

Submission
No 11

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

Organisation: National Abuse Free Contact Campaign
Name: Ms Marie Hume
Telephone:
Date Received: 20/10/2006

- **NATIONAL ABUSE FREE CONTACT
CAMPAIGN**

•

NAFCC is a national (and international) feminist coalition of organisations who have formed to advocate on behalf of women and children going through the Family Court system with concerns about domestic violence and child abuse.

Marie Hume
National Abuse Free Contact Campaign
PO Box 380
Mannum
SA 5238
Phone: 0429 404 987

Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000
lawandjustice@parliament.nsw.gov.au

20 October 2006

Dear Secretary

Please find attached the National Abuse Free Contact Campaign's response to the Committee's **Inquiry into the impact of the Family Law Amendment (Shared Parental Responsibility) Act2006 (Cth)**

Thank you for the invitation to provide a response. We would be pleased to provide oral evidence in support of the submission.

Yours sincerely

Marie Hume
National Abuse Free Contact Campaign

Terms of Reference

- (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.

We are concerned about changes which are expressed in the following selected sections.

Presumption of Equal Shared Parenting Responsibility

The presumption as to shared parenting is contained in Section 61D.

“When making a parenting order the Court must apply a presumption that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility of the child.”

This presumption does not apply if there are **reasonable** grounds to believe that there is abuse of the child or family violence.

Section 60CC sets out the considerations to be taken into account in determining what is in the best interests of the children. These include the willingness and ability of a parent to facilitate a close and continuing relationship with the other parent, and the parent’s attitude to the child and the responsibilities of parenthood demonstrated.

The Primary considerations are set out in subs (2) and are:

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

The Family Law Act creates conflicting primary considerations for determining a child's best interests that are likely to lead to children being placed at greater risk of exposure to violence or abuse:

Fulfilling Responsibilities/ Facilitating Relationships

The changes to the Family Law Act have included a new secondary criterion, which is the willingness to facilitate a relationship with the other parent (s60CC(3)(c)). Section 60CC (3) (c) talks of the willingness and ability of a parent to facilitate and encourage a close and continuing relationship between the child and the other parent.

This is likely to have significant influence over decision-making in cases of violence because the primary considerations will cancel each other out. This assumption is supported by recent research (Shea Hart 2006) conducted on how the best interests of the child were constructed by judges under the *Family Law Reform Act* 1995 in contested contact cases where domestic violence was an issue. This research shows that women victims of domestic violence were caught

in a 'Catch 22' situation where strong mother blaming discourses were used to problematise mothers who failed to support the children's relationships with violent fathers, but were also blamed in cases where they had allowed ongoing father-child relationships and the children's wellbeing was adversely affected by their exposure to violence/abuse (Shea Hart, 2006)

By definition parents who fear violence will be trying to act to protect children from harm and not be willing to facilitate a relationship with the other parent. However, contemporary Australian feminist research provides consistent information about the pro-contact orthodoxy that places serious pressure on these women (Rendell, Rathus & Lynch 2000; Kaye, Stubbs & Tolmie 2003).

The parent who has genuine concerns about violence or abuse or neglect and therefore has concerns about ongoing contact with the other parent runs the risk of being a "non-facilitating parent". Research shows that where mothers depart from normatively defined gendered roles and responsibilities they are defined as unacceptable 'alienating' parents within the Australian family law jurisdiction (Shea Hart 2006). They then have the difficulty of relying on the other Section 60CC factors on this issue but then runs the risk of losing out on the Section 60CC(4) factors.

The primary considerations, that children are to have meaningful relationships with both parents, is likely to override considerations about children being

protected from harm (s60CC(2)) These will cancel each other out in any case where there is an allegation of violence. Prior Australian research shows that narrow definitions of domestic violence and a major focus on interparental conflict relied on by the Family Court, serve to mask the issues of children's exposure to domestic violence in cases that reach the stage of final hearing in the Family Court, thus minimising children's right to safety (Shea Hart 2006).

