

Submission
No 15

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

Organisation: Women's Refuge Resource Centre
Name: Ms Catherine Gander
Telephone: 02 96989777
Date Received: 20/10/2006



NSW Women's Refuge Movement
Working Party Inc.

ABN 51 006 110 505

19th October 2006

Standing Committee on Law and Justice
Parliament House
Macquarie St
Sydney NSW 2000

Dear Sir or Madam,

Please find attached the submission of the NSW Women's Refuge Movement (NSW WRM) to the inquiry into the impact of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

The NSW WRM is a statewide representative body of 57 refuges with a specific focus on providing accommodation and quality support for women and children escaping domestic violence and child abuse.

The NSW WRM has serious concerns over the impact of this Act on the safety of women and children leaving a violent relationship. Our concerns are based on our first hand experience in supporting women and children who need to apply for or contest Parenting Orders. These concerns were detailed in the submissions prepared for various Federal Inquiries which are also attached for your information.

The WRM remains convinced that the Act makes it more difficult and dangerous for women and children to stabilize their lives safely after leaving a violent relationship.

The NSW WRM would like the opportunity to support this submission with oral evidence.

Yours sincerely,

Catherine Gander
Executive Officer,
NSW Women's Refuge Resource Centre



NSW Women's Refuge Movement
Working Party Inc.

**A Response To
The Inquiry Into the Impact Of The Family Law Amendment
(Shared Parental Responsibility) Act 2006 (Cth)**

***From: NSW Women's Refuge Resource Centre on behalf of the NSW
Women's Refuge Movement Working Party Inc.***

October 2006

Contact Person:
Catherine Gander
Executive Officer
NSW Women's Refuge Resource Centre
Telephone: 02-96989777
E-mail: eo@wrrc.org.au

BACKGROUND

The NSW WRM is a statewide representative body of 57 refuges with a specific focus on providing accommodation and quality support for women and children escaping domestic violence and child abuse.

Due to the lack of available Legal Aid, refuge support workers often witness first hand the complex navigation involved in seeking safe living arrangements for women and children as they support them through the Family Law Court processes.

Even before the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006*, refuge workers have constantly reported how difficult it is for women and children escaping domestic violence to have their story heard and validated in the Family Law Court, and that often orders are made in favour of contact with abusive partners/fathers. These reports note an increase in the court giving contact to a violent parent since the 1995 Family Law Act reforms legislated a child's right to have contact with both parents.

The NSW Women's Refuge Movement is deeply concerned that the Family Law Amendment (Shared Parental Responsibility) Act 2006 did not take adequately into account the frequency and severity of domestic violence often involved in separation, and has therefore in fact increased the risks faced by women and children leaving an abusive relationship.

RESPONSE TO TERMS OF REFERENCE

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

Our response to this term of reference will be limited to the impact of the Family Law Amendment Act on women and children in NSW *who have experience domestic violence and/or child abuse*.

1. Prevalence of domestic violence

Domestic violence is a mainstream problem, which affects a great number of women and children.

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 serious¹. 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

¹ Australian Institute of Family Studies, 2000

make it to the final stage of judgment in the Family Court have issues of serious physical domestic violence.²

The Government commissioned *Family Law Pathways Report* identified that in two thirds of separations involving children, violence or other abuse was present.³

Issues of violence and safety are therefore a pressing concern for many women and children in Family Law Court proceedings.

The Access Economics Report⁴ estimated that in 2002-2003, 263,000 children lived with family violence. Of these children, about 181,200 witnessed the domestic violence. This estimate is considered to be very conservative given the lack of disclosure regarding domestic violence, even after the families have separated. According to this report, more than a quarter of a million Australian children live in homes afflicted by domestic violence in an "expensive epidemic" costing \$8.1 billion a year.

2. Major changes brought about by the Act and risks for women and children leaving an abusive relationship

The Family Law Amendment (Shared Parental Responsibility) Act 2006 brought about substantial changes to how arrangements for children are dealt within relationship breakdowns. It aims at bringing about a cultural shift in how family separation is managed: away from litigation and towards cooperative parenting.

The major changes are summarized below:

- presumption of equal shared parental responsibility
- emphasis on equal or substantial sharing of parenting time
- residence orders and contact orders are replaced by 'live with' and 'spend time with' orders
- mandatory family dispute resolution and the establishment of new Family Relationship Centres
- new provisions concerning enforcement and breaches of parenting orders
- move away from adversarial system and adoption of Children's Cases Program
- new responsibilities for legal advisors

The primacy given to the child having contact with both parents throughout the Act has raised expectations in the community that "shared parenting" will be the norm, while the safety of women and children takes second place.

² Submission of The Family Court of Australia: Part B Statistical Analysis, to the HoR Inquiry into Child Custody Arrangements, Feb 2004

³ Family Law Pathways Report, 2001

⁴ Access Economics, *The Cost of Domestic Violence to the Australian Economy*, PADV October 2004

The shifts towards “cooperative parenting” after separation and away from the legal processes will make it harder for women leaving a violent relationship to protect both themselves and their children.

A short summary of the impact of various aspects of the Act on women and children escaping domestic violence is outlined below.

3. Primary considerations regarding the best interest of the child

While the best interest of the child is still the paramount consideration when making Parenting Orders, the matters to be taken into consideration in deciding what is the best interest of the child have changed.

The Primary considerations 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 harm

Despite the statement about the need to protect the child, the Act with its strong emphasis on the child having a “meaningful relationship” with both parents, undermines the existing inadequate protections for children and adults from violence and harm in the family law system.

The principle of substantial contact with both parents and the principle to protect the child from harm would be contradictory in cases where there is domestic violence and/or child abuse and it is not clear how this contradiction will be resolved.

It has been our experience that previous changes to the Family Law Act in 1995 that were already moving towards a greater right of contact, have in fact increased the access of abusive partners to women and children.

We therefore fear that more children will be exposed to unsafe and extensive contact with abusive parents.

4. Additional considerations regarding the best interest of the child

Some of the additional considerations are also going to have an adverse impact on women and children separating in a domestic violence context.

a) “Friendly parent” consideration

The “friendly parent” consideration states that the Court needs to take into account the willingness and ability of each parent to facilitate and encourage close and continuing relationship between the child and the other parent.

The WRM believes that this consideration will disadvantage women leaving a violent relationship. A woman who has experienced domestic violence, or who believes her child has been abused by the ex-partner is unlikely to facilitate the relationship between the child and the child's father, as she has good reasons to believe that such a relationship would put the child or herself at risk. If she cannot prove her concerns with hard evidence, having only her story or that of her child to argue her case, she may well be seen as reluctant to facilitate the relationship with the ex-partner, and may be disadvantaged in the Court proceedings.

An abusive partner on the other hand, would be more than happy to "facilitate" contact with their ex-partner in order to use it as an opportunity to continue to abuse.

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.

b) family violence considerations

Other additional considerations the Court needs to consider are

- Any family violence involving the child or member of the child's family
- Family Violence Order if final or contested order

The WRM supports family violence as a consideration in determining the best interest of the child, however we are concerned that it is an additional consideration, and not a primary one.

Moreover, we are concerned that only final or contested orders will be taken into account in determining the best interest of the child. This will be discussed under the response to the second term of reference.

5. Equal parental responsibility

The Act introduced a rebuttable presumption of equal parental responsibility. Equal parental responsibility means that "major decisions" will have to be made jointly by both parents. For women escaping an abusive relationship, the requirement to consult with the ex-partner on major long term issues may well increase the likelihood and frequency that the ex-partner will use this process to continue the violence.

Moreover, the presumption of joint parental responsibility will give further precedence to contact over other provisions which are intended to protect adults and children from harm. This places the protection rights of children at risk of being over-ridden by the parent's right to contact.

The NSW WRM is aware that the presumption of joint parental responsibility may be rebutted where there are reasonable grounds for the court to believe that family violence or child abuse are present.

However, it is not clear what requirements will need to be met for the Court to be satisfied that there is evidence of violence or child abuse to reverse the presumption. On the

contrary, other provisions in this Act militate against an effective screening for violence, as described under point 10 *Domestic Violence and child abuse exemptions* .

Requiring victims of violence to counter a presumption of shared responsibility may further discourage women from leaving violent relationships, for fear of their safety and that of their children.

6. Equal time

The Act directs parents, Advisers, Family Relationship Centres and the Family Law Court to consider equal time or “substantial and significant” time with both parents.

This undermines the capacity to hold the best interests of children as paramount in cases of domestic violence/child abuse.

In cases where family violence exists, there are serious concerns that a preference for substantial sharing of parenting time opens the possibility to perpetrators of utilizing formal avenues to continue to threaten, harass and abuse their ex-partners and children. For example, refuge workers report that during handover violent fathers often threaten to kidnap or harm the children.

