Aid Commission website, <www.legalaid.nsw.gov.au/asp/index.asp?pgid=484, accessed> (accessed 9 October 2006)

³⁸ Domestic Violence Advocacy Service, <www.dvas.org.au/public/aboutdv/avo.php> (accessed 9 October 2006)

³⁹ Hon John Della Bosca, Crimes Amendment (Apprehended Violence) Bill, Second Reading Speech, 27 September 2006

2.46 One of the most important changes set out in the *Apprehended Violence Act* is section 562G which amends the test for the issuing of ADVO. Under the previous test it was necessary for the court to be satisfied that the victim does in fact fear domestic violence. This creates a dilemma if a victim is reluctant to proceed with an application and tells the court she or he is not in fear. Examples of why a victim might say this include being intimidated and worrying about retribution if they proceed or perhaps simply being scared of going to court.⁴⁰ The amendment allows for a court to still make the order, if the victim has been subjected at any time to conduct by the defendant amounting to a personal violence offence, and there is a reasonable likelihood that the defendant may commit a violent offence against the person, and the making of the order is necessary in the circumstances to protect the person from further violence.⁴¹

Care Orders

2.47 In NSW, the *Children and Young Persons (Care and Protection) Act 1998* (hereafter, *Care and Protection Act*) includes provisions for the State Children's Court to make Care Orders in respect of children under 18 where there is no parent who can care for the child, where the child has been or may be abused or ill-treated, where the child's physical, psychological or educational needs are not being met or the child is suffering psychological harm or developmental impairment.⁴² Section 47 of the *Care and Protection Act* provides for the issuing of an order to prevent a parent from having contact with their child.

2.48 These Care Orders operate to prevent family violence perpetrators from coming into contact with their children. The interaction of Care Orders with Family Court orders and ADVOs is examined in Chapter 4.

Parenting Orders

2.49 Federally, the Family Law Court and the Federal Magistrates Court have the authority to make court orders known as Parenting Orders in cases where parents cannot agree about the arrangements for their children.

2.50 There are four main types of Parenting Orders:

- residence (refers to who the child lives with)
- contact (refers to who the child has contact with)
- child maintenance (refers to financial support for the child)
- specific issues (refers to any other aspect of parental responsibility).⁴³

⁴⁰ Hon John Della Bosca, Crimes Amendment (Apprehended Violence) Bill, Second Reading Speech, 27 September 2006

⁴¹ Hon John Della Bosca, Crimes Amendment (Apprehended Violence) Bill, Second Reading Speech, 27 September 2006

⁴² NSW Commission for Children and young People <<http://www.kids.nsw.gov.au/ourwork/cypcpa1998.html>> (accessed 6 November 2007)

⁴³ *Family Law Act 1975* (Cth), s 64B

- 2.51** According to s 60CA of the *Family Law Act Act*, the court must regard the best interests of the child as the paramount consideration when making a particular Parenting Order in relation to a child. Parenting Orders can operate to prevent family violence perpetrators from coming into contact with their children through the conditions of the order.
- 2.52** In order to vary an existing Parenting Order, the applicant must demonstrate that there has been a significant change of circumstances and that a new order is now required.
- 2.53** A Parenting Order is a specific type of Family Court order relating to the parental care of children. Throughout this Report, Parenting Orders are also referred to as Family Court orders, however the term 'Family Court order' encompasses other orders of the Family Court such as recovery orders and injunctions.

Relationship between Apprehended Domestic Violence Orders and Family Court orders

- 2.54** The new Division 11 (Family Violence) in the *Family Law Act* sets out the relationship between family violence orders (known as Apprehended Domestic Violence Orders in NSW) and Family Court orders. According to the Explanatory Memorandum the purpose of the amendments is to make the new division 'clearer, more concise and easier to understand by the people who use and implement it'.⁴⁴ The main provisions of this division are set out below.
- 2.55** Section 68Q clarifies the relationship between Parenting Orders and State family violence orders. Subsection 68Q(1) provides that where a Parenting Order is inconsistent with a State family violence order, the Parenting Order prevails and the family violence order is invalid to the extent of the inconsistency.
- 2.56** Section 68P(2) of the act outlines the obligations of a court when making a Parenting Order that is inconsistent with an existing ADVO. The intention of these amendments is to ensure that the court considers the effect of making an order that is inconsistent with an existing family violence order and explains to the parties how the new order will work. It is hoped that this will ensure that all affected people are made aware of the new order and that the order contains appropriate safeguards.⁴⁵
- 2.57** Section 68R gives state courts the power to change or suspend Parenting Orders that provide for a child to spend time with a person, when they deal with an application for an ADVO. The court may revive, vary, discharge or suspend these orders on its own initiative or on the application by any person. This provides protection for children and their parents where a Family Court order may expose them to violence or risk of violence.⁴⁶

⁴⁴ Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p147

⁴⁵ Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p149

⁴⁶ Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, p150

- 2.58** Paragraph 68R(3)(b) provides that the court must not revive, vary, discharge or suspend an order or injunction mentioned in paragraphs 68R(1)(a), (b) and (c) unless the court has material before it that was not before the court that made the order or injunction. The intention is to prevent parties circumventing Family Court orders by applying to a State or Territory court where there is no new evidence of violence or abuse.⁴⁷
- 2.59** The implications of the inter-relationship of ADVOs, Family Court orders and Care Orders are examined in Chapter 4.

Committee comment

- 2.60** This chapter has provided the necessary background to inform the detailed examination of the impacts of the *Shared Parental Responsibility Act* on women and children in NSW, and on the operation of court orders that prevent perpetrators of family violence from coming into contact with their families.

⁴⁷ Family Law Amendment (Shared Parental Responsibility) Bill 2005, Explanatory Memorandum, pp150-151

Chapter 3 **Impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* on women and children in NSW**

In this chapter the Committee examines specific issues arising from the amendments to the *Family Law Act 1975* (Cth) as they pertain to women and children in NSW. Although the Act has only recently become operational, the Committee heard evidence raising concerns about the potential and current impact of the legislation.

Family dispute resolution

3.1 As outlined in Chapter 2, under the new legislation families are required to attend Family Relationship Centres (FRCs) or an accredited family dispute resolution practitioner prior to having a matter heard in either the Family Court or the Federal Magistrates Court.

3.2 Mediation is not required where the court is satisfied that there has been family violence or abuse or there is a risk of family violence or abuse. Parties however will not be able to self-select out of the family dispute resolution process but instead must be screened by staff at FRCs to determine whether there is evidence of domestic violence.

3.3 FRCs form the centrepiece of the Commonwealth Government's commitment to shift family law proceedings away from an adversarial and litigious environment. Several witnesses to the Inquiry expressed support for the introduction of family dispute resolution including Ms Janet Loughman, Principal Solicitor, Women's Legal Services of NSW, who stated in evidence that:

Early dispute resolution is something we would support. The legal system is often unwieldy, and encouraging people to reach their own agreement and sort out their problems early is a positive thing and in appropriate cases we certainly support that. Family dispute resolution is quicker, cheaper and it is people working to reach their own solutions.⁴⁸

3.4 Ms Loughman did, however, express concern regarding the compulsory nature of the family dispute resolution model introduced as part of the amendments:

The compulsory family dispute resolution has its difficulties. Mediation needs to be a voluntary process so the compulsory nature of it takes away from that voluntary process. People need to be making informed decisions about participating in mediation and all the way through the process.⁴⁹

⁴⁸ Ms Janet Loughman, Principal Solicitor, Women's Legal Services of NSW, Evidence, 31 October 2006, p35

⁴⁹ Ms Loughman, Evidence, 31 October 2006, p35

Screening for domestic violence

- 3.5** Family violence is a common issue in marital separation. The National Abuse Free Contact Campaign cited in its submission research by the Australian Institute for Family Studies which found that violence was an issue amongst 66% of separating couples, with 33% of couples describing the violence as serious.⁵⁰
- 3.6** Concern was expressed by a number of Inquiry participants regarding the difficulty of accurately identifying the presence of family violence issues. According to the submission from the Family Law Working Party, Central Sydney Violence Against Women Reference Group, there is a high incidence of women who do not disclose incidents of family violence or who minimise the extent of family violence.⁵¹ The Women's Refuge Resource Centre supported this assertion. According to figures presented in its submission, 70.9% of women find it very difficult to disclose domestic violence and child abuse to lawyers, counsellors or other professionals.⁵²
- 3.7** The NSW Government submission to the Inquiry emphasised the need for mediators to have specialised training in detecting and properly dealing with family violence in order to ensure that affected parties did not have to participate in the mediation process. It also noted that screening tools must have the capacity to identify physical, sexual and emotional violence as well as financial power control, stalking, harassment and intimidation.⁵³
- 3.8** The Commonwealth Attorney-General stated in correspondence to the Committee that FRCs and accredited family dispute resolution practitioners are required to adopt the Good Practice Principles Framework developed by the Australian Catholic University's Institute of Child Protection Studies when screening and assessing for family violence. In addition the Attorney-General asserts that his department will work with the Australian Catholic University to maintain the effectiveness of these tools:
- ...[The Commonwealth Attorney-General's Department] continues to monitor this important issue. To this end, [the Australian Catholic University] ACU will shortly consult with staff in each centre and in light of practical experience, consider whether modifications are required to the Framework. This will ensure the Framework continues to be an effective resource to assist Centre staff when undertaking their screening and assessments.⁵⁴
- 3.9** The Commonwealth Attorney-General also stated in correspondence to the Committee that FRCs are required to recruit staff with a high level of existing skills relevant to the services

⁵⁰ Submission 11, National Abuse Free Contact Campaign, p6

⁵¹ Submission 18, Family Law Working Party, Central Sydney Violence Against Women Reference group, p5

⁵² Kaye M, Staubbs J and Tolmie J, Research Report 1, *Negotiating Child residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003 as cited in Submission 15, Women's Refuge Resource Centre, p10

⁵³ Submission 23, NSW Government, p7

⁵⁴ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p9

they provide, including screening and assessing for violence issues. In addition the Commonwealth Attorney-General's Department is currently considering the process for identifying additional training needs.⁵⁵

- 3.10** Several Inquiry participants raised concern that it was difficult to assess the level of training provided because the accreditation process for family dispute resolution practitioners had not yet been finalised and FRCs have only been in operation a short time. One such witness was Ms Loughman who stated in oral evidence that:

My understanding is that they are required to screen for the presence of violence and carry out a risk assessment. I am not aware of the details of how they do that, and the accreditation process for accrediting family dispute resolution practitioners is still in the experimental stage, it has not yet been finalised. But whatever the screening process and risk assessment is it will always depend on the quality of its implementation, the quality of the professionals and their expertise and their training and experience in domestic violence.⁵⁶

- 3.11** Mr Duncan Holmes, a family law practitioner, expressed a similar view when asked by a Committee member whether he considered staff at Family Relationships Centre were adequately trained to screen for family violence:

I think that is a real worry that we have. We do not know the answer to that. We do not know the level of skills that these people are going to have as criteria. The organisations that the Government seems to be choosing for its providers are generally good organisations—I think it is Unifam and people like that—Relationships Australia, who have significant qualifications and experience in the field. So, to some extent, I suppose, we are trusting them.⁵⁷

- 3.12** The Commonwealth Attorney-General also stated in correspondence to the Committee that his Department is currently in the process of developing an accreditation process for individual dispute resolution practitioners. The accreditation process will not be in place by July 2007, however the Department will maintain transitional arrangements in relation to the accreditation of practitioners until 30 June 2009. This is designed to ensure that the provision of family dispute resolution services continues uninterrupted.⁵⁸

- 3.13** In its submission to the Inquiry, the NSW Government highlighted the importance of adequate screening of family violence given that cases involving victims of family violence may be referred to mediation by courts as a result of confusion over the provisions of the Act:

Some providers of the Women's Domestic Violence Court Assistance Schemes have informally identified a number of cases of victims of family violence being referred by

⁵⁵ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p9

⁵⁶ Ms Loughman, Evidence, 31 October 2006, p36

⁵⁷ Mr Duncan Holmes, Solicitor, Slade Manwaring Solicitors, Evidence, 31 October 2006, p66

⁵⁸ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p6

courts to Family Relationship Centres and to other dispute resolution service providers since 1 July 2006. This anecdotal evidence would appear to suggest that there is some confusion about the amendments to the Act and the appropriateness of dispute resolution in situations involving family violence. Further, this reinforces issues in relation to the effectiveness of screening tools used by the Centres and by other dispute resolution service providers.⁵⁹

- 3.14** The difficulties associated with screening are likely to be exacerbated by the new requirement to prove a ‘reasonable apprehension’ of family violence. These requirements are discussed in greater detail later in this chapter. The NSW Government asserted in its submission to the Inquiry that more stringent processes for proving family violence will discourage even more women from disclosing the existence of family violence:

It is highly probable that screening may not exclude all families experiencing domestic and family violence from the mediation process. The potentially increased requirements to prove violence creates risks that women will be discouraged from disclosing violence and that matters will be inappropriately forced into Family Dispute Resolution processes.⁶⁰

- 3.15** Relationships Australia recommended in its submission that steps be taken to improve information sharing between Family Relationship Centres and State based agencies to assist parties with family violence issues:

Whilst current legislation does enable some communication in high risk cases of family violence, knowledge sharing is often unable to occur for other cases of concern. Relationships Australia believes that improved coordination and information sharing between agencies are required to more effectively ascertain and respond to high risk cases of family violence and other case of concern.⁶¹