Further, the 'meaningful relationship' consideration is already reflected in the additional considerations in s60CC(3). Its repetition would be likely to give it inappropriate weight over considerations of safety. It is important to question what assumptions underlay what is meant by children having 'meaningful relationships' with violent fathers. To date, the parenting practices of violent men is a seriously under-researched area, but one groundbreaking study conducted in the UK revealed the unacceptable parenting of violent men who sought to meet their own needs and compromised the wellbeing of their children (Harne 2004)

The conflicting considerations about children having meaningful relationships with both parents and children being protected from harm are also included in the Objects provision of Part VII (s60B(1)(a)&(b)). These objects will nullify each other in any case where there is an allegation of violence, leaving decision-makers to refer to the other objects and principles in s60B. The 'meaningful relationship' object is already reflected in the principles about children's rights in

s60B(2) whilst the 'safety' object is not reflected at all in the principles. Repetition of the 'meaningful relationship' concept is likely to give it inappropriate weight over considerations of safety.

Research by the Australian Institute of Family Studies identified violence as being present in 66% of all marital breakdowns, in 33% the violence was identified as serious. The prevalence of domestic violence is even higher than this with families going through the Family Law Court. A 2003 Family Law Court survey showed that over 66% of cases which make it to the final stage of judgment in the Family Court have issues of serious physical domestic violence.

The Government commissioned *Family Law Pathways Report* identified that in two thirds of separations involving children, violence or other abuse was present.

Children witness that violence in nearly half of those cases and child abuse is more likely to occur in families where there is domestic violence. The rate of co-occurrence of children's exposure to domestic violence and direct child abuse is consistently reported as being between 30-60% (Edleson 2002). Whilst many children are also subjected to violence directly, witnessing violence against a parent, in and of itself, is extremely damaging to children. Witnessing parental domestic violence causes a range of behavioural and emotional problems amongst children and is the strongest predictor that young people will later use

violence in their own intimate relationships. Knowledge is now emerging about children's own perspectives on their exposure to domestic violence. Significantly, in the child-inclusive studies there are consistent findings that children identify their prime needs as being safety; support, and ongoing support from their mothers and siblings (Mullender et al 2002; Irwin et al 2002). In these studies children have also consistently stated their wish to be believed as reliable witnesses to their own experiences of violence and to have a say in decisions about future family relationships (Shea Hart 2006).

The resident parent has no effective legal recourse where the father breaches an anti-violence order (such as by threatening or harassing their ex-partner). For example, where a mother has an Apprehended Violence Order on her ex-partner, if there is a Family Court order for contact, then often the state police can do nothing to prevent her ex-partner from contacting her and harassing and abusing her at contact handovers. We have had reports of women who receive 5-6 phone calls a day during which they are verbally abused and threatened, but their family court order allows for phone calls to arrange contact and to talk to the children. The state police are unable to intervene. There have also been many incidents of women being physically and sexually assaulted at contact handovers, and even cases of women being murdered on such occasions. Women in remote, rural and regional centres are particularly vulnerable because of the lack of services.

Section 60CC (3) (k) sets out as an “additional consideration” for the Court the issue of family violence orders that apply to the child or a member of the child’s family. **However this is only a consideration if the order is a final order or the making of the final order was contested by a person.**

Most family violence orders are made on the basis that they are not contested. Unless the victim chases the making of a final order on a contested basis the family violence order will not have any weight in terms of proof of the allegations of violence and those allegations will need to be tested in the Family Court.

Changes to Division 11, which deals with the interaction between family law orders and state family violence orders, may make it harder to change family law orders to protect people from violence and do not give effect to the Family Law Council’s recommendations.

They do not prioritize the need to protect people from family violence in decision making (s68R(5) and referring to s68N)

They focus only on protecting children from family violence and lose the current broader focus on protecting people from family violence (s68R(5) and referring to s68N).