7. Family Dispute Resolution

The Act introduced mandatory family dispute resolution in all cases before an application for a Parenting Order can be made to the Family Law Court.

This is being introduced in stages, as it is linked to the establishment of Family Relationship Centres throughout Australia. However all *new* application made after 1 July 2007 and all applications made after 1 July 2008 will be subject to the requirement that parties must attend dispute resolution and can only lodge an application with the Family Law Court with a certificate form a Family Dispute Resolution provider that they have done so, or that failure to do so has been caused by the other party’s refusal or non-attendance.

While this requirement will not apply if the court is satisfied that there are “reasonable grounds” to believe there has been or is a risk of abuse or family violence, it is our experience that often women alleging domestic violence and/or child abuse in the context of Family Law proceedings are not believed and their claims are not adequately investigated.

The evidence required to satisfy ‘reasonable grounds’ is not clear. Studies show that 80-95% of women who experience domestic violence do not seek assistance from any services; police, doctors, refuges etc.⁵

⁵ ABS, Women’s Safety Survey 1996: Victorian Family Violence Database, 2003. See also OSW Department of PM&C, Working Together Against Violence. The First Three Years of Partnerships Against Domestic Violence, Commonwealth of Australia, 2001, p.v.

Even where a party does not attend family dispute resolution due to the existence or risk of family violence or child abuse, parties must obtain information about the issue/s in dispute from a family counsellor or family dispute resolution practitioner before the application is considered by the court.

It is also clear that there may be costs implications for a party who fails to make a “genuine” attempt to resolve the dispute.

In practice, many women who have experienced violence will have to attend Family Relationship Centres or other Family Dispute Resolution providers and undergo mediation with their abusive ex-partners.

Mediation is not appropriate in cases involving domestic violence, where there is a power imbalance between the 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.

The possible increased requirements to document or prove violence or abuse create the risk that women will be discouraged from disclosing violence and abuse and/or that matters will be inappropriately forced into FDR processes.

Services that provide FDR are to screen for violence in families. However, even if the Family Dispute Providers had excellent screening tools and highly skilled and experienced workers, not all cases of domestic violence will be identified. We are very concerned however, that to our knowledge there are no standards being developed with the sector in relation to screening tools and essential skill base of the workers.

8. Parenting Plans

Another main part of the FDR process consists in strongly encouraging parents to enter into Parenting Plans. In fact, the number of Parenting Plans entered into will be one of the outcome indicators for Family Relationship Centres. This may create conflict of interest between the interest of the client and the funding body.

Parenting Plans provide for the time a child spends with particular people, the allocation of parental responsibility, ‘other communications’ a child is to have, child maintenance and the form of consultation about parental decisions and processes for changing plans by agreement.

The NSW WRM has concerns over the focus on reaching early agreement regarding the future parenting arrangements of children. The early stages of separation are when women and children are most at risk when there has been a history of violence. Recent studies have found that between 80-97% of women experienced violence post-separation, with 36% actually noting an increase in violence.⁶

We have great concerns about women escaping domestic violence being pushed into inappropriate and unsafe Parenting Plans, especially as no legal advice is required for

⁶ Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

Parenting Plans, and lawyers are not allowed to be present at Family Dispute Resolution Sessions where the Parenting Plans are made.

The existence of a Parenting Plan will be taken into account by the Family Law Court if the matter ends up there at a later stage. It is of great concern that Parenting Plans made during this early separation period and possibly under pressure to agree to substantial sharing of parenting time will be taken into consideration by the Family Court in the future. Particularly in cases where the agreements have broken down due to violence or child protection issues and the women's non-compliance may be viewed as obstructive.

It is also of great concern that Parenting Plans made after a Court Parenting Order will override that Order, with no checks being in place in regards to the safety of the new arrangements.

9. Breaches of Parenting Orders

Punitive measures have been introduced for parents breaching Parenting Orders, ranging from order for compensatory time to fines and imprisonment. The Court can also impose bonds and order the payment of compensatory expenses.

NSW women's refuges report that the most common reason for women's non-compliance with parenting orders is to protect children from abuse or neglect, or to protect themselves from abuse happening during change over.

A high proportion of contravention applications occurred in cases where parents had agreed to consent orders. In many of these cases, the residential parent had contravened the order due to violence issues and it has been suggested that such contact orders should probably not have been made in the first place. It is likely that the resident parent may have been under pressure to consent to an order that did not protect themselves and their children from violence, and could therefore not continue with these arrangements⁷.

The WRM is extremely concerned that these punitive measures will have extremely dangerous consequences for women and children in situations of domestic violence. These measures will become an additional barrier for women when trying to protect their children and/or themselves by withdrawing contact with the other parent if they believe that the children are at risk, or if they are abused during changeover times.

10. Domestic Violence and child abuse exemptions

We are aware that many of the provisions of this Act, such as the rebuttable presumption of shared parental responsibility and the requirement to attend Family Dispute Resolution process are not applicable in case where the Court is satisfied that there are "reasonable grounds" to believe that there has been or is a risk of abuse or family violence.

⁷ Rhoades, Graycar, Harrison, The Family Reform Act 1995: the first 3 years, 2000, University of Sydney and Family Court of Australia

However, it is not clear how “reasonable grounds” are going to be determined.

It is our experience that often women alleging domestic violence or child abuse in the context of Family Law proceedings are not believed and their claims are dismissed as “strategies” to get an advantage in Family Law.

This occurs notwithstanding available research that disproves the myth of false allegations of domestic violence/child abuse in Family Law Court proceedings and that proves instead that women and children are often put at risk by Family Law Court Orders that do not adequately take into account safety concerns.

Domestic Violence and sexual assault are crimes that predominately occur in the privacy of a home with no witnesses. Many of the women and children in our NSW refuges do not have 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.

Screening

Not all domestic violence is readily apparent and previous attempts to screen for domestic violence have not been very successful. Research into mediation services in Australia have repeatedly shown that many people who should be excluded from mediation because of violence are not. Australia’s most recent research shows that most women (70.9%) find it very difficult to disclose domestic violence and child abuse when the opportunity arises; to lawyers, counselors or other professionals. This is in direct contrast to the 70% of such professionals who, when asked, responded that they thought their clients would disclose domestic violence.⁸

The onus of screening for domestic violence should not be the responsibility of the victim, but the responsibility of the service.

The above research is consistent with reports from refuges that a high number of women and children escaping domestic violence and entering into Family Law Court processes do not disclose violence for reasons that include; shame, fear that they will not be believed and/or that the violence may escalate.

Aboriginal and Torres Strait Islanders and newly arrived refugee communities who have lived through recent and generational trauma have a strong investment in building and keeping their communities together. Women escaping domestic violence or child abuse from these communities will be more reluctant to disclose for reasons that include; past systems trauma, protection of the abuser, community pressure and attitudes to preserve existing relationships and fear of isolation from the culture and community. Women from refugee or migrant background may not be aware of their rights or the legal remedies

⁸ Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

against domestic violence, may lack information on the support systems available, may face language barriers and may be fearful of deportation if they speak out against the violence.

Moreover provisions in the Act such as awarding of cost against a person for “false allegation” of domestic violence/ child abuse, will actively militate against women disclosing domestic violence and/or child abuse.

(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.

Given the serious concerns detailed above regarding the safety of women and children in Family Law arrangements it is essential that the state systems do not let down women and children in need of protection. The systems at state level that respond to women and children in Domestic violence are the Courts, the Police and the Child Protection system.

Unfortunately, it is often the case that women and children’s safety is put at risk, due to the gaps in the interface of the federal Family Law system and the state based child protection system, the inconsistencies that may exist between Family Law Orders and Apprehended Domestic Violence Orders, and the pervasiveness of the myth that women use domestic violence to gain an advantage in Family Law.

The new Family Law Act makes provisions for the evidence relating to child abuse or family violence from State authorities to be provided to the Family Court, including notifications and investigations of child abuse. It is essential that reluctance to become involved in Family Law proceeding is overcome and this evidence is provided.

1. Apprehended Domestic Violence Orders and considerations in determining the best interest of the child

The Family Law Act included in its additional considerations on the best interest of the child the Existence of a Family Violence Order but only *if final or contested order*.

Our experience is that, on the contrary, family violence allegations are often dismissed in Family Law proceedings.

There seems to be a lot of confusion in the sector as to which ADVO will be taken in consideration by the Court when determining the best interest of the child, particularly around whether final ADVOS made by consent will be admissible or not.