- 3.16** Ms Sara Blazey, Board Member, Combined Community Legal Centres’ Group in her evidence to the Inquiry also recommended that appropriate NSW Government agencies should be involved in assisting FRCs deal with cases of domestic violence:

... the Department of Community Services [DOCS] would certainly be high on that list. There are organisations that are very, very experienced around family violence. The Women’s Domestic Violence Court Assistance Scheme would be another. Those are two, obviously, State-funded organisations. There are organisations out there that are very experienced around that and I would like to see those organisations, and particularly DOCS around child abuse allegations, working very closely and on a more formal basis with the family relationships centres.⁶²

⁵⁹ Submission 23, p7

⁶⁰ Submission 23, p6

⁶¹ Submission 13, Relationships Australia, p3

⁶² Ms Sara Blazey, Board Member, Combined Community Legal Centres’ Group, Evidence, 31 October 2006, p28

Imbalance of power in mediation

- 3.17** Concern was expressed in a number of submissions that participation in family dispute resolution will have significant detrimental impacts on women and children who are victims of unidentified family violence. According to the NSW Government submission to the Inquiry, successful family dispute resolution rests primarily on the equal bargaining power of both parties. If one party feels intimidated by the other during mediation, a significant power imbalance occurs.⁶³ Given that the victims of family violence are typically women and their children,⁶⁴ it is more likely that women will be in a weaker position than fathers during mediation.
- 3.18** Ms Loughman highlighted the problems associated with mediation between parties where family violence existed in evidence to the Inquiry:
- It is well acknowledged that mediation is not appropriate where family violence is or has been present. The power imbalance, the risk of having an unfair outcome or a dangerous outcome is there.⁶⁵
- 3.19** According to the NSW Government submission the consequence of this power imbalance is that the intimidated party may be unable to articulate their concerns and views resulting in unfair and potentially dangerous mediation outcomes.⁶⁶ The Women's Refuge Resource Centre stated in its submission to the Inquiry that in these situations the safety of victims may be placed at greater risk:
- Mediation is not appropriate in cases involving domestic violence, where there is a power imbalance between ex-partners and it is highly likely that the safety of women and children will be placed at risk as a direct result of arrangements or compromises made in these settings, as well as during the mediation sessions themselves.⁶⁷
- 3.20** Despite the disadvantages of victims of family violence participating in dispute resolution, a number of submissions note that some women who have experienced family violence may still choose to undertake mediation. The Combined Community Legal Centres suggested in its submission that this may be a response to recent publicity campaigns or the fact that the services provided are free. It may also be that some women are more comfortable undertaking dispute resolution rather than going through a court process.⁶⁸
- 3.21** Unless appropriate protocols for dealing with family violence are utilised at FRCs, detrimental mediation outcomes are likely to continue to occur. The Combined Community Legal Centres' Group submission to the Inquiry stated that there are currently no appropriate protocols in FRCs for dealing with family violence cases:

⁶³ Submission 23, p6

⁶⁴ Submission 23, p6

⁶⁵ Ms Loughman, Evidence, 31 October 2006, p35

⁶⁶ Submission 23, p6

⁶⁷ Submission 15, Women's Refuge Resource Centre, p8

⁶⁸ Submission 10, Combined Community Legal Centres, p5

There are models being developed around mediation of cases involving allegations of violence and abuse but no evidence FRCs are adopting these or are even aware of them.⁶⁹

Lack of legal representation

3.22 As part of the Commonwealth Government's policy to shift family law proceedings away from litigation towards cooperative parenting, parties attending FRCs will not be legally represented nor will staff at FRCs provide any legal advice.⁷⁰

3.23 Concern was raised during the course of the Inquiry that the lack of legal representation is likely to exacerbate power imbalances where family violence exists. The NSW Government stated in its submission that lawyer assisted mediation can work to counteract the effects of a power imbalance:

The involvement of lawyers can facilitate participation by parties to disputes where there might otherwise be a power imbalance...Without the benefit of legal advice, agreements may be reached through coercion or intimidation, which do not reflect the best interests of the woman or the child.⁷¹

3.24 The Women's Legal Services NSW notes that women need access to information and advice about the process and dynamics of mediation as well as advocacy during mediation. Several Inquiry participants pointed to the current dispute resolution program operated by the NSW Legal Aid Commission as an alternative model for FRCs to adopt. For example, Ms Blazey expressed support for the NSW Legal Aid Commission's alternative dispute resolution and suggested that links be established between this service and FRCs:

One of the big gaps in the setting up of family relationships centres, particularly within New South Wales—I am presuming you are aware that legal aid runs family law conferencing, which is basically mediation with lawyers. That may be a very useful alternative model for cases where there is domestic violence, but as far as I know there is very little linking up between family relationships centres and the Legal Aid Commission about that program, which is a big shame.⁷²

3.25 It should be noted however that parties participating in family dispute resolution are still free to seek legal advice before and after attending mediation. Ms Blazey stated that she considered that seeking legal advice before and after mediation was vital to reaching a satisfactory agreement:

The best way to sort out any issue around relationship breakdown is first of all to get legal advice about what your position is so you go into any alternative dispute resolution understanding what the parameters are. You then go through the mediation

⁶⁹ Submission 10, p5

⁷⁰ Submission 23, p7

⁷¹ Submission 23, p7-8

⁷² Ms Blazey, Evidence, 31 October 2006, p28

process and, hopefully, reach agreement, and then go back to get legal advice on that outcome.⁷³

The specific impact of family dispute resolution on Aboriginal women

- 3.26** Concern was raised during the course of the Inquiry that the requirements for mandatory family dispute resolution will have a significant impact on Aboriginal women.
- 3.27** According to the submission from Women's Legal Services Australia, an Aboriginal woman is 45 times more likely to experience violence than a non-Aboriginal woman and less likely to report this violence.⁷⁴ Further, Aboriginal women often avoid dealing with authorities and the legal system. As a consequence, Aboriginal women are in a vulnerable position when having to deal with family law proceedings and family dispute resolution.⁷⁵
- 3.28** In addition, Women's Legal Services NSW stated in its submission to the Inquiry that for those Aboriginal women in regional, rural and remote communities, dealing with family law related matters was significantly more difficult due to the lack of legal services and culturally appropriate assistance.⁷⁶
- 3.29** Concern was raised during the Inquiry as to whether mediators running family dispute resolution would have undergone training in order to be culturally sensitive to the particular needs of Aboriginal families. Ms Rachael Martin, Principal Solicitor from the Wirringa Baiya Aboriginal Women's Legal Centre stated in evidence to the Inquiry that despite the importance of cultural sensitivity training, she was unaware whether it was mandatory at FRCs:

I am not aware of Aboriginal culture awareness training being mandatory for all those who work in mediation, whether it be the intake officer or the actual mediator him or herself, and that is certainly a concern of our centre that it is not mandatory. One of our concerns would be, for example, that a mediator may not understand that extended family is very important to an Aboriginal parent, and that extended family might want to attend mediation or even have an input into that mediation process.⁷⁷

- 3.30** The Hon Philip Ruddock MP, Commonwealth Attorney-General, stated in correspondence to the Committee that the Commonwealth Government was providing additional funding for Indigenous services in specific FRCs identified as high-need areas or with significant Indigenous communities. According to the Commonwealth Attorney-General this funding will have a positive impact on Indigenous families undertaking family law proceedings:

The additional funding enables Centres to engage advisers for Indigenous service delivery. They will assist Indigenous people in each region to access Family Relationship Centres and other services, and to develop the capacity of Family

⁷³ Ms Blazey, Evidence, 31 October 2006, p27

⁷⁴ Submission 24, Women's Legal Services NSW, p7

⁷⁵ Submission 24, p7

⁷⁶ Submission 24, p5

⁷⁷ Ms Rachael Martin, Principal Solicitor from the Wirringa Baiya Aboriginal Women's Legal Centre, Evidence, 31 October 2006, p27

Relationship Centres to provide effective services to Indigenous families ... Advisors may be engaged directly by the Centre or by arrangement with another organisation with experience and credibility in the delivery of services to Indigenous families⁷⁸

- 3.31** Of the four FRCs currently operating in NSW, only Lismore has received the additional funding for Indigenous services. However, according to the Commonwealth Attorney-General, Indigenous advisors, regardless of their location, are expected to contribute to the development of effective services to Indigenous families across the whole network of FRCs.⁷⁹

Distribution of Family Relationship Centres

- 3.32** Adequate access to FRCs for all NSW residents was another issue raised during the course of the Inquiry. There are currently four FRCs in NSW with another seven due to open in 2007-2008, and a further ten in 2008-2009.⁸⁰ Outreach services will be available for rural areas.⁸¹

- 3.33** Ms Loughman expressed concern that the current number of Centres is insufficient for many NSW residents living in rural and regional locations:

There are only four Family Relationship Centres in New South Wales—at Lismore, Penrith, Sutherland and Wollongong—so the western part of New South Wales is not serviced and people in those communities either will have to access accredited independent family dispute resolution practitioners in the absence of a Family Relationship Centre ...⁸²

- 3.34** Mr John Longworth, Member, Family Issues Committee, Law Society of NSW, expressed similar concerns in evidence to the Committee:

But the general comment—and I would echo the comments we hear from rural members of our committee—is that there are not enough [Family Relationship Centre] resources, and what resources there are very thinly spread.⁸³

- 3.35** In its submission to the Inquiry the Country Women's Association of New South Wales also expressed concern that resources for FRCs were insufficient to service all of NSW:

⁷⁸ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p3

⁷⁹ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p4

⁸⁰ Family Relationships Online, <<http://www.familyrelationships.gov.au/Locations+of+new+services+for+2007-08+and+2008-09.doc>> (accessed 10 November 2006)

⁸¹ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p2

⁸² Ms Loughman, Evidence, 31 October 2006, p36

⁸³ Mr Longworth, Member, Family Issues Committee, Law Society of NSW, Evidence, 31 October 2006, p59

We cannot stress enough the need to have sufficient services in place for families to access without additional stress – otherwise it will not work. We all recognise that divorce and family break up is increasing at an alarming speed, so the facilities to cope must also keep pace ... For Newcastle, currently the nearest Family Relationship Centre ... is Sutherland (The Newcastle Centre is not due to be opened until 2008). This is unacceptable. It has to be easy and it has to be accessible. All of the support systems need to be in place before the regulation comes into being. Phasing in afterwards is not practical.⁸⁴

- 3.36** The Committee notes that the Commonwealth Government, in its response to the recommendations of the Senate Legal and Constitutional Legislation Committee's Report on *Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, stated that it was concerned about the possibility of people in remote locations being disadvantaged by the requirement to undergo compulsory dispute resolution:

The [Commonwealth] Government will monitor the incidence of parties in remote locations needing to pay fees from providers other than Family Relationship Centres in the context of compulsory dispute resolution.⁸⁵

- 3.37** The Commonwealth Attorney-General in correspondence to the Committee suggests that the Family Relationships Advice Line may also be of assistance to families in rural and regional areas. In addition, the Advice Line and the FRCs are also supported by Family Relationships Online. This service provides information about the changes to the family law system and information about family relationships and separation.⁸⁶

Committee comment

- 3.38** The Committee is concerned that screening tools used at FRCs and by accredited family dispute resolution practitioners may be inadequate to identify all cases involving family violence. This is particularly concerning given the number of submissions to the Inquiry highlighting the serious impacts on dispute resolution resulting from a failure to identify family violence.
- 3.39** The Committee considers that it would be appropriate for the Commonwealth Government to establish links or consult with relevant NSW Government agencies, which are expert in dealing with family violence issues, in order to assist NSW families with family violence issues.

⁸⁴ Submission 27, Country Women's Association, p3

⁸⁵ Commonwealth Government response to the recommendations of *Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, Senate Legal and Constitutional Legislation Committee, March 2006, p5, attachment to correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 7 November 2006

⁸⁶ Correspondence from the Hon Philip Ruddock MP, Commonwealth Attorney-General, to the Hon Christine Robertson MLC, Chair, NSW Legislative Council Standing Committee on Law and Justice, received 13 November 2006, p3

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.

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.

- 3.40** The Committee is concerned that the accreditation process for family dispute resolution practitioners will not be operational by July 2007. The Committee notes that transitional arrangements are planned, but considers that an established accreditation process is necessary to provide certainty and confidence in the system.
- 3.41** The Committee believes that legal advice and possibly legal representation during the family dispute resolution process is important to safeguard the best interests of women and children. The Committee therefore considers that steps should be taken by the Commonwealth Government to offer NSW residents the alternative of lawyer assisted mediation.
- 3.42** The Committee notes that the alternative dispute resolution service provided by the NSW Legal Aid Commission is an appropriate mediation model. It is the view of the Committee that the Commonwealth Government should take steps to adopt this model in order to ensure satisfactory mediation outcomes for NSW women and children.
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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.

- 3.43** The Committee notes that Aboriginal women and children are in a particularly vulnerable situation given the high incidence of family violence in Indigenous communities. The Committee is concerned that the Commonwealth's provision of additional funding for Indigenous services at the Lismore FRC is insufficient to cater to the needs of the State's entire Indigenous population.
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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.