The requirement to provide new material to a state court (s68R(3)(b)) before it can change a family law order may operate to obscure a history of violence.

“Every Picture Tells a story” Report on the inquiry into child custody arrangements in the event of family separation. December 2003.

In the House of Representatives report, Recommendations 15 and 16 were:

Recommendation 15

“The committee recommends that all family law system providers, but most particularly the single entry point service, should screen for issues of entrenched conflict, family violence, substance abuse, child abuse including sexual abuse and provide direct referral to the courts for urgent legal protection, and for investigation of allegations by the investigative arm of the Families Tribunal.”

Recommendation 16

“The committee recommends that an investigative arm of the Families Tribunal should also be established with powers to investigate allegations of violence and child abuse in a timely and credible manner comprised of those with suitable experience.

It should be clear that the role is limited to family law cases and does not take away from the States’ and Territories’ responsibilities for child protection.”

In the body of the report (Chapter 4 p.69, 70) the report highlights that child protection and domestic violence jurisdiction remains with the State and Territory governments. *“Commonwealth agencies are neither funded nor do they have the expertise to investigate and respond to allegations of child abuse or family violence and yet these are issues that are affecting some families involved in the family law courts systems.”* (p.69-70).

The report also raises the serious concerns relating to this division of responsibilities and the poor outcomes for women and children where there are allegations of abuse and violence.

“Often when the child protection authority is aware that matters are proceeding in the Family Court they will decide not to investigate, leaving the question to that court to decide on the issues. However, the Family Court is not resourced to investigate such matters. The children involved then fall through the jurisdictional gaps.”)p. 71).

They then go on to quote the Family Law Council: *“We regard the split in jurisdiction as one of the most pressing matters affecting children in Australia. There is evidence suggesting that it can lead to terrible outcomes for children.”*

However, the changes to the Family Law Act which were implemented in July 2006 have not addressed this significant problem at all. There continue to be

serious concerns about the interaction between state responsibilities for domestic violence and child abuse, and family law matters.

Sometimes reports are taken and treated with due process, sometimes reports are dismissed and not taken, and sometimes reports are taken and not acted on at all.

Not only is there a continued reluctance for state authorities to become involved in family law cases, despite allegations of child abuse, there also appears to be a growing skepticism of the veracity of such allegations when made in this jurisdiction. We know of two recent cases in NSW where disclosures of sexual abuse were made to JIRT teams by mothers involved in family court cases. In both cases there was a serious lack of professionalism in the investigation process with a very apparent prejudice against the mother in raising these allegations. In one case the mother was accused of lying and threatened with police action against her for making a false allegation. Research has clearly shown that false allegations of child sexual abuse are rare in family law proceedings, and yet the JIRT investigators jumped to this conclusion without adequate investigation of the sexual abuse complaints.

When the Family Court refers an allegation of abuse to the child protection service, it may not rate a service according to the department's criteria (Brown et al. 1998, Hume 1996, Rendell et al 2000). When the state department has a

protective involvement in a case, empirical research has identified a strong and persistent trend for state departments to refer cases to the Family Court for resolution if they believe a case is pending (Brown et al 1998, Fehlberg and Kelly 2000). It is common for the Family Court to have no detailed information available from the state department about a case in which it has had involvement (Brown et al. 1998, Hume 1996, Rendell et al 2000).

It would appear that neither state nor federal governments are prepared to take responsibility for this serious gap in services to abused children. The Federal government has failed to follow the recommendation of the House of Representatives inquiry to address this issue. It is incumbent on state governments to ensure that child abuse investigations are thoroughly and professionally carried out.

The new Family Law Act does make provisions for the evidence from State authorities to be provided to the Family Court.