The WRM supports final ADVO by consent to have the same value as contested ones. We are aware of many cases where the perpetrator agrees to ADVO by consent as he is known to the Police, there is strong evidence and he is aware that the ADVO would probably be

granted if it was contested. It is therefore advantageous for him to agree to the ADVO without admission.

The WRM believes that the limitations on interim orders being admissible will have negative repercussions on the safety of women and children seeking these ADVOs because:

- Often violence escalates or starts in the period immediately following separation. An abusive partner often become more violent or threatening when divorce proceedings or Parenting Orders are sought. At this point a woman may apply for an ADVO. She may not have a final ADVO in place when Parenting Orders are made, especially if the perpetrator uses delaying tactics.
- More orders may have to be contested, which may take time and financial resources, as well as increasing stress and trauma.
- The workload of the Local Courts may be increased.

2. Intersections of myth of false allegations and ADVO

The amendments to the Family Law Act were strongly influenced by the myth that women make unfounded allegations of domestic violence to gain an advantage in Family Law proceedings.

For example, the Explanatory Memoranda to the Bill make it clear that the provision to award cost against a party who makes a false allegation was added in response to “concerns that have been expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings”.

Research has proven this to be unfounded⁹.

On the contrary, Project Magellan identified that child abuse issues in the Family Court were rarely without foundation, were often serious and complex and that many cases had not been investigated by the state child protection services.

It is of concern that the myth of the “vengeful mother” in Family Court would be given increased credibility and that Local Court Magistrates would refuse to grant ADVO to women involved in Family Law Proceedings, or would refuse to include children in those orders.

Breaches of Orders, may also be dismissed as a Family Law tactics, especially if they are difficult to prove or do not involve overt physical violence.

⁹ See for example:

Brown, T. (2003). Fathers and child abuse allegations in the context of parental separation and divorce. *Family Court Review*, 41(3), 367-381

Hay, A. (2003, May). Child protection and the family court of Western Australia: The experiences of children and protective parents. Paper to the Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Australian Institute of Criminology, Adelaide.

Melville, A., & Hunter, R. (2001). 'As everybody knows': Countering myths of gender bias in family law. *Griffith Law Review*, 10(1), 124-138.

It is essential that correct information and training is provided to counteract this myth.

3. Parenting Orders and ADVO

Under Section 68 R and Section 68 T of the Family Law Act the State courts already had the power to vary, revive, discharge or suspend a Parenting Order while making an ADVO. However a significant new provision is that these powers can now only be exercised where the Court “has before it material that was not before the Court that made the order”.

Local Courts have not used these powers very often, possibly in part because ADVO are often brought by the Police and Police prosecutors do not have experience in Family Law. The WRM is concerned that this new provision may decrease the already low rate at which these powers are used.

It is imperative that Police prosecutors are informed of these powers and of the increased safety they can bring to women and children by varying potentially unsafe parenting orders, if new violent incidents occur after the Family Law proceedings.

Recommendation:

That Police Prosecutors and Magistrates are informed and trained regarding the power of the Local Court to vary, revive, discharge or suspend a Parenting Order while making and ADVO.

4. Role of Child Protection Agency

It is our experience that there are gaps in the intersection of the Family Law Court and Child Protections systems, and that often children are put at risk due to the lack of coordination between the two.

The Child Protection agency is often reluctant to intervene in cases where the children are involved in Family Law Court proceedings. On the other hand, the Family Court often has no other avenues to obtain a clear and comprehensive picture regarding the safety risks for children it is making Parenting Orders about.

The Every Picture Tells a story report states that:

“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 gaps¹⁰.”

Refuges report that Child Protection workers are not involved at the level they should be in ensuring that the Family Law Court has all the relevant information, so it can make decisions on the best interest of the child where there are child protection issues.

¹⁰ *Every picture tells a story Report on the inquiry into child custody arrangements in the event of family separation*, House of Representatives, Standing Committee on Family and Community affairs, Canberra 2003, page 71.

Recommendations

- When Child Protection workers assess children to be at such risk of violence that they advise the mother to leave the relationship, they should inform the mother of the option of taking out an ADVO with the children included as protected persons, and support her to do so.
- If Parenting Orders are already in Place, the Child Protection worker is to advise the woman that the Local Court has the power to vary, revive, discharge or suspend a Parenting Order while making an ADVO, and should liaise with the Police in this regard.
- That NSW recommends the Family Law Court, when a case comes before it and Child Protection agencies have been involved, require a full report from the Department of Community Services, outlining the reason for Child Protection involvement, so that vital information is provided to the Family Law Court when making decision as to the best interest of the child.

Attachment 1

To: Consultation Secretariat
Family Law and Legal Assistance Division
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600
Email: consultation@ag.gov.au

**A RESPONSE TO
THE FAMILY LAW DISCUSSION PAPER:
A NEW APPROACH TO THE FAMILY LAW SYSTEM**

***From: NSW Women's Refuge Resource Centre on behalf of the NSW
Women's Refuge Movement Working Party Inc.***

January 2005

Contact Person: Catherine Gander
Organisation: NSW Women's Refuge Resource Centre
1/619 Elizabeth Street, Redfern 2016
Telephone: 02-96989777
E-mail: eo@wrrc.org.au

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INTRODUCTION

The NSW Women's Refuge Movement (NSW WRM) is a statewide representative body of 55 refuges with a specific focus on providing accommodation and quality support for women and children escaping domestic violence and child abuse.

Due to the lack of available Legal Aid, refuge support workers witness first hand the complex navigation involved in seeking safe living arrangements for women and children as they support them through the Family Law Court processes.

Refuge workers constantly report that the Family Law Court is "soft" on violence and continues to make orders in favour of contact with fathers against whom allegations of violence and abuse have been made. These reports note an increase in the court giving contact to a violent parent since the 1995 Family Law Act reforms legislated a child's right to have contact with both parents.

This is a significant problem given that violence and safety concerns are the key reason for many women and children entering the Family Law Court. Research by the Australian Institute of Family Studies identified violence as being present in 66% of all marital breakdowns, 33% of the violence was identified as serious¹¹ 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.¹²

It is therefore of deep concern that the discussion paper 'A New Approach to the Family Law System' ignores the serious safety issues of women and children during separation. Contrary to the reputable body of research undertaken over recent years of which a large proportion was commissioned by the government, it is apparent that this model dismisses this serious threat to safety and makes biased provisions for claims of domestic violence and child abuse being false.

RECOMMENDATIONS

The NSW Women's Refuge Movement recommends;

¹¹ Australian Institute of Family Studies, 2000

¹² Submission of The Family Court of Australia: Part B Statistical Analysis, to the HoR Inquiry into Child Custody Arrangements, Feb 2004

1. The FRC adopts safety first principles, policies and practices that recognise domestic violence as a mainstream problem affecting a majority of FLC cases.
2. FRC develops a thorough continuum of check points that screen for the presence of domestic violence and ensures that domestic violence is not minimalised as conflict.
3. That breaches of parenting orders be assessed on a case by case bases to identify whether non-compliance is a response to protect children from abuse or neglect.
4. That priority funding be made available to legal aid and community legal centres to ensure that women with domestic violence and other abuse issues are legally represented.
5. In support of the recommendation of the National Network of Women's Legal Services that the Family Relationship Centres allow for the provision of early information and assistance, but only require dispute resolution sessions to prepare parenting plans to occur anytime within the first 12 months after separation.
6. That adequate on-site security be made available to protect participants and staff at all the Family Relationship Centres.
7. That the Family Law Act not be amended to require advisers who are assisting in parenting plans to commence negotiations at the starting point of equal contact.
8. That additional funding for Contact Order Programs and contact services not be used to ensure that violent parents can continue contact when research shows that is it not in the best interests of the child.
9. That the Family Relationship Centres and the Family Law Court treat and address domestic violence as a child protection issue.
10. That the safety and best interests of the child remain paramount in determining the future residency arrangements for children.
11. That child residency and contact be determined on individual, case by case bases and not by a one size fits all model.
12. The FRC be an option for separating parents and not the single entry point to the Family Law Court.
13. That changes to the Family Law Act do not require parents to consult on decisions regarding the children when domestic violence has been identified.
14. The access to free interpreting services be made available to families from non-english speaking backgrounds and Aboriginal and Torres Strait Islanders.
15. The proposed additional legal aid funding for grandparents be extended to women and children whose matters are referred to the Family Law Court because of violence or child abuse.

16. The proposal to enable the courts to award costs against the people making false allegations of violence or child abuse be removed in acknowledgement of the low disclosure and false claims data.
17. The Family Law Act be amended to introduce Section 16B of New Zealand's Guardianship Act.
18. That the FRC and the FLC develop practices to screening violence and child abuse to remove the sole onus and responsibility from the victim.

A NEW APPROACH TO THE FAMILY LAW SYSTEM.