- 3.44** The Committee notes that there will be a maximum of just 11 FRCs in NSW once the requirements for compulsory dispute resolution take effect in mid 2007, with a further ten FRCs to be provided in 2008-2009. The Committee is concerned that this number will be inadequate to service a population of over 6 million people. The Committee is of the view that the Commonwealth Government should adequately resource the infrastructure so that everyone has easy access to FRCs.
- 3.45** The Committee also has serious concerns that the small number of FRCs and their sparse distribution across the State will significantly disadvantage rural and regional populations. Given the low number of FRCs to be established in NSW, it is likely that those people living in rural and regional areas of NSW will have to travel great distances to access FRC services.
- 3.46** The Committee also notes that the Commonwealth Government has not consulted with the NSW Government in relation to the number and distribution of FRCs to ensure that all NSW residents have access to FRCs.
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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.

Legal presumption of shared parental responsibility and consideration of equal parental time

- 3.47** Inquiry participants raised a number of concerns about the new legal presumption of shared parental responsibility and consideration of equal parental time in family law proceedings.

Priority given to parents' rights

- 3.48** Several Inquiry participants expressed concern that the introduction of a legal presumption of shared parental responsibility and consideration of equal time or substantial and significant time is promoting the rights of the parents at the expense of the best interests of the child as the paramount consideration. Although the *Family Law Act* states that the best interests of the child is the paramount consideration on which all decisions are made, this may not be the outcome when the amendments are considered in detail.

3.49 This is particularly the case given that the views of the child are now relegated to secondary factors when considering the best interests of the child. As described in Chapter 2, section 60CC divides the criteria the Court must use in determining what is in the child's best interests into a two-tier system. There are now primary considerations (i.e. the benefit to the child of having a meaningful relationship with both of the child's parents and the need to protect the child from physical or psychological harm) and additional considerations.

3.50 The primary considerations will be given greater weight than those matters set out in the additional considerations. According to the NSW Commission for Children and Young People submission to the Inquiry, referring to the views of the child as an additional consideration means that a court is no longer required to consider the views of children as a primary consideration:

[A] court is no longer required to consider the views of children, they are just an additional consideration with low status given the hierarchy of objects, principles, primary and secondary factors.⁸⁷

3.51 The Combined Community Legal Centres Group echoed these concerns in its submission to the Inquiry and questioned how the best interests of the child could be considered paramount when the views of the child were now a secondary consideration:

If a child aged 13 years, for example is adamant they only want to stay with a parent one night a week it has to be assumed this will be over ridden by the primary consideration of meaningful relationship [with both parents]. It is hard to reconcile the assertion that the best interests of the child will remain paramount ...⁸⁸

Potential for greater exposure to violence

3.52 As noted in Chapter 2, when a court makes a Parenting Order for equal time or substantial and significant time it must consider the best interests of the child, including the need to protect that child from harm.

3.53 If a victim of family violence is unwilling or unable to establish that there are reasonable grounds to support a claim of family violence or abuse against the other parent, then the court will examine the case from the perspective that it is in the child's best interests to spend equal or substantial / significant time with each parent.⁸⁹ Mr Rod Best, Director of Legal Services at the NSW Department of Community Services stated in evidence to the Inquiry that, in cases such as these, there is potential for children to be exposed to greater contact with an abusive and violent parent:

If, therefore, you are going to have difficulties in terms of mothers wanting to come forward to prove the violence, if you are going to impose burdens upon them such as possible costs orders, if they fail to appropriately establish their case, I think you are going to find that fewer people [are] putting forward that information before the court and therefore the court is not going to be able to weigh that up. I think they are going

⁸⁷ Submission 1, NSW Commission for Children and Young People, p3

⁸⁸ Submission 10, p3

⁸⁹ Submission 23, p10

to therefore come back and rely upon a presumption for shared parenting, which will result in increased contact.⁹⁰

3.54 In addition, the two primary considerations when determining the child's best interest - the benefit to the child of having a meaningful relationship with both of the child's parents and the need to protect the child from physical or psychological harm – are potentially contradictory in families where violence exists.

3.55 Several Inquiry participants expressed concern that, where there is tension between the two provisions, the courts may be more likely to resolve in favour of the right to contact. For example, Ms Loughman expressed her concern that courts were increasingly favouring contact with both parents over protecting the child from harm where a tension between the primary considerations existed:

To some extent, where there is family violence or child abuse present there is an understanding that these two provisions may cancel each other out. Then the courts or the decision makers will be taken to the other factors in section 60CC. The safety of children should be the highest priority. We saw from the changes in 1995 to the *Family Law Act* that there was in practice a presumption in favour of contact as a result of the introduction of a child's right to contact with both parents ... Our concern here is that there is going to be a further move towards that happening with less consideration for protecting children from harm.⁹¹

Community misconception regarding shared parental responsibility

3.56 Concern was raised during the course of the Inquiry that community misconception regarding the legal presumption of shared parental responsibility may adversely impact NSW women and children. For example, Ms Blazey noted in evidence to the Inquiry that the introduction of the legislation has caused separating parties to wrongly assume that it is now mandatory that their children spend equal time with both parents regardless of family circumstances:

At the Elizabeth Evatt Legal Centre where I work, which is based in the Blue Mountains, we run a telephone advice service. Even before the changes were implemented we were taking calls from people who were saying, "We have separated and I have heard that it is now 50:50; that the children have to be shared 50:50." Obviously we would then explain, first, that the law had not at that point changed and, second, that that was not the change in the law.⁹²

3.57 As a result of this misconception, parties may enter mediation under the incorrect assumption that they are required to share their child with their partner 50% of the time. According to Mr Glenn Thompson, Member of the Law Society of NSW Family Issues Committee, this will have an impact on mediation outcomes in terms of parental contact hours with the child:

I would agree with that basic premise that many people on the street now think that that presumption remains equal time. That is a problem that some people who may

⁹⁰ Mr Rod Best, Director, Legal Services, NSW Department of Community Services, Evidence, 31 October 2006, p46

⁹¹ Ms Loughman, Evidence, 31 October 2006, p33

⁹² Ms Blazey, Evidence, 31 September 2006, p22

not have legal advice before negotiating arrangements are negotiating from a false premise of what the law may or may not say. As we know, and it is in the paper, that is not what the law says.⁹³

3.58 The Law Society of NSW reinforced this view in its response to questions taken on notice:

The impact of this misconception can be that people are negotiating arrangements for children from a false premise of what they think the law says. This may result in people feeling pressured to enter settlements for equal time or close to equal time without realising that they may well fit within a circumstance where the presumption of equal shared parental responsibility does not apply or that it is not in the best interests of the child for there to be equal time or indeed substantial and significant time.⁹⁴

3.59 In addition, the Law Society of NSW also raised concern in its submission that the misconception regarding shared contact may result in fathers demanding equal time in order to use it as a bargaining tool in property proceedings.⁹⁵

Committee comment

3.60 The Committee is concerned that there is a lack of community understanding of the implications of the amendments to the *Family Law Act 1975* (Cth) despite the significant impacts of the legislation. The Committee is of the view that NSW families may be seriously disadvantaged if they undertake mediation without a full appreciation of their rights and responsibilities under the Act.

3.61 The Committee considers that a public education campaign needs to be undertaken in NSW to inform parties in divorce and separation proceedings of the impact of the amendments. This should assist in protecting NSW women from unnecessarily entering into mediation agreements that may be disadvantageous to them and their children.

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.

⁹³ Mr Glenn Thompson, Member, Family Issues Committee, Law Society of NSW, Evidence, 31 October 2006, p56

⁹⁴ Answers to questions on notice taken during evidence, 31 October 2006, Law Society of NSW, question 6, p4

⁹⁵ Submission 26, Law Society of NSW, p4

Family violence

3.62 In this section, the Committee examines the changed definition of family violence in the *Family Law Act* and the possible implications for women and children in NSW.

New definition of family violence

3.63 As outlined in Chapter 2, the existing definition of family violence has been changed to include the term ‘reasonable’ in relation to fear or apprehension of violence. This means that a victim of family violence must prove that his or her fear is reasonable. The definition of family violence includes an explanatory note that further defines ‘reasonable’ in the context of family violence.

3.64 According to the Senate Legal and Constitutional Legislation Committee, the aim of this amendment is to address concerns that allegations of family violence can be made in family law proceedings even where a fear of violence is far fetched:

[T]he purpose of the amendment is to raise the burden of proof on allegations of family violence – a purpose which is reliant on a view about the frequency of vexatious complaints of violence.⁹⁶

3.65 A number of submissions expressed concern that the introduction of the objective test will have a negative impact on women and children in NSW. For instance, the requirement of the objective test makes it more difficult for some victims to prove real violence when the violence is perpetrated in ways that are particular to the victim, but not necessarily obvious to an objective observer.⁹⁷

3.66 Further, victims who are already disempowered and intimidated may be discouraged from alleging violence now that documentary proof or third party evidence of that violence is required.⁹⁸ This is particularly the case given the difficulties of proving the existence of domestic violence. The Women’s Refuge Resource Centre outlined in its submission to the Inquiry some of the difficulties in reasonably proving the existence of family violence:

Domestic violence and sexual assault are crimes that predominantly occur in the privacy of a home with no witnesses. Many of the women and children in our NSW refuges do not have [Apprehended Violence Orders] AVOs in place, forensic evidence, doctors’ reports or ambulance records to present. Yet they may have been living in a violent relationship for a significant number of years. The evidence available is often only the word of the victim. The fact that it cannot be proven through supporting evidence is by no means proof that the violence or abuse did not occur.⁹⁹

3.67 The Combined Community Legal Centres Group stated in its submission to the Inquiry that NSW Government agencies such as the Department of Community Services (DOCS) had a

⁹⁶ *Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, The Senate Legal and Constitutional Legislation Committee, March 2006, p33

⁹⁷ Submission 24, p7

⁹⁸ Submission 23, p12

⁹⁹ Submission 15, p10

role to play in assisting women prove the existence of family violence. The Group contended that where DOCS workers are aware that family violence exists, they should support NSW women and children by providing documentary evidence to substantiate their claims in court.¹⁰⁰

- 3.68** Mr Best, in evidence to the Committee, commented that he could see the potential for an increase in the workload of the Department of Community Services as a result of assisting women prove allegations of family violence:

[O]ne 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 those matters where they previously would not be in those proceedings at all.¹⁰¹

- 3.69** Mr Best told the Committee that these concerns had first been raised in the context of the Magellan project, a cooperative project between State community service agencies and the Family Court, intended to address child abuse issues. He commented that, due to the way the court structured the involvement of DOCS, the workload implications had been kept to a minimum.¹⁰²

Penalties for false allegations

- 3.70** The other amendment relating to family violence which may adversely impact NSW women and children is the introduction of penalties for making false allegations during family law proceedings. Section 117AB requires a court to make an order of (some or all) costs of another party or parties to the proceedings, where the court is satisfied that the party has knowingly made a false allegation or statement in the proceedings.
- 3.71** The purpose of this amendment is to address concerns that allegations of family violence and abuse can be easily made and may influence the outcome of family law proceedings.¹⁰³ In contrast, however, several Inquiry participants asserted that family violence is an underreported crime and that false allegations about family violence are not a widespread occurrence. In this regard, Ms Judith Walker, Director, Family Law, NSW Legal Aid Commission stated in evidence to the Inquiry that in her experience she did not consider false allegations to be common:

... From my long experience in family law, I would not say such a thing as there are a lot of false allegations ... I am really very well aware in my own practice, especially

¹⁰⁰ Submission 10, p7

¹⁰¹ Mr Best, Evidence, 31 October 2006, p48

¹⁰² Mr Best, Evidence, 31 October 2006, p48

¹⁰³ Parliament of the Commonwealth of Australia, Family Law Amendment (Shared Parental Responsibility) Bill 2005, Revised Explanatory Memorandum, p43

care and protection, that the prevalence of domestic violence in many of those families is quite horrific.¹⁰⁴

- 3.72** Women's Legal Services NSW echoed the above view that there was little evidence to support the assumption that false allegations of family violence were widespread, particularly in relation to child abuse:

Child abuse allegations made in the Family Court were found to be false no more frequently than child abuse allegations made in other circumstances: some 9% were found to be false.¹⁰⁵

... Child abuse allegations in this context [of parental separation] should not be classed as a red herring, or a diversion stemming from the dispute, but as a red light, an indicator of serious family problems. Child abuse in this context is real and serious.¹⁰⁶

- 3.73** Other submissions highlighted that family violence is far more likely to be un-reported than falsely reported. In its submission to the Inquiry, Catholic Social Services Australia cited research finding that approximately 40% of women subjected to violence by their current partner do not disclose the experience to anyone.¹⁰⁷

- 3.74** The NSW Government asserted in its submission that the impact of a more stringent definition of family violence when combined with penalties for making false allegations is likely to deter even more women from disclosing family violence for fear of not being believed and incurring additional costs of proceedings.¹⁰⁸ Mr Best echoed this view in his evidence to the Inquiry:

We think it will be one of the factors which will stop women from coming forward with [family violence] information because, as with most situations occurring in the home, it can be difficult to prove, and prove for a whole range of reasons: not just because there may not be other witnesses available ... So we think that if you put all of those things together and then you have got a costs order, which in a Family Court proceeding could be quite extensive, then that is likely to act as a deterrent [to disclosing the existence of family violence].¹⁰⁹

¹⁰⁴ Ms Judith Walker, Director, Family Law, NSW Legal Aid Commission, Evidence, 31 October 2006, p5

¹⁰⁵ Bron T, Frederico M, Hewitt L and Sheehan R, 2000, 'Revealing the existence of child abuse in the context of marital breakdown and custody and access disputes', *Child Abuse and Neglect*, vol. 24 no. 6, pp.849-859 as cited in Laing L, *Australian Domestic Violence Clearing House Topic Paper: Domestic Violence and family law 2003*, as cited in Answers to questions on notice taken during evidence 31 October 2006, Ms Janet Loughman, Principal Solicitor, Women's Legal Services NSW.

