Submission No 10

INQUIRY INTO IMPACT OF THE *FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) ACT 2006* (CTH)

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Submission to Inquiry into the impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)

Combined Community Legal Centres Group (NSW) Inc. (CCLCG) is the peak body representing 39 member Community Legal Centres (CLCs). CLC's work for the public interest, particularly assisting people who, for a range of reasons, have difficulty in accessing the legal system, including people with disabilities, women, young people, Indigenous people and people from a culturally and linguistically diverse community. CLCs provide legal services including information, referral and advice, strategic case work, community legal education and law reform campaigns. Family law is a significant area of work for CLCs with priority given to clients facing family violence and accordingly CLC's have a particular expertise in this area.

The matters CLCs deal with through their referral, advice and casework activities provide a valuable source of information about the problems people in the community face when dealing with family law issues. CLC's are also able to advocate on behalf of the most disadvantaged sections of the community who would otherwise have no voice.

Background

The Family Law Amendment (Shared Parental Responsibility) Act 2006 implements a new regime for dealing with arrangements for children on relationship breakdown. The Act came about as a result of intense lobbying from various interest groups in particular, father's rights groups. The Federal Government has made it clear it expects to see a major change in the way disputes over children are handled and resolved. The explanatory memorandum issued to accompany the new Act stated:

> *"These initiatives represent a generational change in family law and aim to bring about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting."*

There has been much debate on how far reaching these changes will be. There is a community expectation these changes mean 50/50 shared care of children will become the norm on relationship breakdown. It is clear this legislation does not create a presumption of shared care. The Court is obliged to consider equal time or substantial and significant time but has to take into account whether there is family violence or abuse. It also has to consider whether arrangements satisfy the "reasonable practicality" test. These are important provisions but there is much less community awareness about them.

There is no argument that the ideal situation is for parents to agree and cooperate on all matters concerning their children, that children should have a close relationship with both parents and be able to spend substantial time with both parents where this is appropriate and practical. There is also no argument that if parents can sort out any disputes through family dispute resolution this is far more preferable than court proceedings. However, we believe the Federal Governments preference for a system of no lawyers, no courts and no orders exposes the most vulnerable to inappropriate and in some cases dangerous arrangements concerning the children.

CCLCG have a number of concerns about how these changes are impacting on the community, particularly women and children.

Community perception
The mistaken perception of what the new law does influences decisions and agreements made without recourse to the courts. Some 95% of cases concerning children settle without a fully contested hearing. This covers parents who make arrangements without any outside intervention through to cases that settle at the door of the court. It is clear from the many clients who contact CLC's they know about the supposed shared care provisions but not about the other important provisions.

Parental rights
Our second area of concern is that parental rights have become more prominent in the legislation at the expense of the principle that the best interests of the child are the paramount consideration. Although the Act clearly states this is the basis on which all decisions are made, when the amendments are considered in detail we believe the effect has been to demote the best interests principle.

Family Violence
We are concerned about how the changes impact in cases where there is family violence or abuse. There are important new provisions to protect children in these situations. However, the Federal Government came under intense pressure to take action against so called false allegation cases. The result is a balancing exercise between the perceived interests of fathers around contact to children and the perceived interests of mothers around issues of family violence. There is no evidence to support the view there has ever been a significant number of false allegations of abuse or violence. However the provisions introduced may operate to dissuade parents from putting these matters before the court.

The detail of these concerns is set out below.

(a) The impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) on women and children in NSW.

As stated above there is great emphasis on children spending substantial time with both parents. We believe the push to bring about this change means it is given greater significance than other considerations that are just as important. All references are to the Family Law Act 1975 as amended.
We refer to the following examples:

Section 60B Objects and Principles

This is an extensive rewriting of the Objects and Principles. It is stated the intention is to emphasis the best interests of the child but s60B(1)(a) makes it clear this includes meaningful involvement of both parents to the maximum extent possible.
S60B(1)(b) is included to allay fears that children could be exposed to a risk of violence. This "balancing exercise" is repeated in a number of places in the Act and sets up contradictory matters to be taken into account, namely the principle of substantial contact with both parents as against the need to protect the child. We would submit the need to keep children safe should always be the most important consideration. It remains to be seen how the Family Court will resolve this contradiction.