An increased availability of information and other assistance to parents who are cooperative in their approach to future parenting after separation is likely to be of benefit. However the NSW Women's Refuge Movement is concerned that the proposed reforms do not adequately acknowledge or make provisions for the levels of domestic violence and other abuse often involved in separation.

While the NSW Women's Refuge Movement acknowledges the proposed Family Relationships Centres to be of benefit to couples separating with a low level of conflict, mediation is not appropriate for dealing with high level conflict or where there is a power imbalance between the couple. The

discussion paper acknowledges this in proposing that cases involving abuse, domestic violence and entrenched conflict be referred to court.

However the proposal contains notable conflict between the protection of children from violence and abuse and the aim to facilitate parent contact. This conflict is consistent throughout the paper and compromises mindful consideration of ‘what is in the best interests of the child’. The recommendation of 50/50 shared parenting time as a starting point for child contact negotiations will give further precedence to contact over other provisions which are intended to protect adults and children from harm.

SAFE CONTACT AND RESIDENCY ARRANGEMENTS

A recent research study undertaken with women who were negotiating and facilitating child residence and contact arrangements with an ex-partner who had abused them found; “The high level of unsupervised contact arrangements in our study is disturbing given that the fathers of the children had a past record of violent behaviour in all instances towards the mother of the children (more often than not witnessed by the children), and in a significant number of instances towards the children themselves.”¹³ The same study found that “an overwhelming majority (71, 4%) of the women who were resident parents expressed concerns about the treatment of the children during contact visits.

The expansion of Children Contact Services to assist the handover of children to a violent or abusive parent is an example of the pro-contact approach over the best interests of the child. Whilst the Family Law Act has provisions and a responsibility to protect children from violence and abuse, the paper’s approach is to increase the facilitation of the unsafe parents contact through the expanded establishment of Contact Services.

The discussion paper also proposes that if there is an intentional breach of orders the parenting orders may be changed and the child sent to live with the non-obstructive parent. NSW women’s refuges report that the most common reason for women’s non-compliance with parenting orders is to protect children from abuse or neglect. Breaches need to be assessed on case by case bases to distinguish conflict from protective behaviour. It is inappropriate and potentially dangerous to propose a change of residence as a solution or punishment for breaches. Such a response would have very negative safety consequences and implications for the protection of children.

Research and reports from refuges workers raise the issue of contact with children being utilized by an abusive parent to continue to perpetrate violence and threats against the mother. The Women’s Refuge Movement is apposed to changes to the Family Law Act that would require women to consult with the abusive partner on decisions regarding the children where domestic violence has been identified.

NEW ZEALAND’S GUARDIANSHIP ACT.

Since the introduction of Section 16B into New Zealand’s Guardianship’s Act evaluations of children’s safety has improved. The Act does not allow for residency or unsupervised contact by a parent who has

¹³ Negotiating Child residence and Contact Arrangements Against a Backdrop of Domestic Violence, 2003; Miranda Kaye, Julie Stubbs and Julie Tolme; Socio-Legal Research Centre School of Law.

been violent or abusive. The adoption of such a presumption of no contact in case involving violence would be in the best interest of the child.

GRANDPARENTS

The Family Law Act currently has adequate provisions for grandparents to have on-going relationships with their grandchildren after separation. The NSW Women's Refuge Movement disagrees with the blanket assumption that assisting all grandparents to have increased contact with their grandchildren post separation is in the best interest of the child.

Whilst the NSW Women's Refuge Movement acknowledges the positive contribution that many grandparents make to their grandchildren's lives, refuges report cases where grandparents use their contact to provide access to an abusive parent who the court has granted limited or supervised contact because of violence or child abuse. Where violence or child abuse is identified, the courts need to take precautions that orders articulate clearly that contact with the grandchild/ren cannot be used to facilitate contact with the abusive parent.

The NSW WRM also rejects the proposal to increase legal aid funding to grandparents when many of the women and children that we support are forced to go through the Family Law Court unaided. Legal aid to women and children escaping domestic violence and child abuse should be prioritised.

SCREENING

Not all domestic violence is readily apparent and previous attempts to screen for domestic violence have not been successful. Research into mediation services in Australia have repeatedly shown that many people who should be excluded from mediation because of violence are not. Australia's most recent research shows that most women (70.9%) find it very difficult to disclose domestic violence and child abuse when the opportunity arises; to lawyers, counselors or other professionals. This is in direct contrast to the 70% of such professionals who, when asked, responded that they thought their clients would disclose domestic violence.¹⁴

The above research is consistent with reports from refuges that a high number of women and children escaping domestic violence and entering into Family Law Court processes do not disclose violence for reasons that include; shame, fear that they will not be believed and/or that the violence may escalate.

Aboriginal and Torres Strait Islanders and newly arrived refugee communities who have lived through recent and generational trauma have a strong investment in building and keeping their communities together. Women escaping domestic violence or child abuse from these communities will be more reluctant to disclose for reasons that include; past systems trauma, protection of the abuser, community

¹⁴ Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

pressure and attitudes to preserve existing relationships and fear of isolation from the culture and community.

It is of deep concern to the NSW Women's Refuge Movement that given the overwhelming body of research highlighting the under reporting and lack of disclosure of domestic violence that the proposed approach focuses on concerns and penalties for false allegations of domestic violence and child abuse. Reputable studies all show a low incidence of false claims. For example, Project Magellan identified that child abuse issues in the Family Court were rarely without foundation, were often serious and complex and that many cases had not been investigated by the state child protection services. The possibility of having to pay costs will further silence victims and compromise the screening of violence and child abuse.

In 2004 the NSW WRM partnered with the Family Law Court in Sydney to improve the safety of women and children using the court. The NSW Women's Refuge Resource Centre and NSW women's refuges will continue to work with the FLC in Sydney to develop an approach to screening violence and other abuse that acknowledges the onus of identifying violence cannot be solely reliant on the victim. A more effective approach that reflects the prevalence of domestic violence and child abuse in families entering the family law court is needed.

EVIDENCE

The NSW Women's Refuge Movement notes that the paper does not clarify how it will measure domestic violence or child abuse claims or what will be deemed as permissible evidence. Studies show that 80-95% of women who experience domestic violence do not seek assistance from any services; police, doctors, refuges etc.¹⁵ Even when police apply for an AVO on the woman's behalf there is a high withdrawal rate by the women. In NSW 2002-03 the AVO withdrawal and dismissal rate was 44.8%.

Domestic Violence and sexual assault are crimes that predominately occur in the privacy of a home with no witnesses. Many of the women and children in our NSW refuges do not have AVO's in place, forensic evidence, doctors reports or ambulance records to present. Yet they may have been living in a violent relationship for 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.

PARENTING AGREEMENTS

The NSW Women's Refuge Movement has concerns over the discussions paper's focus on reaching early agreement regarding the future parenting arrangements of children. The Government commissioned *Family Law Pathways Report* identified that in two thirds of separations involving children, violence or other abuse was present.¹⁶ Recent studies have found that between 80-97% of

¹⁵ ABS, Women's Safety Survey 1996: Victorian Family Violence Database, 2003. See also OSW Department of PM&C, Working Together Against Violence. The First Three Years of Partnerships Against Domestic Violence, Commonwealth of Australia, 2001, p.v.

¹⁶ Family Law Pathways Report, 2001

women experienced violence post-separation, with 36% actually noting an increase in violence.¹⁷ The early stages of separation are when women and children are most at risk, particularly when there has been a history of violence. Separation for any couple, particularly where there are children in the relationship, is a highly emotional time. The NSW Women's Refuge Movement supports the provision of information, advice and support during this early period, but are apposed to the emphasis placed on reaching long term parenting agreements.

It is of great concern that parenting plans made during this early separation period and possibly under pressure to agree to equal parenting time will be taken into consideration by the Family Court in the future. Particularly in cases where the agreements have broken down due to violence or child protection issues and the women's non-compliance may be viewed as obstructional.

The lack of independent advice regarding legal rights and the options available will heighten the risk of unsustainable and dangerous coerced agreements, especially if parenting plans don't need to be registered or checked. Where are the checks and balances to ensure that the agreements reached are actually in the child's best interests, rather than merely being the arrangement that the parents could most easily agree to? This is particularly of concern in cases where there is a power imbalance between the parties that will skew the result in the favour of the best negotiator on the day. There must be systems in place where parents have the opportunity to obtain independent legal advice, either before the session, or before signing the agreement.

TRAINING

All Staff at the Family Relationship Centres will need to comply with standards currently in practice in the domestic violence and child protection and support sector. Domestic Violence Competency Standards were developed under the government's Partnerships Against Domestic Violence Initiative. The standards outline best practices for all levels of staff in services.