¹⁰⁶ Bron T, Frederico M, Hewitt L and Sheehan R, 2001, *Resolving Family Violence to Children*, Monash University, Caulfield, Vic as cited in Laing L, *Australian Domestic Violence Clearing House Topic Paper: Domestic Violence and family law 2003*, as cited in Answers to questions on notice taken during evidence 31 October 2006, Ms Janet Loughman, Principal Solicitor, Women's Legal Services NSW.

¹⁰⁷ Australian Bureau of Statistics, *Women's Safety Australia*, Canberra 1996, cited in submission 25, Catholic Social Services Australia, p7

¹⁰⁸ Submission 23, p13

¹⁰⁹ Mr Best, Evidence, 31 October 2006, p48

'Friendly parent' consideration

- 3.75** In addition to pecuniary penalties, a number of Inquiry participants noted that the so-called 'friendly parent' consideration in the amended act may also deter women from disclosing the existence of family violence. Section 60CC(3)(c) states that the court can take into account 'the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent'¹¹⁰ when determining what is in the child's best interests.
- 3.76** According to the Women's Refuge Resource Centre, a woman who has been abused or whose child has been abused, is unlikely to want to foster the relationship between her child and an abusive father for fear that such a relationship would put herself or her child at risk. On the other hand the abusive party is likely to be willing to facilitate contact with his ex-partner in order to use it as an opportunity to continue the abuse.¹¹¹
- 3.77** This provision clearly disadvantages women leaving a violent relationship as they are caught in the predicament of having to disclose violence in order to protect the child while at the same time not appearing to be an uncooperative parent. Ms Loughman, highlighted in her evidence to the Inquiry the problems that victims of family violence face as a result of the 'friendly parent' consideration:

For women who have concerns about harm to their children, there is a terrible tension between raising the allegations and being seen as not facilitating a relationship with the other parent. So that friendly parent provision, we think, will discourage women from coming forward with allegations of abuse, for fear that they will lose their children because they have been seen to be not facilitating a relationship with the other parent.¹¹²

- 3.78** The Women's Refuge Resource Centre also raised these concerns in its submission to the Inquiry:

The 'friendly parent' consideration is also a barrier to women disclosing abuse and domestic violence, as they would risk being seen as 'non-cooperative' and not prepared to facilitate contact with the other party.¹¹³

Committee comment

- 3.79** The Committee considers that the amendments to the definition of family violence in the Act now make it more difficult for women to prove the existence of family violence.
- 3.80** The Committee notes that the combination of the stricter definition of family violence, penalties for false accusations and the 'friendly parent' consideration is likely to act as a significant deterrent to women disclosing the existence of family violence during divorce or separation proceedings.

¹¹⁰ *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), s 60CC

¹¹¹ Submission 15, p6

¹¹² Ms Loughman, Evidence, 31 October 2006, p38

¹¹³ Submission 15, p6

- 3.81** Given the serious implications that can result from failing to identify and address family violence, the Committee considers that NSW Government agencies have a responsibility to assist women and children to meet the requirements to prove family violence in cases where it is known to exist.

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.

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- 3.82** The Committee acknowledges that greater involvement of DOCS in family law matters is likely to result in an increased workload for DOCS caseworkers, and is concerned that this may impact on the provision of front-line services by those case workers. It is therefore important that DOCS monitor the workload implications of its involvement in family law matters as a result of the newly developed protocols.

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.

Chapter 4 **Impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* on the operation of court orders to prevent family violence perpetrators from coming into contact with their families**

In this chapter, the Committee examines the relationship between Apprehended Domestic Violence Orders (ADVOs) issued in New South Wales and Family Court orders issued by the Family Court or Federal Magistrates Court. The impact of the recent amendments to the *Family Law Act 1975 (Cth)* as a result of the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)* on the operation of those court orders is examined in detail.

Court orders that prevent family violence

- 4.1 In Chapter 2, the Committee outlined the three kinds of orders that can operate to prevent perpetrators of family violence from coming into contact with their families. Orders of the Family Court of Australia and the Federal Magistrates Court (Family Court orders); Apprehended Domestic Violence Orders (ADVOs), issued by NSW courts; and Care Orders issued under the *Children and Young Persons (Care and Protection) Act 1998 (NSW)* can all operate to prevent perpetrators of family violence from coming into contact with their families.
- 4.2 In the following section, the Committee examines the broader impact of the amendments to the *Family Law Act* on the operation of ADVOs in NSW. In a later section, the Committee examines the specific part of the *Family Law Act 1975* (hereafter, *Family Law Act*), Division 11 of Part VII, which is intended to address those situations where a Family Court order and an ADVO interact and conflict.

Considering ADVOs in the making of Family Court orders

- 4.3 The *Family Law Act* refers to ‘family violence orders’ as those State or Territory issued orders that operate to protect against the possibility or actuality of family violence. In NSW such orders are known as Apprehended Domestic Violence Orders (ADVOs), a subset of Apprehended Violence Orders (AVOs). The process for obtaining ADVOs and recent changes to the NSW legislation governing them, contained in the *Crimes Amendment (Apprehended Violence) Act 2006 (NSW)* (hereafter, *Apprehended Violence Act*), are described in more detail in Chapter 2.
- 4.4 Family Court orders (specifically, Parenting Orders) are intended to determine parental responsibility and address issues of whom the child lives with, spends time with, and has communication with. In Chapter 3, the Committee examined how family violence is considered in the context of Family Court orders. This section will examine how ADVOs are considered in the process of determining a Family Court order, and the consequent implications for the operation of ADVOs in NSW.

- 4.5 The *Family Law Act* requires the court to have consideration of a range of matters in determining the best interests of the child (and therefore parental responsibility); two primary considerations and a range of additional considerations, as described in Chapter 3. Section 60CC(3)(k) states that the existence of a final or contested ADVO is one of the additional considerations. Interim ADVOs or uncontested ADVOs are not an additional consideration.
- 4.6 A final ADVO is an ADVO that has been made under the *Crimes Act 1900* (NSW), whether contested or uncontested. A contested ADVO is where a person in need of protection makes an application for an ADVO and the other party disagrees with the need for an order. A magistrate determines the matter according to the civil burden of proof – the balance of probabilities.¹¹⁴
- 4.7 The NSW Government, in its submission to the Inquiry, commented on the possible reason for the limits on which types of ADVO can be considered in Family Court matters:

The intention of this subsection [s 60CC(3)(k)] is apparently to ensure that the Family Court does not take account of uncontested or interim family violence orders, as they may not be grounded in fact[,] and to address a perception that unproven violence allegations are taken into account in some family law proceedings.¹¹⁵

Implications for NSW courts

- 4.8 One possible impact of this provision in NSW, identified by a number of Inquiry participants, is that there is a greater likelihood of ADVOs being contested, to avoid a final (uncontested) ADVO being taken into consideration during the determination of the child's best interests under s 60CC.
- 4.9 The NSW Government's response to questions taken on notice during the public hearing on 31 October 2006 commented that an increase in contested ADVO matters may in turn contribute to an increased workload for NSW courts and related services:

... the number of State AVO defended hearings are likely to increase. This would in turn mean more court, police, legal aid and victim support resources would be consumed as well as women having to go through the significant trauma of a contested and drawn out hearing.¹¹⁶

- 4.10 Mr Neil Jamieson, Solicitor and Director, Champion Legal, echoed this view, stating that he felt there may be an increase in the representation of parties to ADVOs in State courts:

Because the outcome has significance, parties will want representation to ensure that there is an appropriate outcome.¹¹⁷

¹¹⁴ Answers to questions on notice taken during evidence 31 October 2006, NSW Attorney General's Department, question 15, p6

¹¹⁵ Submission 23, NSW Government, p16

¹¹⁶ Answers to questions on notice taken during evidence 31 October 2006, NSW Attorney General's Department, question 15, p6

¹¹⁷ Mr Neil Jamieson, Solicitor and Director, Champion Legal, Evidence, 31 October 2006, p62

- 4.11** Mr Jamieson added that the *Family Law Act's* presumption of shared parental responsibility can be rebutted, with one of the ways to rebut the presumption being the existence of family violence, and that this would have an impact on the number of ADVOs sought:

Is that going to lead to more people seeking family violence orders to rebut that presumption? I think the answer is yes.¹¹⁸

- 4.12** Ms Judith Walker, Director, Family Law, NSW Legal Aid Commission, also commented that section 60CC(3)(k) was likely to lead to a change in the way ADVOs are sought:

In a number of key provisions in the Act domestic violence or allegations of abuse become significant. Stemming from that there may well be a perceived need by people for forensic purposes, if they are likely to go to court in domestic violence matters, not to settle without omissions, as has commonly been the case, but to have defended hearings in those matters.¹¹⁹

- 4.13** Another impact of this provision may be an increase in the number of ADVOs sought. The Combined Community Legal Centres Group, in its submission, commented that the amendments were likely to increase the number of ADVOs sought, despite the fact that the amendments arose partly because of concerns about the misuse of ADVOs in family law matters:

There have frequently been allegations that AVO's have been used to gain an advantage in family law proceedings, again with no evidence to back this up. Ironically the advice that now has to be given is apply for an AVO whenever there has been family violence as this will at least establish a prima facie case of reasonable grounds.¹²⁰

- 4.14** However, Mr John Longworth, Member, Family Issues Committee, NSW Law Society, commented that he thought the changes to the *Family Law Act* had not impacted on people's willingness to get an ADVO:

It is my perception that the willingness of an individual to approach a State court for a protective order – and it is only my perception, because again it may prove to be different in history—has not been affected.¹²¹

- 4.15** Ms Sara Blazey, Board Member, Combined Community Legal Centres Group, told the Committee that the Group was concerned that the overriding philosophy of the *Shared Parental Responsibility Act* would have an impact on the operation of ADVOs in NSW:

Our concern is, similar to what happened when there were changes ... 10 years ago, that the meaningful relationship becomes the all encompassing, absolutely overriding issue. When a magistrate goes to make an AVO the first question is not, "How do I ensure that the children will be safe?" It is, "I am not going to make an order that will

¹¹⁸ Mr Jamieson, Evidence, 31 October 2006, p64

¹¹⁹ Ms Judith Walker, Director, Family Law, NSW Legal Aid Commission, Evidence 31 October 2006, p3

¹²⁰ Submission 10, Combined Community Legal Centres (NSW) Inc, p7

¹²¹ Mr John Longworth, Member, Family Issues Committee, New South Wales Law Society, Evidence, 31 October 2006, p59

in any way affect the father's contact with the children." It is that shift which is our concern.¹²²

Definitions of family violence and the use of ADVOs

4.16 Ms Walker observed that s 60CC(3)(k), and others like it, are intended to address the assumption that false allegations of domestic violence are common, and are used as strategic bargaining tools to gain advantage in determining parental responsibility in Family Courts.

4.17 Ms Walker noted that the Commonwealth Government has referred domestic violence to the Australian Institute of Family Studies for investigation to 'try to get more than anecdotal evidence about it' and commented on the timing of the investigation, saying that it:

... should have occurred before the legislation rather than afterwards.¹²³

4.18 The issue of whether applications for ADVOs are being made as part of a strategy to improve the outcome of family law matters is a contentious one. The issue is related to the broader issue of false allegations of family violence and child abuse. Amendments to the *Family Law Act* that penalise false allegations by imposing costs on parties that knowingly make false allegations (s117BA) reflect concern that there are false allegations of family violence and child abuse being made. The stricter definition of 'family violence' contained within the amended *Family Law Act* also reflects this concern. In Chapter 3, the Committee examined the implications of this stricter definition on women and children in New South Wales.

4.19 The definition used to establish a reasonable fear of violence in New South Wales is easier to satisfy than that used in the Family Court of Australia. Some submissions to this Inquiry criticised the current ADVO system and echo the concerns expressed by some of the submissions provided to the 2005 Commonwealth Senate and House of Representatives inquiries that led to the *Family Law Amendment (Shared Parental Responsibility) Act (2006)* in relation to false allegations of violence.