Section 69ZW

Evidence relating to child abuse or family violence

1. The Court may require a prescribed State or Territory Agency to provide the Court with documents or information
2. they must be about one or more of
 - a. any notifications of the agency of suspected abuse of a child

- b. any assessments by the agency of investigations into a notification and outcomes of those investigations
 - c. any reports commissioned by the agency in the course of investigating a notification
6. the Court must not disclose the identity of the person who made a notification or information that could identify that person unless
- (a) the person consents to the disclosure; or
 - (b) The Court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.
7. The agency must be notified about the intended disclosure and be given an opportunity to respond.

The failure to conduct and properly assess allegations of child abuse has serious consequences for women and children in the family law system. Not only does this mean that children will continue to have contact with abusive parents but the Family Court now has new powers to discipline parents who make allegations that they are unable to prove. There are now **False allegations' provision in the Act** where courts are required to order costs against parties 'knowingly' making a false allegation or statement (s117AB). This will put pressure on women to 'keep quiet' about violence or abuse and obscures the problem of false

denials of violence. Already we have heard of situations where women are being advised by their lawyers not to raise allegations of abuse in Family Court procedures because of concerns about this aspect of the Family Law Act.

References

- Australian Institute of Family Studies, 2000
- Brown, T., Frederico, M., Hewitt, L. and Sheehan, R., (2001) 'The Child Abuse and Divorce Myth' *Child Abuse Review*, 10: 113-124.
- Edleson, J. L. (2002). Studying the Co-Occurrence of Child Maltreatment and Domestic Violence in Families. In S. A. Graham-Bermann, & J. L. Edleson (Eds.), *Domestic Violence in the Lives of Children. The Future of Research, Intervention, and Social Policy*. Washington, DC: American Psychological Association.
- Family Law Pathways Report, 2001
- Fehlberg, B., and Kelly, F., (2000), Jurisdictional Overlaps: Division of the Children's Court of Victoria and the Family Court of Australia, *Australian Journal of Family Law*, 14 (3): 211-233.
- Harne, L. (2004). *Violence, Power and the Meanings of Fatherhood in Issues of Child Contact*. Doctoral Thesis, University of Bristol, Faculty of Social Sciences, Bristol.
- Hume, M. (1996) Child Sexual Abuse Allegations and the Family Court. Masters Thesis Uni. Of SA
- Irwin, J., Waugh, F., & Wilkinson, M. (2002). *Domestic Violence and Child Protection. A Research Report*. A Collaborative Research Project by Barnardos Australia and the University of Sydney, Department of Social Work, Social Policy and Sociology, University of Sydney, NSW.
- Kaye, M., Stubbs, J., & Tolmie, J. (2003). *Negotiating Child Residence and Contact Arrangements against a Background of Domestic Violence. Research Report No. 1*. Families, Law and Social Policy Research Unit, Griffith University, Queensland.
- Mullender, A., Hague, G., Imam, U., Kelly, L., Malos, E., & Regan, L. (2002). *Children's Perspectives on Domestic Violence*. London: Sage.
- Rendell, K., Rathus, Z., & Lynch, A. (2000). *An Unacceptable Risk. A Report on Child Contact Arrangements where there is Violence in the Family*. Brisbane: Abuse Free Contact Group and the Women's Legal Service Inc.
- Shea Hart A . (2006) *Children Exposed to Domestic Violence: Whose 'Best Interests in the Family Court?'* Doctoral Thesis,
- Sheehan, G., Carson, R., Fehlberg, B., Hunter, R., Tomison, A., Ip, R., Dewar, J., (2005) *Children's Contact Services: Expectations and Experiences*, Brisbane, Griffith University Socio-Legal Research Centre.
- Submission of The Family Court of Australia: Part B Statistical Analysis, to the HoR Inquiry into Child Custody Arrangements, Feb 2004
http://www.ag.gov.au/agd/WWW/flcHome.nsf/Page/Publications_Reports_to_the_AG_All_Reports_Family_Law_and_Child_Protection_-_Final_Report