Family Relationship Centres will need to have extensive knowledge and understanding of Australian families including; the extended family structures of Aboriginal and Torres Strait Islanders, families from non-english speaking backgrounds and same sex couples.

It will be imperative that counselors, mediators and advisors are competent in working with couples and have expertise in the dynamics of gender related violence and abuse.

CHILDREN

Parenting Advisers need the skills to ascertain whether *any* contact is in the best interest of the child. Provisions are made to protect adults from contact with a known perpetrator of violence or abuse, yet under the proposed model the protection rights of children are at risk of being over-ridden by the parent's right to contact. Parenting Advisers will need extensive knowledge of the traumatic impact of violence and abuse in relation to a child's development, including the long term impacts on their social, health and wellbeing

¹⁷ Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

LEGAL REPRESENTATION

The NSW WRM is concerned that if a woman who has experienced domestic violence cannot get Legal Aid and cannot afford legal representation while her ex-partner can, she may keep silent about domestic violence or other abuse to keep the case in the Family Relationships Centres. There are further concerns that if a woman does not raise domestic violence from the outset, their claims may lack credibility and be viewed as relationship conflict.

It is also highly unlikely that a women who has suffered the effects of domestic violence will be able to negotiate safe outcomes for themselves and their children in the presence of the ex-partner they are afraid of and intimidated by.

Women who have escaped a relationship because of violence or other abuse require the legal representation and advice of a lawyer. It is the right of the women to chose to have a lawyer present and this should not be dependent on whether the parenting adviser thinks it is *appropriate*. Further more, if parenting plans are to be deemed legally binding documents, then it is imperative that legal representation is available throughout the process.

Attachment 2



14th July 2005

The Secretariat
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600
e-mail: laca.reps@aph.gov.au

Dear Secretariat,

Please find attached the submission of the NSW Women's Refuge Movement (NSW WRM) to the inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 ('the Bill').

The NSW WRM is a statewide representative body of 55 refuges with a specific focus on providing accommodation and quality support for women and children escaping domestic violence and child abuse. In January 2005, the NSW WRM submitted a response to the Family Law Discussion Paper: 'A New Approach to the Family Law System'.

It is of deep concern to the NSW WRM that the proposed Bill does not sufficiently address the issue of the safety of women and children.

An increased availability of information and other assistance to parents who are cooperative in their approach to future parenting after separation is likely to be of benefit. However the NSW WRM is concerned that the the Bill does not adequately acknowledge or make provisions for the levels of domestic violence and other abuse often involved in separation.

While there are exceptions provided within the Bill in relation to child abuse or family violence and discretion around the 'best interests' of children, there are no proactive steps to screen domestic violence or address the gaps in providing safety for women and children after separation. Given that violence and safety concerns are the key reason for

many women and children entering the Family Law Court, the Bill may actually increase the risk to safety for women and children.

This submission specifically addresses the terms of reference drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled *Every Picture Tells a Story*, namely to:

- a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate
- b) promote the benefit to the child of both parents having a meaningful role in their lives
- c) recognise the need to protect children from family violence and abuse, and
- d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

The NSW WRM would like the opportunity to support this submission with oral evidence.

Yours sincerely,

Catherine Gander
Executive Officer,
NSW Women's Refuge Resource Centre

Schedule 1 – Shared Parental Responsibility

Content

Item 2 of the Schedule amends the objects provision of Part VII of the Act to provide that, subject to safety issues, children have the right to know and be cared for by both parents.

Comment

The concept of a child having a meaningful relationship with both parents after separation and being protected from harm are in practice often diametrically opposed.

While this provision may support separations that occur in low level conflict situations, the fact remains that violence and safety concerns are the key reason for many women and children entering the Family Law Court. Research by the Australian Institute of Family Studies identified violence as being present in 66% of all marital breakdowns, 33% of the violence was identified as serious¹⁸. 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.¹⁹

The WRM believe that priority should be given to the safety of children from abuse and violence. The primacy of safety has not been sufficiently emphasized.

Recommendations

Give expression to the primacy of human rights to safety in the definition of the child's rights.

Give expression to children's right to live free from continuing parental conflict.

The Family Law Act adopts safety first principles, policies and practices that recognize domestic violence as a mainstream problem affecting a majority of FLC cases.

Family Dispute Resolution (FDR)

Content

Item 9 provides that people applying for a parenting order will be required to first attempt to resolve their dispute using family dispute resolution services. A court cannot hear an application for a parenting order unless the applicant provides a certificate of attendance

¹⁸ Australian Institute of Family Studies, 2000

¹⁹ Submission of The Family Court of Australia: Part B Statistical Analysis, to the HoR Inquiry into Child Custody Arrangements, Feb 2004

at family dispute resolution or that failure to do so has been caused by the other party's refusal or non-attendance.

Exceptions to attendance are

1. Where the parties have agreed to consent orders.
2. Once substantive court proceedings have commenced.
3. Where there is or has been family violence or abuse, subject to the party satisfying the court that there are 'reasonable grounds' to believe that abuse or violence has occurred or may occur.
4. Where there is an existing order relating to an issue in a current contravention application and the person has shown 'serious disregard' of the order.
5. In cases of urgency such as relating to location and recovery of a child including cases of child abduction,
6. Where a party is 'unable' to participate effectively in family dispute resolution due to incapacity (significantly intellectually impaired or substance addicted) or physical remoteness without access to a telephone.

Even where a person meets a ground of exemption, the court may still order them to attend family dispute resolution.

Where a party does not attend family dispute resolution due to the existence or risk of family violence or child abuse, parties must obtain information about the issue/s in dispute from a family counsellor or family dispute resolution practitioner before the application is considered by the court.

All applications made after July 1 2008 will need to be fully compliant with these provisions.

Comment

While the NSW WRM acknowledges that Family Dispute Resolution may be of benefit to couples separating with a low level of conflict, mediation is not appropriate for dealing with high level conflict or where there is a power imbalance between the couple. In cases involving domestic violence, 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 during mediation sessions.

Evidence

The requirement to make dispute resolution compulsory provides exceptions to cases where there is or has been family violence or abuse. However, it is of great concern that there is no clear process as to how the Court will determine what are 'reasonable grounds' to believe that abuse or violence has occurred or may occur. What is currently accepted as evidence leaves many cases involving violence or abuse unidentified. To ensure the protection of women and children, Family Relationship Centres need to approach cases with a presumption that domestic violence or other abuse is highly likely to be present. The approach would remove the onus on the victim to disclose and would ensure a screening tool was inbuilt in all practices and procedures undertaken by Family Relationship Centres or the Family Law Court.

The evidence required to satisfy 'reasonable grounds' is not clear. Studies show that 80-95% of women who experience domestic violence do not seek assistance from any services; police, doctors, refuges etc.²⁰ Even when police apply for an AVO on the woman's behalf there is a high withdrawal rate by the women. In NSW 2002-03 the AVO withdrawal and dismissal rate was 44.8%.

Domestic Violence and sexual assault are crimes that predominately occur in the privacy of a home with no witnesses. Many of the women and children in our NSW refuges do not have AVO's in place, forensic evidence, doctors reports or ambulance records to present. Yet they may have been living in a violent relationship for 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.

The possible increased requirements to document or prove violence or abuse creates risks that women will be discouraged from disclosing violence and abuse and/or that matters will be inappropriately forced into FDR processes.

Screening

The Bill does not contain any approach to screening violence that reflects the prevalence of domestic violence and child abuse in families entering the family law court. The onus of identifying violence is solely reliant on the victim²¹. Given the evidence around low disclosure and the prevalence of cases involving domestic violence and other abuse going through the family law system, practices and procedures should reflect that domestic violence is a mainstream problem affecting a majority of Family Law Court cases.

Not all domestic violence is readily apparent and previous attempts to screen for domestic violence have not been successful. Research into mediation services in Australia have repeatedly shown that many people who should be excluded from mediation because of violence are not. Australia's most recent research shows that most women (70.9%) find it very difficult to disclose domestic violence and child abuse when the opportunity arises; to lawyers, counselors or other professionals. This is in direct contrast to the 70% of such professionals who, when asked, responded that they thought their clients would disclose domestic violence.²²

The above research is consistent with reports from refuges that a high number of women and children escaping domestic violence and entering into Family Law Court processes do not disclose violence for reasons that include; shame, fear that they will not be believed and/or that the violence may escalate.

Aboriginal and Torres Strait Islanders and newly arrived refugee communities who have lived through recent and generational trauma have a strong investment in building and

²⁰ ABS, Women's Safety Survey 1996: Victorian Family Violence Database, 2003. See also OSW Department of PM&C, Working Together Against Violence. The First Three Years of Partnerships Against Domestic Violence, Commonwealth of Australia, 2001, p.v.