4.20 Mr Stephen Blayney, private citizen, for example, commented in his submission to this Inquiry that ADVOs were 'a joke' and a lawyer's 'dirty trick to deny fathers custody or access based on vindictive and malicious lies'.¹²⁴

4.21 Mr Blayney added that the definition of violence for establishing an ADVO in New South Wales was too broad and suggested that 'real' violence was more limited in scope:

Physical & Sexual violence is real and factual violence. Other forms are a perception to an observer and should not be allowed.¹²⁵

4.22 Mr William Turner, private citizen, in his submission to this Inquiry also raised concerns about the alleged misuse of ADVOs and commented that:

¹²² Ms Sara Blazey, Solicitor, Combined Community Legal Centres Group, Evidence, 31 October 2006, p29

¹²³ Ms Walker, Evidence, 31 October 2006, p3

¹²⁴ Submission 16, Mr Stephen Blayney, p1

¹²⁵ Submission 16, p1

This system [of AVOs] should maintain community confidence and not be allowed to degenerate into disrepute or be used as a weapon to the advantage of the opportunist.¹²⁶

- 4.23** Other participants in this Inquiry refuted the idea that there was widespread misuse of ADVOs. The Combined Community Legal Centres Group, for example, commented that they were not aware of any studies that indicate women are using ADVOs or accusations of family violence as a tactic in family law cases.¹²⁷
- 4.24** Ms Janet Loughman, Women's Legal Services NSW cited a related study that demonstrated that 'child abuse allegations made in the Family Court were found to be false no more frequently than child abuse allegations made in other circumstances'.¹²⁸
- 4.25** In response to questions from a Committee member about whether the lack of a definition for 'reasonable' in the NSW legislation relating to ADVOs was a problem, Ms Blazey commented that the NSW-based legislation's requirement that any fear of violence be both actual and reasonable made the lack of definition 'less of a problem'. In relation to the concept of 'reasonable fear', she commented that:

It is a relatively well-understood legal concept. It is the difference between subjective and objective. I do not think it particularly needs to be spelt out. I think most lawyers and people involved in the scheme completely understand the legal requirements.¹²⁹

- 4.26** The Committee notes that the Australian Institute for Family Studies (AIFS) is undertaking research into family violence that will specifically examine the issue of false allegations of family violence and child abuse. The Committee also notes evidence cited by witnesses that suggest the prevalence of misuse of ADVOs is low. Mr Rod Best, Director, Legal Services, NSW DOCS, told the Committee of four recent studies on false accusations, three of which gave a 'very small percentage' of false accusations, and one of which showed a 'significantly high percentage of false allegations in dispute'.¹³⁰

Committee comment

- 4.27** The Committee believes it is important that the contentious issue of false allegations be addressed with objective analysis, such as that currently being undertaken by the Australian Institute of Family Studies. The issue of false allegations of domestic violence and child abuse in family law matters is examined further in Chapter 3.

¹²⁶ Submission 8, Mr William Turner, p8

¹²⁷ Answers to questions on notice taken during evidence 31 October 2006, Combined Community Legal Centres Group, Question 5 (c), pp3-4

¹²⁸ Brown, T., Frederico, M., Hewitt, L., & Sheehan, R. 2000 'Revealing the existence of child abuse in the context of marital breakdown and custody and access disputes', *Child Abuse and Neglect*, vol.24, no.6, p852, cited in Laing, L. 2003 *Domestic Violence and Family Law*, Australian Domestic and Family Violence Clearinghouse, cited in answers to questions on notice taken during evidence 31 October 2006, Ms Janet Loughman, Women's Legal Services NSW, Question 10, p5

¹²⁹ Ms Blazey, Evidence, 31 October 2006, p23

¹³⁰ Mr Rod Best, Director, Legal Services, DOCS, Evidence, 31 October 2006, p47

- 4.28** The Committee notes the suggestion of many Inquiry participants that the *Shared Parental Responsibility Act* may lead to an increased number of applications for ADVOs, and an increase in the number of ADVOs that are defended, with consequent implications for local court resources.
- 4.29** The Committee believes it is important that the NSW Government monitor the impact of these amendments on the incidence of ADVOs and associated resourcing issues, for State courts and support services such as the Women's Domestic Violence Court Assistance Program.

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.

- 4.30** The Committee acknowledges the comments of Inquiry participants in relation to the incidence of false allegations in relation to child abuse and family violence. The *Shared Parental Responsibility Act* contains a number of provisions that are intended to address the perception that false allegations are common, and that ADVOs are being used strategically for advantage in family law matters. This perception does not appear to be supported by any substantive evidence, but the Committee notes that the Australian Institute of Family Studies is currently undertaking research that should provide definitive information to address these concerns.

Interaction of Family Court orders and Apprehended Domestic Violence Orders

- 4.31** The amendments to the *Family Law Act* have changed the way in which ADVOs interact with Family Court orders. Division 11 of Part VII of the *Family Law Act* is intended to resolve inconsistencies between ADVOs and Family Court orders, and to ensure that Family Court orders do not expose people to family violence.¹³¹
- 4.32** Family Court orders override ADVOs when they are made after the ADVO has been made. When Family Courts make a Parenting Order they must take into account the ADVO but can vary it as long as certain conditions are met (explained in Chapter 2). Conversely, State courts have the power to modify Family Court orders when they are considering an ADVO. This inter-relation is intended to ensure that people are protected from the possibility of family violence as a result of an earlier order.
- 4.33** The Family Law Council is a statutory authority established in 1975 under the *Family Law Act* to advise and make recommendations to the Commonwealth Attorney-General concerning

¹³¹ *Family Law Act 1975* (Cth), s 68N

the workings of the *Family Law Act*. In November 2004, prior to the recent amendments to the *Family Law Act*, the Chairperson of the Family Law Council, Professor Patrick Parkinson, provided a 'letter of advice' to the Commonwealth Attorney-General outlining concerns the Council had with the operation of Division 11 of Part VII of the *Family Law Act* and making recommendations for improvements to the Division. The submission of the Family Law Council to this Inquiry stated that 'those recommendations have now been substantially implemented'.¹³²

- 4.34** The Council, in its letter of advice, advised that Division 11 was 'unnecessarily complex and confusing' and should be simplified, with a 'clearer and more succinct statement of the principles to be applied by State and Territory courts when exercising their powers'.¹³³
- 4.35** The advice noted that the powers of State and Territory courts to make or vary Family Court orders, which were in existence before these recent amendments, were rarely used, and that simplification of Division 11 might address this problem.¹³⁴
- 4.36** The simplifications to Division 11 include removing the power of State and Territory courts to 'make' a Family Court order (a parenting order, recovery order, or injunction) in the context of proceedings to make or vary a family violence order (ADVO in NSW). State and Territory courts retain the power to 'revive, vary, discharge or suspend' a Family Court order.¹³⁵ Other changes include a requirement that the State and Territory courts, when proposing to revive, vary, discharge or suspend a Family Court order, must have before it material that was not before the court that made the Family Court order.¹³⁶
- 4.37** Despite the recommendations of the Family Law Council having been 'substantially implemented', other participants in the Inquiry were sceptical of the effectiveness of Division 11.
- 4.38** In their submission to the Inquiry, the National Network of Women's Legal Services commented that the changes to Division 11 would not make it easier for State courts to vary Family Court orders:

This is because Division 11 has been made even more complicated to apply and because of the requirement in s68R(3)(b) to provide 'new material' to a state court before it can change a family law order.¹³⁷

¹³² Submission 2, Family Law Council, p1

¹³³ Letter of advice from Professor Patrick Parkinson, Chairperson, Family Law Council to the Hon Philip Ruddock MP, Commonwealth Attorney-General, 16 November 2004, cited in Submission 2, p4

¹³⁴ Letter of advice from Professor Patrick Parkinson, Chairperson, Family Law Council to the Hon Philip Ruddock MP, Commonwealth Attorney General, 16 November 2004, cited in Submission 2, p4

¹³⁵ *Family Law Act 1975* (Cth) s 68R

¹³⁶ *Family Law Act 1975* (Cth) s 68R(3)(b)

¹³⁷ Submission 6, National Network of Women's Legal Services, p3

4.39 The National Network of Women’s Legal Services also commented that there remained a lack of direction in Division 11 for State courts in relation to which matters require consideration in varying those Family Court orders that could undermine the effectiveness of ADVOs:

The new Division 11 as amended by the Act does not tell state courts what considerations to give priority to – and it certainly does not clearly prioritise protecting people from violence – given that the new objects and principles in s60B are so heavily balanced in favour of contact rights and promoting the child’s relationship with both parents.¹³⁸

4.40 The Combined Community Legal Centres Group, in its submission, commented that there were a number of reasons why the powers of local courts to vary the provisions of Family Court orders were rarely used, including a reluctance to alter orders made by a higher court, and police prosecutor’s lack of knowledge of family law.¹³⁹ The Group recommended ‘training for police prosecutors and Magistrates on variation of parenting orders on the making of an AVO to ensure greater use is made of this provision’.¹⁴⁰

4.41 Mr Best summarised the concern of the Department of Community Services in relation to the interaction of ADVOs and Family Court orders:

The difficulty that we have with this situation is that what we are now going to be confronted with are orders in the Family Court that will take priority over the State orders, where those orders have a different set of priorities, and those priorities are set out in the Family Law Act and they are not reflected in the State legislation.¹⁴¹

4.42 Mr Best went on to comment that section 47 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) provides for the making of orders that, as child welfare orders, take precedence over Family Court orders and therefore further complicate the situation. The requirement that a State court consider new material when determining a change in a Family Court order was cited as another complication:

So you can start to see that there is not only a conflict between the Federal and the State, and depending upon where you go, how that will apply, but different judicial officers will take into account different circumstances and be required to look at different things, depending upon which order the application is brought and to which court the application is brought. That all strikes me as being quite a complex and messy situation, and it would be good if we could try and resolve that.¹⁴²

4.43 A number of specific potential implications arising from the new Division 11 are examined in the following sections.

¹³⁸ Submission 6, p3

¹³⁹ Submission 10, p7

¹⁴⁰ Submission 10, p8

¹⁴¹ Mr Best, Evidence, 31 October 2006, p49

¹⁴² Mr Best, Evidence, 31 October 2006, p49

Duplication of hearings

- 4.44** One potential implication of Division 11 relates to the potential for a multiplicity of hearings on the same issue. The NSW Law Society Family Issues Committee stated that this is a potential implication of the operation of s 68Q, which provides that an ADVO can be rendered invalid where it is inconsistent with Family Court order, but only to the extent that it is inconsistent.¹⁴³
- 4.45** The court is required to ensure that this invalidation is explained to the parties, and that the relevant State authorities are informed of the variation (by notifying the Police Commissioner, in NSW).¹⁴⁴
- 4.46** The Family Issues Committee assume that the court issuing the Family Court order would be under an obligation to consider the evidence which led to the original ADVO before invalidating it, which would expose parties to ‘associated cost and distress’ additional to that incurred during the process of obtaining the ADVO.¹⁴⁵

Requirement for new material

- 4.47** Another implication arises from s 68R, which provides that State and Territory courts have the power to ‘vary, discharge or suspend’ Family Court orders. The Family Issues Committee commented that the steps involved in using this section were onerous, with the requirement that there be new material which had not been considered in determining the original Family Court order.¹⁴⁶
- 4.48** The requirement for new material was cited by the National Network of Women’s Legal Services as possibly diminishing the effectiveness of family violence orders:

The effect of making it harder to change family law orders when making family violence orders will be to make family violence orders less effective.¹⁴⁷

- 4.49** Additionally, a number of considerations are required to be taken into account when varying the Family Court order, which the Family Issues Committee noted had ‘the potential to expand the ambit of a trial in the State or Territory Court’:

This will have consequences of pressure on Magistrates, Prosecutors and the Courts generally and the potential for longer trials and delays in the availability and delivery of justice.¹⁴⁸

¹⁴³ Submission 26, Law Society of New South Wales, p4

¹⁴⁴ *Family Law Act 1975* (Cth), s 68P and s 68Q

¹⁴⁵ Submission 26, p4

¹⁴⁶ Submission 26, p5

¹⁴⁷ Submission 6, p3

¹⁴⁸ Submission 26, p5

4.50 Mr Longworth reinforced these comments by highlighting that NSW courts operate under time and resource pressures that limit their capacity to expand the focus of any particular matter:

My experience of being in Local Courts, with busy lists and dealing with issues like this, is that the process of dissecting what was before another court on another day may be quite challenging, and then perhaps running yet another hearing on the same issue. I can see that being a challenge for certain magistrates—and I do not mean a challenge to their ability; I mean a challenge to their time and resources.¹⁴⁹

4.51 Mr Glenn Thompson, Member of the Family Issues Committee, NSW Law Society, in responding to the same issues, commented that it was too early to tell whether State Courts exercised the powers they have under the *Family Law Act* to modify Family Court orders:

... time will tell whether Local Court magistrates decide to launch into varying, complex children's orders made by the Family Court following a hearing, or whether they adopt the approach that your question is leading to, "I will deal with the violence side of the matter and suggest that they go back to the Family Court to deal with any amendment that is necessary in the long term".¹⁵⁰

4.52 Mr Thompson added that State Courts had the capacity to make a 'short-term amendment' to a Family Court order, which would allow the Family Court or Federal Magistrates Court to deal with its order 'knowing that, if there is urgency, parties can get to the courts on an urgent basis'.¹⁵¹

4.53 Another potential implication, identified by the Family Issues Committee, relates to s 68S, which releases the State or Territory Court from certain provisions when exercising power under s 68R, the effect of which might be that Family Court orders could be decided differently depending on the court in which the matter is heard – 'the same facts yet pursuant to different considerations'.¹⁵²

4.54 Mr Longworth commented that it was difficult at this early stage to see what effect the provisions of Division 11 would have in relation to the use by plaintiffs and defendants of multiple courts to address parenting issues:

... with good advice and with good guidance, people may be able to navigate the minefield that they are in without having to run down the paths I am outlining that the Act may provide. We have had the situation that the Family Court has had the power to deal with State violence orders before, and it has often been a bit easier and a bit cheaper to deal with the matter in two courts rather than in the one just because of the processes. But it is there and they do have an overlap. From a technician's perspective I can see issues, but what they mean in the future it is very hard to say.¹⁵³

¹⁴⁹ Mr Longworth, Evidence, 31 October 2006, p60

¹⁵⁰ Mr Glenn Thompson, Member, Family Issues Committee, Law Society of NSW, Evidence, 31 October 2006, p60

¹⁵¹ Mr Thompson, Evidence, 31 October 2006, p60

¹⁵² Submission 26, p5

¹⁵³ Mr Longworth, Evidence, 31 October 2006, p60

Committee comment

- 4.55** The Committee notes that there is some scepticism about the effectiveness of the changes to Division 11 and the likelihood that State courts will in fact use the powers they have under the *Family Law Act* to vary Family Court orders. The Committee is concerned that unless magistrates and police prosecutors can confidently use the powers, situations may arise where women and children are at risk of family violence.
- 4.56** The Committee agrees with evidence provided by Inquiry participants, particularly the Combined Community Centres Legal Group, that identifies a need for further training to be provided to magistrates and police prosecutors in the application of Division 11 of Part VII of the *Family Law Act*.