How the Court determines what is in the best interests of the child

Section 60 CA confirms the child's best interests are the paramount consideration in making a parenting order. Section 60CC sets out the criteria the Court must use in determining what is in the child's best interests and contains one of the most controversial changes. The section now creates a "two tier" system for determining what is in the child's best interests. There are now primary considerations and additional considerations. It has to be assumed that the primary considerations of meaningful relationship and need to protect the child will be given much greater weight than those matters in the additional considerations. Again, these two issues are given equal weight. If there are no issues of abuse or harm then the only primary consideration is that of "meaningful relationship". Most significant is the demotion of the views of the child to additional 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. It is unlikely the court would consider one night a week a meaningful relationship and therefore the child's views would be overridden. It is hard to reconcile the assertion that the best interests of the child will remain paramount with the effect of this section.

Subsection (4) is an important new section and directs the Court to consider how parents have exercised parental responsibilities. If this section is applied correctly it should go a long way to ensuring appropriate orders are made. However, it may have little impact on those cases that do not get to Court as the following case study shows.

Case Study
Client rang a CLC as she was upset about advice she had received from a private solicitor. The father had incurred substantial debt in the mother's name to the extent the family home was lost. He had spent little time with the children since separation and had taken no part in their day to day care when the parents were together. He paid no child support and although he still had substantial capital had arranged his affairs so this money was untraceable. There had also been some violence during the relationship. The client had been advised she would have to consider shared care. The CLC solicitor advised her of the provisions relating to violence and the operation of subsection 4. This was not a case where a shared care order would have been appropriate.

Equal time or substantial and significant time

Section 65DAA directs the court to consider making an order for equal time or if not equal time then substantial and significant time. The two safeguards that must be taken into account are a reminder in this section that the best interests principle must be applied and a consideration that any proposed arrangements are reasonably practical. The court does not have to consider equal time or substantial and significant time if it does not make an equal shared responsibility order. However, it will be rare for a sole parental responsibility order to be made so this section will apply in most cases

Subsection (5) dealing with whether the arrangements are reasonable and practical is crucial. If correctly applied, it may be that fears that inappropriate 50/50 arrangements will be imposed are unfounded. However, again the concern is that scant regard is given to this section in advice being given to parents.

Section 63DA (2) requires advisers to advise clients to consider the option of equal time or substantial and significant time if they are considering entering into a parenting plan. This is another example of the legislation emphasising one view of parenting. Although the section directs advisors to raise issues relating to reasonable practicality and the best interests principle, it is our experience this is not being done in many cases.

The intention is that many more children will be subject to arrangements where they will spend equal time or nearly equal time with both parents. If there is little cooperation between the parents it will be a nightmare for the child. Parents have to be able to cooperate about basics such as notes home from school, uniform

and homework to name a few. If they do not there is the potential for even more disputes and possibly further litigation. Again, hardly in the best interests of the child.

Family Dispute Resolution and Family Relationship Centres.

The main platform of this new regime is that Family Dispute Resolution will become mandatory and the new Family Relationship Centres are to be central to parents reaching agreement. It is hoped or anticipated many more parents will resort to parenting plans rather than court orders. There is no duty to refer parents to get legal advice prior to signing. This is one of the areas where community misapprehension could have most impact. There are major issues of inequality of bargaining power and there is already evidence that some cases involving women who have experienced violence have been inappropriately dealt with.

> **Case studies of Family Relationship Centres**
> A woman attended FRC and reported violence in the relationship. She was told "don't' be stupid, the violence is in the past and we are looking to the future"
>
> In another case a woman was told family dispute resolution was compulsory and not advised of the exemption where there was violence.
>
> Client asked for the opportunity to get legal advice before signing an agreement and was told she did not need legal advice.

Parents are exempt from the mandatory provisions if there is violence or abuse. However it is clear many women are still going to the FRC's. There are many reasons for this. There has been a massive publicity campaign and the services are free. Some women are aware of the exemptions but still feel dispute resolution is preferable to going through a court process. The concern is that there are no appropriate protocols for these cases. There are models being developed around mediation of cases involving allegations of violence and abuse but no evidence FRC's are adopting these or even aware of them.

Family Violence and Abuse

As stated above, the legislation attempts to balance what are seen as competing interests around issues of violence and abuse. We would submit the starting point should always be the safety of the child as determined through consideration of the best interests principle.
The legislation introduces an objective element to establish there has been violence or abuse.