²¹ Refer to page 4 paragraph 5

²² Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

keeping their communities together. Women escaping domestic violence or child abuse from these communities will be more reluctant to disclose for reasons that include; past systems trauma, protection of the abuser, community pressure and attitudes to preserve existing relationships and fear of isolation from the culture and community. Women from refugee or migrant background may not be aware of their rights or the legal remedies against domestic violence, may lack information on the support systems available, may face language barriers and may be fearful of deportation if they speak out against the violence.

Services that provide FDR will also play a role in screening for violence in families. However, even with the most sensitive screening tool and highly skilled and experienced worker, not all cases of domestic violence will be identified.

Victims of domestic violence are not supported within the dispute resolution processes contained in this Bill.

Recommendations

A sworn statement by a party that violence or abuse has occurred should be sufficient to establish 'reasonable grounds' to believe that violence or abuse has occurred or may occur.

A further range of indicators of violence or abuse in families should be provided to the court to support 'reasonable grounds'. These should include but not be limited to:

- ***Allegations of abuse or violence by a party***
- ***Children's disclosures of abuse or violence***
- ***Any police records, reports, prosecutions, convictions pertaining to violent conduct of a party***
- ***Any mandated child protection notifications against a party***
- ***Any child protection records pertaining to a child of a party***
- ***Any audio or video recording of abusive or violent conduct by a party including threats to harm or kill***
- ***The existence of a previous or current Restraining Order against a party***
- ***Any witness statements attesting to violent or abusive conduct by a party***

An additional presumption of human rights to safety should be expressed, providing that the court specifically has responsibility to ensure that its orders do not expose parties or children to actual or threatened harm.

That a Domestic Violence Homicide Review Process be established and that further legislation should provide for a statutory compensation system for parties and children who are killed or suffer serious physical or psychological harm from parties who the court orders them to have contact with or reside with.

As a matter of urgency the family law system capacity to identify and respond effectively to violence and abuse to support adult and child safety should be addressed. The recommendations of the Family Law Council in its Family Law and

Child Protection Report (2002) and letter of Advice on Family Violence under Division 11 of the Family Law Act (2004) should be implemented forthwith.

The FRC be an option for separating parents and not the single entry point to the Family Law Court.

Presumption of Joint Parental Responsibility

Content

Item 11 provides a new presumption for the court to consider in making an order, that parents have joint parental responsibility for the child except where there are reasonable grounds for the court to believe that a parent of a child or a person who lives with a parent of a child, has engaged in child abuse or family violence. The presumption will also be rebutted where the court considers that joint parental responsibility would not be in the best interests of children.

Comment

The NSW WRM is aware that the presumption of joint parental responsibility may be rebutted where there are reasonable grounds for the court to believe that a parent of a child or a person who lives with a parent of a child, has engaged in child abuse or family violence or where the court considers that joint parental responsibility would not be in the best interests of children.

However, it is not clear what requirements will need to be met for the Court to be satisfied that there is evidence of violence, abuse or entrenched conflict to reverse the presumption. In practice, this cannot be a protective provision for children if there are no effective procedures in place to screen for domestic violence.

The presumption of joint parental responsibility will give further precedence to contact over other provisions which are intended to protect adults and children from harm, placing the protection rights of children at risk of being over-ridden by the parent's right to contact.

Requiring victims of violence to counter a presumption of shared responsibility may further discourage women from leaving violent relationships, for fear of their safety and that of their children.

The onus here is on the victim of abuse proving that she has been abused. Consideration is not being given to the State and Federal governments' responsibilities to protect women and children from abuse and violence.

Even when victims can supply evidence of abuse, research suggests that it may not be considered relevant when determining issues relating to parental responsibility.

Joint parental responsibility is not necessarily the best outcome for all families in all circumstances. The principle of the best interests of the child must be the ultimate criteria on which to base decisions, prioritizing the safety of the child and of all parties.

Refuge workers report that contact visits and handover of residency is often used to maintain control over women and children after separation. It enables abusive ex-partners to insist on their preferences in key decisions relating to their child, and provides the opportunity for the abuser to intimidate, harass and abuse their ex-partner. This requirement endangers women and children and has a detrimental effect on their lives.

Recommendations

Determination of parental responsibility should be determined on the unique circumstances of each child. Indicators of the circumstances in which joint parental responsibility would not be in a child's best interests should be developed with reference to research evidence and should take into account the effect of any current custody arrangements on the child. Other indicators may include, in addition to circumstances of violence or abuse, circumstances of ; for example

- ***Substance abuse***
- ***Significant intellectual impairment arising from disability or illness***
- ***Absence for a significant period from exercising parental responsibility***

Substantial Time with each Parent

Content

Item 14 provides that Advisers (as defined in the Bill and including legal practitioners, FDR practitioners, family counsellors) assisting in the making of a parenting plan are required to inform their client/s of the possibility of the child spending substantial time with each of the parties if it is practicable and in the best interests of the child.

Item 23 provides that the court must consider making an order that a child spend substantial time with each parent, if a parenting order provides parents with joint parental responsibility for the child. The court must consider whether both parents wish to spend substantial time with the child and whether it is reasonably practicable for the child to spend this time with each parent and whether it is in the child's best interests.

Comment

The proposal to start from a substantial sharing of parenting time undermines the capacity to hold the best interests of children as paramount. This preconceived notion of what is optimum for all children is particularly dangerous considering the lack of checks and balances to ensure that the agreements reached are actually in the child's best interests.

In practice, substantial sharing of parenting time will also mean granting violent parents access and/or custody of their children.

In cases where family violence exists, there are serious concerns that a preference for substantial sharing of parenting time opens the possibility to perpetrators of utilizing formal avenues to continue to threaten, harass and abuse their ex-partners and children. Refuge workers report that violent fathers often threaten kidnap children or not return them on the agreed time, or harm the children during handover of residency or contact.

Research and reports from refuge workers raise the issue of contact with children being utilized by an abusive parent to continue to perpetrate violence and threats against the mother. Women should not be required to consult with the abusive partner on decisions regarding the children where domestic violence has been identified.

The safety of children must be paramount in determining post-separation parenting arrangements. It is not in the interests of children to spend substantial time with both parents if violence or the potential for violence is present and ongoing.

Recommendations

There should be no assumption that children should spend substantial time with each parent and the circumstances of each child should be taken into account in determining her/his best interests.

The aim of a child spending substantial time with each parent should not place a child at risk with a parent who is violent.

All children whose parents have a dispute about parenting matters have opportunity to express their views and have those views taken into account by Advisers or the Court in developing a parenting plan or making an order. Where children are pre-verbal, child development research evidence should be used to inform outcomes supporting children's healthy emotional and social development.

Children should have a right to reasonable continuity of living circumstances. That a range of indicators of 'practicability' need to be developed and considered in terms of the child's experience of the plan/order. Children should be protected from plans/orders which:

- ***Impose a regime of long travel times on the child***
- ***Disregard the need for secure 'attachment' for healthy infant development***
- ***Prevent/inhibit breastfeeding the child***
- ***Impose medical risks to the child (such as when the child has a serious illness or disability which requires attentive and continuing expert care)***
- ***Impose unreasonably high financial burdens on either parent***
- ***Prevent/inhibit children from participating in regular sport/recreation activities such as weekend sport***
- ***Interrupt/change children's place of education***
- ***Prevent/inhibit children from spending time and participating in family events with other family members***

- **Expose children to continuing emotional distress**

Parenting Plans

Content

Parenting plans/orders provide for the time a child spends with particular people, the allocation of parental responsibility, 'other communications' a child is to be made to have, child maintenance and the form of consultation about parental decisions and processes for changing plans by agreement.

A parenting plan will override a prior court order to the extent of any inconsistency. Parenting plans will also be able to deal with other relatives of the child including step-parents, siblings, grandparents, uncles and aunts, nephews and nieces and cousins.

Comment

The NSW WRM has concerns over the focus on reaching early agreement regarding the future parenting arrangements of children. The Government commissioned *Family Law Pathways Report* identified that in two thirds of separations involving children, violence or other abuse was present.²³ . Recent studies have found that between 80-97% of women experienced violence post-separation, with 36% actually noting an increase in violence.²⁴ The early stages of separation are when women and children are most at risk, particularly when there has been a history of violence. Separation for any couple, particularly where there are children in the relationship, is a highly emotional time. The NSW WRM supports the provision of information, advice and support during this early period, but is opposed to the emphasis placed on reaching long term parenting agreements.