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.

-
- 4.57** The comments of Inquiry participants in relation to the potential increase in workload of State courts is also a concern, and has the potential to compound the potential impact discussed earlier in this chapter and addressed by Recommendation ten.

Availability of legal aid for defendants in ADVO cases

- 4.58** The Committee heard from witnesses that the majority of ADVO cases are brought by police prosecutors, approximately 70%,¹⁵⁴ and that legal aid was very seldom available to defendants of ADVO cases. Ms Walker told the Committee that the Women's Domestic Violence Court Assistance Program operated throughout the State to provide support for complainants in court, but that legal aid was available to defendants in limited circumstances:

Legal aid is available for defendants when there is a risk that they could have some serious consequence of the proceedings. It will depend on the history of that particular person and the likely consequence. There is a possibility of legal aid for defendants, but on conditions.¹⁵⁵

- 4.59** Ms Walker went on to explain that decisions about who receives legal aid have to take into account the amount of funding available to the Legal Aid Commission, and that 'people who have been subject to domestic violence are very vulnerable people who obviously would have some considerable need'.¹⁵⁶

¹⁵⁴ Ms Walker, Evidence, 31 October 2006, p9

¹⁵⁵ Ms Walker, Evidence, 31 October 2006, p9

¹⁵⁶ Ms Walker, Evidence, 31 October 2006, p9

4.60 Ms Blazey, in evidence to the Committee, commented that it was important that parties to a court proceeding receive adequate legal advice, but further noted that the decision about which parties should receive legal aid is a matter of policy:

... clearly it is a policy issue and it is a funding issue about the decisions that are taken about what Legal Aid decides to fund. There are many cases where there are policy decisions not to fund. Defendant AVOs is one of those. ... What is true is that when both parties have had good legal advice and are able to make informed decisions around AVOs, it is a better outcome for everyone.¹⁵⁷

4.61 Mr Longworth responded to a question from a Committee member about the fairness of the current system for the provision of legal aid by saying he was reluctant to make broad assumptions on policy matters, but commented that:

... we know statistically that people who are victims of domestic violence are usually in the weaker position. So, if the State saw fit to support those individuals it would be hard to argue with that.¹⁵⁸

4.62 Mr Thompson in response to the same line of questioning, told the Committee that there was a need for more detailed examination of the issue:

Having said that, I think it is something that should be looked at and I think it is something that needs to be examined in more detail to see if the consequential flow-on is what you are suggesting by the questions, namely, that there is just a blanket no legal aid on one side and absolute legal aid on the other. Because there are still the tests for legal aid, to my understanding, and there would need to be appropriate testing arrangements set in train to make sure that the Legal Aid Commission was not being abused in that situation by either side.¹⁵⁹

4.63 Mr Jamieson commented that the need for assistance in court matters was applicable to anybody, and that legal aid should be granted where it is needed:

I would have to say that anybody appearing before the court needs assistance and if that assistance means a grant of legal aid to get that assistance, then really that is what they should have.¹⁶⁰

4.64 Mr Duncan Holmes, a family law practitioner, commenting from his experience as a member of the Legal Aid Review Committee, said that one possible solution to the large number of unrepresented defendants of ADVOs would be the appointment of a duty solicitor at relevant courts:

I think from a practical perspective one must look at funding issues. The domestic violence lists at some particular courts are absolutely horrendous in length and perhaps one issue is for a duty solicitor to be appointed for defendants.

¹⁵⁷ Ms Blazey, Evidence, 31 October 2006, p25

¹⁵⁸ Mr Longworth, Evidence, 31 October 2006, p54

¹⁵⁹ Mr Thompson, Evidence, 31 October 2006, p54

¹⁶⁰ Mr Jamieson, Evidence, 31 October 2006, p64

At the moment there is an extreme imbalance out there. The AVOs are run by the police and there are hordes of unrepresented defendants out there and the only way to possibly manage that within reasonable financial limits is perhaps a duty solicitor specially set up for that list in those courts.¹⁶¹

Committee comment

- 4.65** The Committee acknowledges that Legal Aid has a limited budget and must make priority-based decisions on where funding is directed.
- 4.66** The Committee believes that the principle that the most vulnerable members of society should receive Legal Aid is worthy and self-evident. In a situation where funding must be prioritised, it is appropriate that Legal Aid is provided to actual or potential victims of domestic violence, who are almost always women.
- 4.67** The Committee notes that there may be an increase in contested ADVOs as a result of the *Shared Parental Responsibility Act*. If the increase does occur, it is sensible that the NSW Government ensure there is a capacity to provide the necessary legal advice (and potentially representation) to avoid burdening NSW courts with ill-conceived ADVO matters.
- 4.68** Accordingly, the Committee believes that the NSW Government should investigate the possibility of establishing a ‘duty solicitor’ in specific courts to address this issue.

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.

¹⁶¹ Mr Duncan Holmes, Solicitor, Slade Manwaring Solicitors, Evidence, 31 October 2006, p64

Chapter 5 Other issues

In this chapter, the Committee examines the impact on women and children in New South Wales of the amendments in relation to the enforcement of Family Court orders, and of the new provisions of the *Family Law Act* that are intended to make child-related proceedings less adversarial. The impact of the amendments on the system of child support payments is also examined.

Enforcement of Family Court orders

5.1 The issue of whether Family Court orders (principally Parenting Orders issued by the Family Court of Australia or the Federal Magistrates Court, examined in Chapters 2 and 3) are adequately enforced by State instrumentalities, such as NSW Police, was raised in questioning with witnesses at the Committee's public hearing on 31 October 2006. Witnesses to the Inquiry had mixed opinions on this issue.

5.2 Ms Janet Loughman, Principal Solicitor, Women's Legal Services New South Wales, stated that she was not aware of a problem in relation to State enforcement of Family Court orders. She cited an example from her recent experience of the actions associated with the enforcement of a Family Court order:

It was an urgent recovery matter. A six-week old baby had been taken from its mother and, of course, and at that very young age she was breast-feeding her child. An application was made to the Local Court for a recovery order. The order was made. The forms were completed and provided through the registrar to the Federal police and back to the local police in that regional community and the police enforced the Family Court order without any difficulty. That is my most recent experience of enforcement of orders and it works very smoothly.¹⁶²

5.3 Ms Loughman also commented that the recent amendments to the *Family Law Act* provided a 'clearer process for dealing with contravention and breaches' and this offered a suitable alternative to dealing with breaches of Family Court orders in the absence of police intervention:

[T]he remedy is to make an application to the court under the convention or breaching provisions of the Act. Our experience has been that the Family Court is willing to enforce orders requiring contact to be facilitated.¹⁶³

5.4 In Chapter 2 the Committee noted that the new Division 13A of the Act establishes a four-tier enforcement regime in order to give the courts more options when dealing with people who have contravened Family Court orders.

5.5 The four types of contravention set out in the Act are:

- contravention alleged but not established

¹⁶² Ms Janet Loughman, Principal Solicitor, Women's Legal Services New South Wales, Evidence, 31 October 2006, p35

¹⁶³ Ms Loughman, Evidence, 31 October 2006, p34

- contravention established but reasonable excuse for contravention
- contravention without reasonable excuse (less serious contravention)
- contravention without reasonable excuse (more serious contravention).¹⁶⁴

5.6 The *Family Law Act* establishes a range of responses to the contraventions provided above, with the responses determined by a relevant court after consideration of the full circumstances of the matter. Section 70NFB, for example, sets out a range of orders that the court can impose for serious contraventions without reasonable excuse. The options include imposing community service orders, bonds, fines and imprisonment.¹⁶⁵

5.7 Mr Glenn Thompson, Member of the Family Issues Committee of the NSW Law Society, in evidence to the Committee commented that he believed there were difficulties with the synchronisation between Federal legislation and the implementation of orders by State instrumentalities, and acknowledged the suggestion of a Committee member that there was a need for further training for police in their role in supporting Family Court orders. However, Mr Thompson's evidence accorded with the comments of Ms Loughman; that the *Family Law Act* provides appropriate mechanisms for addressing lack of compliance with Family Court orders. He added that the *Family Law Act* contains provisions to address urgent situations such as that outlined by Ms Loughman:

If there is need for urgent enforcement or urgent variation of the orders, there is provision to go back to the Federal magistrate at short notice or to the Family Court if need be.¹⁶⁶

5.8 Mr John Longworth, Member of the Family Issues Committee of the NSW Law Society added to the comments of Mr Thompson, noting the 'substantial shift in the work of police and their training over the 20-odd years that I have practised', with the reaction of police in relation to domestic violence issues 'greatly improved'.¹⁶⁷

5.9 Mr Neil Jamieson, a family law practitioner, considered that NSW Police did a satisfactory job in most circumstances but noted that in cases which were irresolvable the NSW Police may choose not to get involved:

Some matters are completely irresolvable by just about anybody and sometimes the police are put into a situation where they are asked to resolve and assist where it is just impossible to do so. In general, my experience is, yes, there are matters that they do not get involved with, but there are a substantial number of matters where they are of great assistance.¹⁶⁸

¹⁶⁴ *Family Law Act 1975* (Cth), Division 13A, subdivisions C-F

¹⁶⁵ *Family Law Act 1975* (Cth), Division 13A, s 70NFB

¹⁶⁶ Mr Glenn Thompson, Member, Family Issues Committee, Law Society of NSW, Evidence, 31 October 2006, p53

¹⁶⁷ Mr John Longworth, Member, Family Issues Committee, Law Society of NSW, Evidence, 31 October 2006, p52

¹⁶⁸ Mr Neil Jamieson, Solicitor and Director, Champion Legal, Evidence, 31 October 2006, p63

- 5.10** Witnesses were asked specifically about the enforcement of Family Court orders relating to non-residential parents having telephone contact with their children. In response to whether NSW Police were adequately enforcing these types of orders, Mr Duncan Holmes, a family law practitioner, conceded that there were difficulties in dealing with contraventions of this nature:

From my perspective anecdotally the telephone orders are a problem with enforcement. They are a nightmare for anyone to try to enforce, be it a court or a police officer. There is a natural reluctance from the State police, invariably in my experience, to get involved in matters of this nature. The police must have their own reasons, be it staffing or whatever, I do not know, and the ball is bounced back. That individual would be told, "Go and see your solicitor".¹⁶⁹

- 5.11** Mr Jamieson considered that Family Court orders pertaining to parental telephone contacts were almost impossible to enforce by police and would be more appropriately dealt with by the courts:

I cannot quite see how the police could possibly have any power to enforce anything in that sense. Only a court can enforce its own orders. The police might be able to assist, but when something such as that has occurred, in a sense behind closed doors, the police will never be in a position to get to the bottom of it. Only a court, after evidence has been given by both parties in a contravention application could ever get to the bottom of it, perhaps resolve it, and make some subsequent orders.¹⁷⁰

Committee comment

- 5.12** The Committee acknowledges that, due to the nature of family law matters, the successful operation of Family Court orders is not a certainty. Ideally, Family Court orders require co-operation between parents who have been through a stressful and possibly acrimonious court proceeding. The Committee sympathises with those parents, mothers or fathers, who feel frustrated when Family Court orders are not followed.
- 5.13** However, the Committee believes that the existing Family Court based mechanisms for enforcing Family Court orders, and the extent of the involvement of NSW Police, are adequate and appropriate for the resolution of disputes over Family Court orders.
- 5.14** The Committee accepts that in some cases NSW Police may have been reluctant to become involved in the enforcement of particular Family Court orders.
- 5.15** The Committee has not heard sufficient evidence on the extent of the possible problem and on the resourcing and operational implications of enforcing all Family Court orders to make recommendations about the level of NSW Police involvement in the enforcement of Family Court orders.
- 5.16** The evidence received from witnesses to this Inquiry indicates that the understanding within NSW Police of issues associated with domestic violence and their responses to domestic violence have improved over the last two decades, for the benefit, overwhelmingly, of women

¹⁶⁹ Mr Duncan Holmes, Solicitor, Slade Manwaring, Evidence, 31 October 2006, p63

¹⁷⁰ Mr Jamieson, Evidence, 31 October 2006, p63

and children. The Committee believes that a focus on preventing domestic violence and ensuring the safety of children is an appropriate priority, and further believes that the enforcement of Family Court orders in relation to access and communication are more appropriately resolved through the mechanisms laid out in the *Family Law Act* than addressed through the application of NSW Police resources.

- 5.17** However, the Committee accepts that there may be a lack of understanding amongst police officers, and even among family law practitioners, of the police role and powers to enforce Family Court orders and therefore believes it is important that the training received by police adequately addresses these issues.

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.