Examples of this include:
Section 4 introduces a new definition of family violence which now incorporates a requirement of reasonableness.

S60I(9) Exempt from mandatory dispute resolution if court satisfied there are reasonable grounds to believe there has been abuse or violence

S61DA(2) Presumption of equal shared parental responsibility does not apply if there are reasonable grounds to believe there has been family violence or abuse

The Senate Legal and Constitutional Legislation Committee made it very clear what the intention was in introducing an objective test:

> *"...the 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"*

We would again question where the evidence is of widespread false allegations.

The concern is the impact will be to silence victims of violence who feel they may not be able to raise allegations because of difficulty in satisfying this standard. The following case study illustrates this.

> **Case Study**
> Client had lived in an extremely abusive relationship for 20 years. There was little physical violence but there were incidents of repeated death threats, use of knives to threaten, forcing the client and young children to sit in a darkened room, hours of screaming abuse. Client had not applied for an AVO as she believed she needed to show physical violence. The parties eventually separated and it was accepted in Family Law proceedings there had been abuse and the children were traumatised by the experience.

We believe there is a risk under the new provisions the client would not have raised the allegations. This excludes relevant evidence so the court does not even have the opportunity to assess it.

Another implication of these changes concerns the involvement of DOCS where children are at risk of abuse, especially from family violence. As the following case study shows the practice has been to leave the matter to the Family Court to deal with.

> **Case Study**
> Client reported suspicions of abuse to DOCS after seeing bruising on child when she returned from contact visit with father. There was a contact

order in place. Client was advised by DOCS they had concerns for child's welfare and she should apply to suspend the order. Client sought advice from CLC solicitor at court who telephoned the DOCS officer to ask if they would provide a letter confirming concerns and action they had advised client to take. They declined to do this.

We believe DOCS will need to be more proactive than has been the practice in the past to provide information in family law proceedings at an early stage.

(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.

Parenting orders and AVO's

There has been no great legislative change in respect of the interaction between Apprehended Violence Orders (AVO) and parenting orders. However, the impact of the changes is very likely to come from an awareness of the philosophy of the changes and an assumption the right of a parent to spend time with their child becomes more important than safety concerns.

Where an AVO is made first followed by a parenting order the terms of the parenting order will override any inconsistent terms of the AVO. There are provisions to try to ensure the parenting order is not inconsistent but if it is, a procedure is set out to deal with this.

Where a parenting order is made first followed by an AVO, the Local Court has power to alter the parenting order. This is not a new provision but is rarely used by Magistrates. There are a number of reasons for this including a reluctance to alter orders made by a higher court and police prosecutors lack of knowledge of family law. One new provision is a requirement there must be new evidence before the Local Court that was not available when the parenting order was made.It is hard to assess at this stage what the impact of this change will be other than an excuse not to make the change when the court has been reluctant to do so in the past anyway.

Reasonable grounds to believe risk of family violence or abuse

We refer to details given above concerning the new objective element now required to establish there has been violence or abuse.
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 facia case of reasonable grounds.

Womens Domestic Violence Court Assistance Scheme (WDVCAS)

WDVCAS are State funded schemes providing support and advocacy on behalf of women and children who face family violence. Women are supported at court when applying for AVO's. Generally workers are not involved in family law issues but refer women to other services. Workers report being increasingly concerned about the issues raised here and the need for clients of the scheme to have access to good quality legal advice about how family law now impacts on the need to protect from violence and abuse.

Recommendations

We would respectfully suggest there are a number of recommendations the Committee may consider to address some of the concerns raised in this submission.

1. NSW Government actively works with Family Relationship Centres to develop and implement appropriate protocols for dealing with cases where there are issues of abuse and violence. Protocols would include issues such as, an agreement not to mediate AVO's and referral for legal advice prior to signing a parenting plan. It is recommended this process would involve agencies and organisations such as DOCS, WDVCAS, Legal Aid Commission and CLC's.

2. New protocols should be developed as to the involvement of DOCS in family law matters where there are child abuse allegations being mindful of the need to provide evidence because of the reasonable grounds requirement.

3. WDVCAS to be resourced and supported in providing services to women to ensure their safety in respect of family dispute resolution and in assisting women to obtain legal advice on family law.

4. 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.

Sara Blazey
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