It is of great concern that parenting plans made during this early separation period and possibly under pressure to agree to substantial sharing of parenting time will be taken into consideration by the Family Court in the future. Particularly in cases where the agreements have broken down due to violence or child protection issues and the women's non-compliance may be viewed as obstructive.

The lack of independent advice regarding legal rights and the options available will heighten the risk of unsustainable and dangerous coerced agreements, especially if parenting plans don't need to be registered or checked. Where are the checks and balances to ensure that the agreements reached are actually in the child's best interests, rather than merely being the arrangement that the parents could most easily agree to? This is particularly of concern in cases where there is a power imbalance between the parties that will skew the result in the favour of the best negotiator on the day. There must be systems in place where parents have the opportunity to obtain independent legal advice, either before the session, or before signing the agreement.

²³ Family Law Pathways Report, 2001

²⁴ Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

There is also a heightened risk of instability in children's lives if they are subjected to a constantly changing sequence of plans/orders about their lives. The approach of continual change of plans may in practice inhibit children's capacity to pursue educational and vocational opportunities which rely on continuous participation.

Recommendations

That the safety and best interests of the child remain paramount in determining the future residency arrangements for children.

That child residency and contact be determined on individual, case by case bases and not by a one size fits all model.

There should be provision for courts and Advisers and parents to consider whether the child's life will be subject to significant fragmentation and disruption by either the terms of the plan/order or changes which are being sought to the plan/order. Children should have a right to reasonable continuity of living circumstances.

There should be provision for the review of a plan/order with respect to how it is working for the child. Where children experience significant emotional or behavioural or physical distress arising from the terms of the plan/order, there should be opportunity for systematic review and changes which assist the child's well-being.

Contact given to extended kin by Courts or Family Relationship Centres should specify that the contact will not be used to facilitate contact with a parent who has been denied contact or residency due to violent or abusive behaviour.

Best Interests of the Child

Content

Items 26 to 36 provide for determining the best interests of the child and include a first tier of two factors –

1. the benefit to the child of having a meaningful relationship with both of her/his parents and
2. the need to protect the child from violence or psychological harm.

Comment

Despite the statement about the need to protect the child, the amendments collectively undermine the existing inadequate protections for children and adults from violence and harm in the family law system. The need to protect the child from violence is represented as subordinate to the child's 'benefit' from a meaningful relationship with both parents. These should be reversed to put safety first.

The Access Economics Report prepared in July, 2004 for John Howard estimated that in 2002-2003, 263,000 children lived with family violence. Of this number, about 181,200 of these children witnessed the domestic violence. This estimate is considered to be very conservative given the lack of disclosure regarding domestic violence, even after the families have separated. According to this report, more than a quarter of a million Australian children live in homes afflicted by domestic violence in an "expensive epidemic" costing \$8.1 billion a year. The largest component of this cost was the \$3.5 billion cost of physical and mental suffering as well as premature mortality.

Despite this readily available data and other supporting evidence and research, the Bill inadvertently continues to support the myth that women routinely invent claims of violence.

Recommendations

The safety of the child and the child's family should be the first consideration in meeting a child's best interests. All considerations of a child's best interests by Advisers and the courts should work systematically through the indicators in this section of the Act.

Parents who seek to protect their children by not adhering to court orders that may place their children at risk should not have the child removed from their care.

Where there is found to be 'reasonable grounds' of the past or current context of violence and abuse the decision-making process should focus on preventing, reducing and managing risks of harm. Courts should be required to make risk assessment the central feature of parenting disputes where domestic violence or child abuse has been present. They include the nature and seriousness of the violence; how recently and frequently such violence has occurred; the likelihood of further violence; the physical or emotional harm caused to the child by the violence; the opinions of the other party and the child as to safety; and any steps the violent party has taken to prevent further violence occurring. The occurrence of such violence should be the central issue of the court's initial inquiry and the assessment of the risk of further violence occurring should determine the shape of the parenting order.

Changes to the Family Law Act

Content

Proposed change to S60B: Objects of Part and principles underlying it

- “
- (1) The objects of this Part are:
 - (a) to ensure that children receive adequate and proper parenting to help them achieve their full potential; and
 - (b) to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and
- ”

- (c) to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.

Comment

The Objects and Principles should include ensuring the right to safety of the child and her/his family.

Recommendations

The Objects and Principles should include ensuring the right to safety of the child and her/his family.

Schedule 2 – Compliance Regime

Content

The Bill proposes amendments reflecting the changes to the object in s60B - that children have a meaningful relationship with both of their parents to the greatest extent possible. Make up contact can be ordered and the Bill provides directions about when the court must consider making a costs order and/or ordering compensation for costs incurred in relation to contact that did not take place because of the breach. The court is also given broader powers to impose bonds. The Bill clarifies that there is a low standard of proof for compliance matters at the 1st and 2nd stages on the basis that the sanctions are not criminal. If the matter is a stage 3 contravention matter - there is a presumption that the court will order costs against the party in breach unless it is not in the child's best interests.

Comment

NSW women's refuges report that the most common reason for women's non-compliance with parenting orders is to protect children from abuse or neglect, or to protect themselves from abuse happening during change over. Breaches need to be assessed on case by case basis to distinguish conflict from protective behaviour.

Any compliance regime should hold the best interests and safety of the child as paramount in considering the actions of a 'contravening parent'. In situations of domestic violence, it is inappropriate and potentially dangerous to propose sanctions or punishment for breaches. Such orders would often have very negative safety consequences and implications for the protection of children. The proposed changes will result in discouraging women from withholding the children from spending time with the other parent where they think violence or abuse is occurring.

A high proportion of contravention applications occurred in cases where parents had agreed to consent orders. In many of these cases, the residential parent had contravened

the order due to violence issues and it has been suggested that such contact orders should probably not have been made in the first place. It is likely that resident parent may have well been under pressure to consent to order that did not protect themselves and their children from violence, and could therefore not continue with these arrangements²⁵.

Recommendations

In recognition of the popularity of contravention applications being used by ex-partners to legally harass residence parents, all applications for contravention proceedings should place the burden of proof on the party bringing the application. Further penalties should be available to the court when applications are found to be without substance and the party bringing the application is exploiting the family law system as a form of harassment and control.

The capacity of parents to withhold contact to protect their children from exposure to violence or abuse needs to be supported.

That if a non-residential parent does not exercise contact without any reason, over a period of time, the Court will consider varying the order to reflect the level of contact actually happening.

Schedule 3 – The Conduct of Child Related Matters

Content

The Bill provides for changes in the way child related matters are conducted. These changes are based on the Children Cases program that has been piloted by the Family Court in NSW. They allow for the Court to act in a more inquisitorial manner. Principles are set out in the Bill to guide the Court in a less adversarial approach. These Principles include:-

- Ensure the proceedings are focused on the child
- The Judicial Officer must control the conduct of the hearing
- Ensure that the proceedings are conducted in such a way to encourage the parents to focus on the children and on their ongoing relationship as parents
- The proceedings should be conducted as expeditiously and with as little formality as possible

The proposed new s60KE provides a number of general duties that the Court must carry out to give effect to the principles. This includes considering whether the likely benefits in taking a step in the proceedings justify the costs of taking it.

Significant changes are proposed in relation to the rules of evidence. Even where the rules of evidence in relation to hearsay evidence are applied a representation made by a child about a matter that is relevant to the welfare of that or another child is admissible.

²⁵ Rhoades, Graycar, Harrison, The Family Reform Act 1995: the first 3 years, 2000, University of Sydney and Family Court of Australia

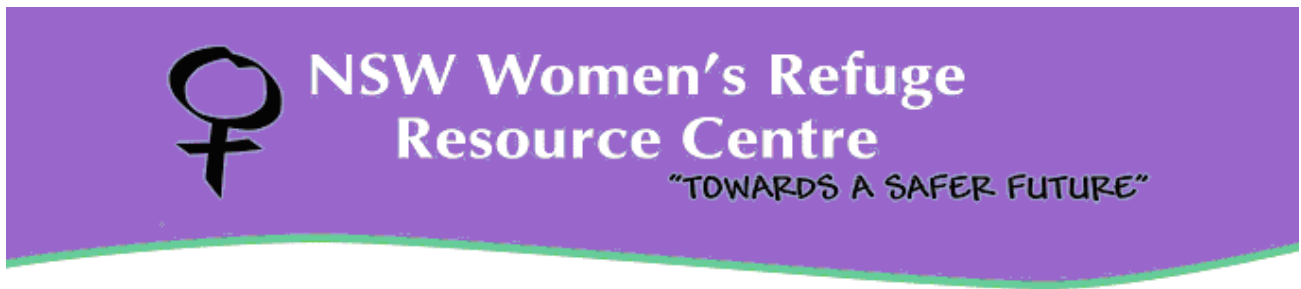
Comment

The focus on the child is a welcome change in direction however the capacity for the court to inform itself of the child's circumstances and risks to the child's safety has still to be improved. The recommendations of the Family Law Council's report on Child Protection and Letter of Advice on Family Violence are critical to the court's capacity to know what has happened to the child.