Child related proceedings

- 5.18** The introduction of new child related proceedings is one area of the new legislation that is likely to have a positive impact on NSW women and children.
- 5.19** As described in Chapter 2 the new Division 12A of the *Family Law Act 1975* (Cth), introduces a number of changes to ensure that child-related proceedings in Court are less adversarial. One of the most significant of these changes is contained in section 69ZT, which stipulates that the rules of evidence no longer apply unless the court sees fit.
- 5.20** Ms Sara Blazey, Board Member, Combined Community Legal Centres' Group stated in evidence to the Inquiry that she considered that section 69ZT would have a positive impact on women and children in NSW:

... because of the relaxation of the rules of evidence; it is now much more flexible, and I have to say that certainly one of the positive things about the changes is to take the evidence technicalities out of this. We completely support that. What that means is the court can take hearsay evidence concerning children rather than direct evidence.¹⁷¹

- 5.21** Another positive impact is contained in section 68LA which specifies the role of the independent children's lawyer. The role of an independent children's lawyer is to form an independent view on the evidence available of what is in the best interests of the child and inform the court of that view and, in relation to the proceedings, act in the best interests of the child.¹⁷² The legislation confirms the confidentiality of communications between the child

¹⁷¹ Ms Sara Blazey, Board Member, Combined Community Legal Centres Group, Evidence 31 October 2006, p27

¹⁷² *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) s 68 LA

and the independent children's lawyer but provides the power to the independent children's lawyer to disclose information to the court if he or she decides it to be in the child's best interest to do so.¹⁷³

- 5.22** A 1994 Family Law Case, *Re K*, stipulates the circumstances in which an independent children's lawyer can be appointed. Mr Holmes provided further details on the appointment of independent children's lawyers in evidence to the Inquiry:

Potentially, if the court wants to appoint an independent child's lawyer it will because the guidelines are so wide. They are usually appointed when there is an issue of violence, when there is an issue of power imbalance between the parties, be it financially or some other aspect, and invariably the cases I have been getting lately are one of the parents has a mental illness.¹⁷⁴

- 5.23** In NSW, all independent children's lawyers are funded by the NSW Legal Aid Commission. The Commission also provides an in-house lawyer to fill the role of the independent children's lawyer unless there are conflict of interest issues. In these cases a private practitioner will be appointed instead. Ms Judith Walker, Director of Family Law Services stated in evidence to the Inquiry that funding independent children's lawyers was a significant cost to the NSW Legal Aid Commission:

Each year we fund over 1,000 independent children's lawyers. About half of them we are able to do in-house but because of conflict of interest where we have had some contact with the parent, those are given to private practitioners. So they can be extremely expensive matters to run for the commission because of the nature of the matters and the complexity and the possible length of trials and the need to have expert evidence, particularly from child and family psychiatrists.¹⁷⁵

- 5.24** Several Inquiry participants expressed support for the concept of an independent children's lawyer. One of the particular advantages highlighted by Mr Holmes was that an independent children's lawyer ensures that all the relevant evidence is put before the court during family law proceedings:

It gives children a voice and it gives the judges the assistance of that independent third party who can look at all the issues and, in fact, make sure that there is before the court all the evidence the court is going to need to properly determine the matter. When there are only two parties quite often they cannot tell their lawyers or not bring before the court all the evidence that really should be there, and one of the great benefits of the independent children's lawyer is not only in representing the children's view but making sure the court has enough evidence it needs to make a proper decision.¹⁷⁶

¹⁷³ Submission 23, NSW Government, p11

¹⁷⁴ Mr Holmes, Evidence, 31 October 2006, p66

¹⁷⁵ Ms Judith Walker, Director of Family Law Services, NSW Legal Aid Commission, Evidence, 31 October 2006, p12

¹⁷⁶ Mr Holmes, Evidence, 31 October 2006, p66

Committee comment

- 5.25** The Committee supports the amendments pertaining to child related proceedings and, noting the comments of witnesses to this Inquiry, considers that NSW women and children will benefit from the changes.
- 5.26** While the *Family Law Act* provided for independent children's lawyers before the recent amendments, the Committee notes the value of ensuring that the child's best interest are specifically represented during court proceedings and notes that the recent amendments should improve the capacity of independent children's lawyers to perform their duties.

Impact on child support payments

- 5.27** A number of Inquiry participants expressed concern that increased contact between children and both parents will result in the parent with whom the child is primarily resident (in the overwhelming majority of cases the mother) receiving less child support. This will have a detrimental effect on women and children because there is not necessarily a corresponding reduction in basic parenting expenses incurred by the mother because the children are spending more time with the father.
- 5.28** Mr Thompson stated in evidence to the Inquiry that despite a reduction in contact time with a child, major expenses remain unchanged:
- ... the resident parent still has to maintain the house whether or not the children are there 10 days out of every 14, five days out of every 14 or seven days out of every 14. So they still have the core expenses ...¹⁷⁷
- 5.29** In its submission, Catholic Social Services Australia, an organisation with extensive experience in the delivery of social services, including those through the Commonwealth-funded Family Relationship Services Program, commented that the impact of the amendments to the *Family Law Act* should be considered in relation to a range of other policy changes.¹⁷⁸
- 5.30** Catholic Social Services Australia cited the practical effect of recent 'Welfare to work' changes, which would have an impact on those parents who, as a result of the shared parental responsibility provisions, spend a greater amount of time with their children but are not considered the primary carer and are therefore not eligible for a range of benefits and considerations. Examples include ineligibility for concession cards, telephone allowances, and pharmaceutical benefits, and an inability to refuse any suitable job offer that brings under \$50 net financial gain per fortnight (a right that primary carers have).¹⁷⁹
- 5.31** However, the Non-Custodial Parents Party stated in its submission that the amendments to the *Family Law Act* would result in an improvement in the situation of children, as a result of the child seeing more of the non-custodial parent, 'a good outcome in itself'.¹⁸⁰ The Non-

¹⁷⁷ Mr Thompson, Evidence, 31 October, p57

¹⁷⁸ Submission 25, Catholic Social Services Australia, p5

¹⁷⁹ Submission 25, p5

¹⁸⁰ Submission 5, Non Custodial Parents Party, p3

Custodial Parents Party also stated that an increase in time with the non-custodial parent would have other benefits that would compensate for lost social security benefits:

In any case, increased contact often equates to increased child support being paid. This would tend to negate any loss in social security payments.¹⁸¹

Committee comment

- 5.32** The Committee notes the concerns expressed in submissions and by witnesses to the Inquiry in relation to the impact of the amendments to the *Family Law Act* on the payment of child support.
- 5.33** The Committee believes that the concept of shared parental responsibility encompasses the need to provide materially for children, however the Committee appreciates that increased parental time with both parents will mean a reduction in child support paid to the parent with whom the child is primarily resident. The intentions explicit in the amendments to the *Family Law Act* to bring about a more ‘meaningful relationship’ between children and both parents may paradoxically result in less material assistance for children, unless parenting plans and Family Court orders are formulated to ensure this does not occur.
- 5.34** The Committee believes that this issue is worthy of further investigation by an appropriately resourced and experienced research body.

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.

¹⁸¹ Submission 5, p3

Appendix 1 Submissions

No	Author
1	Ms Gillian CALVERT, NSW Commission for Children and Young People
2	Professor Patrick PARKINSON, Family Law Council
3	Mr Stephen BARNES (Confidential as per Committee resolution)
4	Ms Annie ROGERS (Confidential as per Committee resolution)
5	Mr John FLANAGAN, Non Custodial Parents Party
6	Ms Joanna FLETCHER, National Network of Women's Legal Services
7	Ms Coral SLATTERY, Family Law Reform Association (NSW) Inc
8	Mr William TURNER (Partially confidential as per Committee resolution)
9	Ms Mary Jane BEACH, Foster Care Association (NSW) Inc
10	Ms Sara BLAZEY, Combined Community Legal Centres Group (NSW) Inc
11	Ms Marie HUME, National Abuse Free Contact Campaign
12	Ms Linda BAKER, Kids in Distress Australia, (Confidential as per Committee resolution)
13	Ms Mary MERTIN-RYAN, Relationships Australia
14	Ms Robyn COTTERELL-JONES, Victims of Crime Assistance League Inc (NSW)
15	Ms Catherine GANDER, Women's Refuge Resource Centre
16	Mr Stephen BLAYNEY
17	Ms Gudrun SCHMIDT (Partially confidential as per Committee resolution)
18	Ms Toni BROWN, Family Law Working Party, Central VAW Reference Group
19	Ms Jac TAYLOR, National Council of Single Mothers and Their Children
20	Ms Nellie FENNELL (Partially confidential as per Committee resolution)
21	Ms Barbara KILPATRICK, Manly-Warringah Women's Resource Centre Limited
22	Ms Patricia MERKIN, National Coalition of Mothers Against Child Abuse (Partially confidential as per Committee resolution)
23	Mr J L SCHMIDT, Cabinet Office of NSW
24	Ms Janet LOUGHMAN, Women's Legal Services NSW
25	Mr Frank QUINLAN, Catholic Social Services Australia
26	Ms June MCPHIE, Law Society of NSW
27	Ms Patricia SHERGIS, Country Women's Association of NSW

Appendix 2 Witnesses

Date	Name	Position and Organisation
31 October 2006 Parliament House	Ms Laura WELLS	Director, Criminal Law Review Division, NSW Attorney General's Department NSW
	Ms Nicole LAWLESS	Policy Officer, Criminal Law Review Division, NSW Attorney General's Department NSW
	Ms Judith WALKER	Director of Family Law Services, Legal Aid Commission
	Ms Sara BLAZEY	Board Member, Combined Community Legal Centres Group of NSW
	Ms Alison AGGARWAL	A/Director, Combined Community Legal Centres Group of NSW
	Ms Rachael MARTIN	Principal Solicitor, Wirringa Baiya Aboriginal Women's Legal Centre
	Ms Janet LOUGHMAN	Principal Solicitor, Women's Legal Services NSW
	Ms Brigid O'CONNOR	Solicitor, Women's Legal Services NSW
	Mr Rod BEST	Director, Legal Services, Department of Community Services
	Mr John LONGWORTH	Member, Family Issues Committee, Law Society of NSW
	Mr Glenn THOMPSON	Member, Family Issues Committee, Law Society of NSW
	Ms Olivia CONOLLY	Member, Family Issues Committee, Law Society of NSW
	Mr Neil JAMIESON	Solicitor, Champion Legal
Mr Duncan HOLMES	Solicitor, Slade Manwaring Solicitors	

Appendix 3 Minutes

Minutes No 40

8.45am, Wednesday 20 September 2006

Room 1108, Parliament House, Sydney

1. Present

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Colless
Mr Donnelly
Ms Fazio

2. Apologies

Ms Rhiannon

3. Minutes

Resolved, on the motion of Mr Donnelly, that the Minutes of Meeting No 39 be adopted.

4. General correspondence

The Chair tabled the following items of correspondence:

- 15 September 2006, from Ms June McPhie, President Law Society of NSW to Chair re reform of the law relating to double jeopardy.
- 19 September 2006, from Hon Reba Meagher MP, Minister for Community Services and Hon Bob Debus MP, Attorney General, re new terms of reference to the Committee.

5. New terms of reference

The Committee considered new terms of reference (tabled under item 4) received from the Hon Reba Meagher MP, Minister for Community Services and the Hon Bob Debus MP, Attorney General, on 19 September 2006, for an inquiry into the impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) as follows:

That the Standing Committee on Law and Justice inquire into and report to Parliament by 1 December 2006 on:

- (a) The impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) on women and children in NSW; and
- (b) The impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) on the operation of court orders that can prevent family violence perpetrators coming into contact with their families.

The Committee considered the terms of reference and the proposed timeline for the inquiry drafted by the Secretariat, including a list of organisations and agencies to invite to make a submission.

Resolved, on the motion of Mr Donnelly, that:

- the Committee accept the terms of reference and that, in accordance with paragraph 5(2) of the resolution establishing the Standing Committee, dated 21 May 2003 (as amended), the Chair advise the House of the Receipt of the terms of reference on 21 September 2006.
- the Committee advertise the terms of reference and call for submissions on 27 September 2006, with a return date of 20 October 2006, in the Sydney morning Herald and the Daily Telegraph.
- the Committee write to stakeholders identified by the Secretariat, as well as any additional stakeholders identified by Committee members and notified to the Secretariat by c.o.b Monday 25 September 2006, and invited them to make a submission to the inquiry.
- a press release announcing the commencement of the Inquiry and the call for submissions be distributed to coincide with the advertisements.

Resolved, on the motion of Mr Colless, that the Committee hold one day of hearings for this inquiry during the week of 23-27 October 2006, on a date to be determined by the Chair in consultation with Committee members.

Resolved, on the motion of Ms Fazio, that the Committee meet prior to the hearing to determine the witnesses to be invited to appear at the hearing, on a date to be determined by the Chair in consultation with Committee members.

6. ***

7. **Adjournment**

The Committee adjourned at 1.30pm *sine die*.

Rachel Callinan
Director

Minutes No 41

8.45am, Friday 20 October 2006

Jubilee Room, Parliament House, Sydney

1. **Present**

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Colless (until 3:00pm)
Mr Donnelly
Ms Fazio
Ms Rhiannon (after 3:15pm)

2. **Apologies**

Ms Rhiannon (until 3:15pm)
Mr Colless (after 3:00pm)

3. ***

4. **Deliberative meeting**

4.1 Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 40 be adopted.

4.2 *****4.3 Shared Parental Responsibility Inquiry****4.3.1 Consideration of witnesses for hearing on 31 October 2006**

Resolved, on the motion of Mr Clarke, that the following organisations be invited to appear before the Committee:

- NSW Attorney General's Department
- NSW Legal Aid Commission
- Combined Community Legal Centres Group of NSW
- Wirringa Baiya Aboriginal Women's Legal Centre
- Women's Legal Services NSW
- Department of Community Services.

4.3.2 Consideration of publication of submissions 1-11

Resolved, on the motion of Mr Donnelly, that in order to better inform those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW) to publish submissions 1, 2, 5-7, 9-11 of the shared parental responsibility inquiry.

Resolved, on the motion of Mr Donnelly, that submission to the shared parental responsibility inquiry that contain personal details and sensitive information relating to other parties be kept confidential including submissions 3 and 4 and parts of submission 8 as identified by the secretariat.

5. *****6. *******7. *******8. Adjournment**

The Committee adjourned at 17.30pm until 10.00am on 31 October 2006.

Rachel Callinan
Director

Minutes No 42

9.45am, Tuesday 31 October 2006
Room 814, Parliament House, Sydney

1. Present

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)

Mr Donnelly (until 12.30pm)
Ms Fazio
Ms Rhiannon (from 10.15am)

2. Apologies

Mr Colless

3. Deliberative meeting

3.1 Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 41 be adopted.

3.2 General correspondence

The Chair tabled the following items of correspondence:

Received

- ***
- 23 October 2006, letter to the Chair from Senator Marise Payne advising that Senate Standing Committee on Legal and Constitutional Affairs will not be making a submission
- 27 October 2006, email from Non-Custodial Parents Party regarding composition of witnesses to appear at the Family Law Amendment (Shared Parental Responsibility) Act hearing

Sent

- 12 October 2006, from Chair to Hon Bob Debus MP, Attorney General, requesting attendance of officers from the Attorney General's Department and the Legal Aid Commission at the hearing for the shared parental responsibility inquiry.
- 23 October 2006, from Chair to Hon Reba Meagher MP, Minister for Community Services requesting attendance of officers from the Department of Community Services at the hearing for the shared parental responsibility inquiry.
- ***
- ***

Resolved, on the motion of Ms Fazio, that correspondence be noted.

3.3 ***

3.4 Inquiry into the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)

3.4.1 Consideration of publication of submissions 12-26

Resolved, on the motion of Ms Fazio, that in order to better inform those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW) to publish submissions 13-16, 18, 19, 21 and 23-26.

Resolved, on the motion of Ms Fazio, that submissions to the shared parental responsibility inquiry that contain personal details and sensitive information relating to

other parties be kept confidential, including submission 12 and parts of submissions 17, 20 and 22 as identified by the secretariat.

4. Public hearing – Inquiry into the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)

The public, the media and witnesses were admitted.

The Chair made a brief opening statement.

Ms Laura Wells, Director, Criminal Law Review Division, NSW Attorney General's Department and Ms Nicole Lawless, Policy Officer, Criminal Law Review Division, NSW Attorney General's Department affirmed and were examined. Ms Judith Walker, Director, Family Law Services, NSW Legal Aid Commission was sworn and examined.

Ms Lawless agreed to provide answers to questions taken on notice.

Questioning concluded and the witnesses withdrew.

The Committee broke from 11.35-11.50am.

Ms Sara Blazey, Board Member, Combined Community Legal Centres Group of NSW, Ms Alison Aggarwhal, A/Director, Combined Community Legal Centres Group of NSW and Ms Rachael Martin, Principal Solicitor, Wirringa Baiya Aboriginal Women's Legal Centre affirmed and were examined.

Ms Blazey agreed to provide an answer to a question on notice.

Questioning concluded and the witnesses withdrew.

The Committee broke from 12.30-1.30pm.

Ms Janet Loughman, Principal Solicitor, Women's Legal Services NSW and Ms Brigid O'Connor, Solicitor, Women's Legal Services NSW affirmed and were examined.

Questioning concluded and the witnesses withdrew.

Mr Rod Best, Director, Department of Community Services, was sworn and examined.

Mr Best tendered a document listing references for articles relating to family violence.

Questioning concluded and the witness withdrew.

The Committee broke from 3.00-3.15pm.

Mr John Longworth, Member, Family Issues Committee, Mr Glenn Thompson, Member, Family Issues Committee were sworn and examined, and Ms Olivia Conolly, Member, Family Issues Committee affirmed and was examined.

Questioning concluded and the witnesses withdrew.

Mr Neil Jamieson, Solicitor, Champion Legal and Mr Duncan Holmes, Solicitor, Slade Manwaring Solicitors were sworn and examined.

Questioning concluded and the witnesses withdrew.

5. Deliberative meeting

5.1 Publication of transcript of hearing

Resolved, on the motion of Ms Fazio, that in order to better inform all those participating in the Inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW), to publish the transcript of hearing held 31 October 2006.

5.2 Publication of tabled documents

Resolved, on the motion of Ms Fazio, that in order to better inform all those participating in the Inquiry process, the Committee accept and make use of the powers granted under Standing Order 233(1) and section 4(2) of the Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW), to publish the following document tendered at the hearing held 31 October 2006.

- List of references for articles relating to family violence, tendered by Mr Rod Best, Director, Legal Services, Department of Community Services.

5.3 Correspondence

Resolved, on the motion of Ms Fazio, that the Chair, on behalf of the Committee, write to the Commonwealth Attorney General providing a transcript of the hearing and requesting responses from the Commonwealth Attorney General's Department to questions provided, where the questions are a relevant subset of those provided to witnesses at the hearing held 31 October 2006.

6. Adjournment

The Committee adjourned at 4.45pm until 20 November 2006.

Rachel Callinan
Director

Minutes No 43

9.00am, Monday 20 November 2006

Room 1108, Parliament House, Sydney

1. Present

Ms Robertson (Chair)
Mr Clarke (Deputy Chair)
Mr Donnelly
Ms Fazio
Mr Colless

2. Apologies

Ms Rhiannon

3. Minutes

Resolved, on the motion of Ms Fazio, that the Minutes of Meeting No 42 be adopted.

4. Correspondence

The Chair tabled the following items of correspondence:

Received

- ***
- ***
- 7 November, email from Alison Aggarwal, Director, Combined Community Legal Centres Group, providing answers to questions on notice for Shared Parental Responsibility Inquiry hearing held 31 October
- 7 November, from Hon Philip Ruddock MP, Commonwealth Attorney-General, advising that he will not be making a submission to the Shared Parental Responsibility Inquiry
- 8 November, from Janet Loughman, Principal Solicitor, Women's Legal Services NSW, providing answers to questions on notice for Shared Parental Responsibility hearing held 31 October
- 10 November, from Hon Philip Ruddock MP, Commonwealth Attorney-General, enclosing responses to questions sent on 1 November relating to Shared Parental Responsibility Inquiry

Sent

- 1 November, from Chair to Hon Philip Ruddock MP, Commonwealth Attorney-General, enclosing questions regarding the introduction and implementation of the *Family Law Amendment (Shared Parental Responsibility) Act*
- 15 November, from Chair to Hon Philip Ruddock MP, Commonwealth Attorney-General, responding to letters dated 7 & 10 November

Resolved, on the motion of Mr Donnelly, that correspondence be noted.

5. Inquiry into the *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)*

5.1 Consideration of publication of submissions 27

Resolved, on the motion of Mr Donnelly, that in order to better inform those participating in the inquiry process, the Committee make use of the powers granted under Standing Order 233(1) and section 4(2) of the *Parliamentary Papers (Supplementary Provisions) Act 1975 (NSW)* to publish submission 27 to the Inquiry into the Family Law Amendment Act.

6. ***

7. Adjournment

The Committee adjourned at 9.35 am until 10.00am Monday 27 November 2006

Rachel Callinan
Director

Draft Minutes No 44

10.00am, Monday 27 November 2006
Room 1108, Parliament House, Sydney

1. Present

Ms Robertson (*Chair*)
Mr Clarke (*Deputy Chair*)
Mr Colless
Mr Donnelly
Ms Fazio
Ms Rhiannon

2. Minutes

Resolved, on the motion of Mr Donnelly, that the Minutes of Meeting No 43 be adopted.

3. Correspondence

The Chair tabled the following items of correspondence:

Received

- 16 November, from Ms June McPhie, President, NSW Law Society, enclosing responses to questions sent 1 November re Shared Parental Responsibility Inquiry
- 17 November, from Mr John Schmidt, Acting Director General, NSW Cabinet Office, enclosing responses to questions sent 1 November re Shared Parental Responsibility Inquiry

Sent

- 20 November 2006, from Chair to Mr Dries, General Manager of Brewarrina (Yetta Dhinnakkal) Centre, enclosing photograph of framed Battle Axe which was presented to the Committee during a site visit for the Inquiry into community based sentencing.

Resolved, on the motion of Mr Colless, that correspondence be noted.

4. Inquiry into the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)

4.1 Consideration of Chair's Draft Report

The Chair submitted her draft report titled 'Impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), Report 33' which, having been circulated, was taken as being read.

The Committee proceeded to consider the draft report in detail.

Chapter 1 read.

Resolved, on the motion of Mr Clarke, that the words 'women and children' in Recommendation 1 be substituted with the word 'families'.

Resolved, on the motion of Mr Donnelly, that Recommendation 1, as amended, be adopted.

Resolved, on the motion of Mr Donnelly, that Chapter 1, as amended, be adopted.

Chapter 2 read.

Resolved, on the motion of Mr Clarke, that the Committee request Mr Rod Best, Director, Legal Services, Department of Community Services, seeking his response to the questions he took on notice during the Committee's hearing on 31 October 2006.

Resolved, on the motion of Mr Colless, that Chapter 2, be adopted.

Chapter 3 read.

Resolved, on the motion of Mr Colless, that the words 'seek to' be removed from Recommendation 2, 3, 5.

Resolved, on the motion of Mr Colless, that Recommendation 2 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 3 be adopted.

Resolved, on the motion of Mr Clarke, that Recommendation 4 be amended to replace the words 'recommend that it adopt' with the words 'discuss the option of'.

Resolved, on the motion of Mr Colless, that Recommendation 4 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 5 be adopted.

Resolved, on the motion of Mr Clarke, that Recommendation 6 be amended to read as follows:

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.

Resolved, on the motion of Mr Donnelly, that Recommendation 6, as amended be adopted.

Resolved, on the motion of Mr Clarke, that the words 'women and children' in the second sentence of paragraph 3.60 be substituted with the word 'families'.

Resolved, on the motion of Mr Clarke, that Recommendation 7 be amended to read as follows:

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 s61DA 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, the strategy should be developed in conjunction with the Commonwealth Government.

Resolved, on the motion of Mr Donnelly, that Recommendation 7 be adopted.

Resolved, on the motion of Mr Clarke, that the word 'women' in Recommendation 8 be replaced with the words 'individuals within families'.

Resolved, on the motion of Mr Clarke, that Recommendation 8 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 9 be adopted.

Resolved, on the motion of Mr Donnelly, that Chapter 3, as amended, be adopted.

Chapter 4 read.

Resolved, on the motion of Mr Colless, that Recommendation 10 be adopted.

Resolved, on the motion of Mr Donnelly, that Recommendation 11 be adopted.

Resolved, on the motion of Mr Clarke, that Recommendation 12 be adopted.

Resolved, on the motion of Ms Rhiannon, that Chapter 4 be adopted.

Chapter 5 read.

Resolved, on the motion of Mr Clarke, that Recommendation 13 be amended to read as follows:

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.

Resolved, on the motion of Ms Fazio, that Recommendation 13 be adopted.

Resolved, on the motion of Mr Colless, that Recommendation 14 be adopted.

Resolved, on the motion of Ms Fazio, that Chapter 5, as amended, be adopted.

Executive Summary read.

Resolved, on the motion of Mr Clarke, that the fourth and fifth sentences of the 3rd paragraph on page xiii of the Executive Summary be amended to read:

The Committee is of the view that the Commonwealth Government should adequately resource the infrastructure so that everyone has easy access to FRCs. The Committee also recommends that the NSW Government discuss the appropriateness of the number and location of FRCs with the Commonwealth Government, and request that future decisions about the location of FRCs be made in conjunction with relevant NSW Government agencies to ensure that the decisions are based on accurately identified population and demographic needs.

Resolved, on the motion of Mr Clarke that the words ‘women and children’ in the second sentence of the 4th paragraph on page xiii of the Executive Summary be replaced with the words ‘individuals within families’.

Resolved, on the motion of Mr Clarke, that the words ‘for women’ be removed from the first sentence of the 5th paragraph on page xiii of the Executive Summary.

Resolved, on the motion of Mr Clarke, that the words ‘almost always’ in the final sentence of the 5th paragraph on page xiv of the Executive Summary be replaced with the word ‘mostly’.

Resolved, on the motion of Mr Clarke, that the 4th paragraph on page xv of the Executive Summary be amended to read as follows:

The Committee therefore recommends that NSW Police review the training provided to police officers in relation to their role in enforcing Family Court orders to determine whether their current training needs to be supplemented. Any additional training needs identified should be provided to ensure officers understand their role in enforcing Family Court orders and are aware of the available appropriate services to refer parties to when particular dispute resolution skills are required.

Resolved, on the motion of Ms Fazio, that the Executive Summary, as amended, be adopted.

Resolved, on the motion of Mr Donnelly, that the Secretariat be permitted to correct any typographical, stylistic and grammatical errors in the report prior to tabling.

Resolved, on the motion of Mr Colless, that the report, as amended, be the report of the Committee and be signed by the Chair and presented to the House in accordance with Standing Orders 227(3), 230 and 231.

5. Adjournment

The Committee adjourned at 11.30 am *sine die*.

Rachel Callinan
Director