Recommendations

Implement as a matter of urgency the Family Law Council recommendations on child protection and family law and elevate the right to safety as the first condition of meeting a child's best interests.

Attachment 3



To: Committee Secretary
Senate Legal and Constitutional Committee
Department of the Senate
Parliament House
Canberra ACT 2600
Australia

legcon.sen@aph.gov.au

Response from the NSW Women's Refuge Resource Centre (WRRC) on behalf of the NSW Women's Refuge Movement (WRM) to the Committee's inquiry into the Family Law Amendment (Shared Parental Responsibility) Bill 2005.

February 2006

Catherine Gander
NSW Women's Refuge Resource Centre
2/619 Elizabeth Street, Redfern 2016
Telephone: 02-96989777

E-mail: eo@wrrc.org.au

The NSW Women's Refuge Resource Centre (WRRC) is the point of contact for the NSW Women's Refuge Movement (WRM), a network of 56 refuges and safe houses committed to providing safe accommodation and quality support to women and children escaping domestic and family violence and sexual assault in NSW.

THE WRRC has previously provided a response to both House of Representatives inquiries by the Family and Community Affairs and the Legal and Constitutional committees and the views and recommendations expressed in those submissions (attached) still stand.

Prevalence of Domestic Violence

Domestic Violence, far from being a minor issue, affects a great number women and children in Australian and in the Family Court system.

A study by VicHealth found that Domestic Violence is the leading contributor to ill-health and premature death for Victorian women under 45²⁶. The Access Economics Report²⁷ estimated that in 2002-2003, 263,000 children lived with family violence.

Violence is the key reason for many women and children entering the Family Law Court.

Research by the Australian Institute of Family Studies identified violence being present in 66% of all marital breakdowns, 33% of which were identified as serious violence.²⁸ A 2003 Family Law Court survey showed that over 66% of the women and children who make it to the final stage of judgment in the Family Court have issues of serious physical domestic violence²⁹.

The myth of False Allegations in Family Law Court proceedings

We are particularly concerned about the potential disadvantage and discouragement that women who are experiencing/escaping domestic violence will face as a direct consequence of the False Allegation Provision in the Bill. The Bill espouses the myth women regularly make vexatious claim of domestic violence or child abuse and/or apply for Family Violence Orders in order to gain an unfair advantage in the Family Law Court or to unreasonably deny contact.

The Explanatory Memoranda to the Bill make it clear that the provision to award cost against a party who makes a false allegation was added in response to "concerns that have been expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings".

²⁶ VicHealth The health costs of violence: measuring the burden of disease caused by intimate partner violence Victorian Department of Health, 2004.

²⁷ Access Economics, The cost of Domestic Violence to the Australian Economy, PADV, Commonwealth of Australia, 2004.

²⁸ Australian Institute of Family Studies 2000

²⁹ Submission of The Family Court of Australia: Part B Statistical Analysis, to the HoR Inquiry into Child Custody Arrangements, Feb 2004

Research has proven time and time again that this is simply not the case (See Attached Fact Sheets for a sample of the relevant research).

On the contrary, Project Magellan identified that child abuse issues in the Family Court were rarely without foundation, were often serious and complex and that many cases had not been investigated by the state child protection services.

Refuge workers report that the outcome of Family Law proceedings often does not protect children and women from further abuse. Domestic violence is often not taken into account when determining residence and contact arrangements even when an AVO is present (and not all our clients apply for an AVO).

At most, supervised hand over is ordered. This does not recognize the harm done to children witnessing domestic violence, nor the control tactics the perpetrator uses to continue harassing and threatening the woman though the children (not turning up, not returning the children on time or at all, using contact to find out where she lives, using the children to pass on threatening messages).

Provisions that will prevent women from disclosing

A number of provisions in the Bill will contribute to silencing women who experience domestic violence or who want to protect their children from their ex-partner's abuse.

As a result, children and women will be put at great risk. Moreover, the screening process which would exclude women experiencing domestic violence from mandatory attendance at primary conflict resolution processes or from the presumption of shared responsibility will not work if women are too scared of the consequences of disclosing in the first place.

These "silencing provisions" include:

1. The awarding of costs against a party that makes false allegations of domestic violence.

Domestic violence and child abuse are notoriously difficult to prove, given the private nature of the offence. Women often do not disclose violence to anybody because of shame, fear of reprisal, fear of not being believed and a myriad of other reasons. Therefore there may not be Police or medical records confirming the violence. It is our experience that women find it difficult to disclose even in a supportive environment. When they go to refuges, they often initially disclose as little as possible and only describe the full extent of the violence when a relationship of trust has been established.

Research (quoted in previous submissions) proves that women consistently under-disclose violence. On the other hand abusive men use the claim of "vexatious allegations" to discredit their ex-partner, but no provision is made in relation to "false denials and use of discrediting tactics" of domestic violence and child abuse in the Bill.

The court must be satisfied on the balance of the probabilities that a party has knowingly made a false allegation. What evidence will the Court use to determine

whether false allegations were made? In many cases domestic violence does not leave physical, visible scars. In some cases it may boil down to his word against hers. Under this provision, a woman disclosing domestic violence or child abuse places herself at risk of punitive measures, whilst a man claiming that the allegations are “vexatious” has nothing to lose.

We are very concerned that claims of domestic violence or child abuse, that are unproven or unsubstantiated because of the difficulty of proving these crimes, will be considered “false” or “vexatious”.

This provision punishes women disclosing violence and will actively prevent them from seeking help.

2. The introduction of the “objective” element in the definition of domestic violence

The introduction of the “objective” element would amend the definition of Domestic violence, so that

“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 other member of the person’s family *reasonably* to fear for, or to be *reasonably* apprehensive about, his or her personal well-being or safety”.

A woman who has experienced domestic violence, possibly over a number of years, may experience fear over an incident or event that would not “reasonably cause” fear in an outsider. This is because the incident may be part of a pattern of abuse and control that outsiders have no insight into. This approach does not take into consideration that the effect of domestic violence is accumulative.

3. Breaches of Parenting Orders

A punitive approach to breaches of Parenting Orders, which does not recognize that often women breach Parenting Orders to protect their children or themselves from further abuse. A woman breaching a parenting Order, because her child has told her of being abused during contact with the father, but who is unable to substantiate the child’s story, would face not only harsh consequence for the breach, but also would not be able to disclose the abuse for fear of not being believed and having to pay cost for “false allegations”.

4. The Friendly Parent Provision

The “friendly parent” Provision also militates against 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.

An abusive partner on the other hand, would be more than happy to “facilitate” contact with their ex-partner in order to use it as an opportunity to continue to abuse.

Our organisation and others have repeatedly expressed a number of concerns about this Bill, primarily in relation to the safety of women and children who have experienced violence and abuse at the hands of a separating partner.

These concerns (detailed in the attached submissions) include:

- The primacy of safety for all not being prioritized and being over-ridden by the parent's right to contact
- The inappropriateness and risks of forcing women who have experience domestic violence into mediation and other dispute resolution processes
- The presumption of joint parental responsibility giving abusive parents shared responsibility and possibly equal time with children, which they will use to continue abusing and controlling children and ex-partners
- Parenting Orders being made that jeopardize the safety of women and children
- Lack of legal representation at Family Relationships Centres where parenting plans can be agreed to
- Fear that women in a situation of domestic violence will be pressured into Parenting Plans that are unsafe and unworkable
- Women who contravene Parenting Orders to protect their children or themselves from violence and abuse, being severely punished

The Government response to these concerns, expressed by the whole sector has consistently been that women and children experiencing domestic violence and sexual assault will be screened out of these processes.

Even in the best set of circumstances, it is extremely difficult to screen effectively for domestic violence. When the Bill so clearly disadvantages women who disclose domestic violence or child abuse and is permeated by myth of "false allegations", then screening becomes impossible as women would be too scared to disclose.

Recommendations

We stand by all the recommendations made in our previous submissions and we think that safety for women and children in Family Law will not be achieved without implementing them.

However in this submission we would particularly like to recommend that, in order not to silence women escaping or experiencing domestic violence and/or protecting their children from child abuse:

That the "false allegations" provision in the Bill - courts required to order costs against parties 'knowingly' making a false allegation or statement (s117AB) – not be introduced

That the Family Law Act definition of domestic violence not be amended to include an "objective" test

That in recognition of the popularity of contravention applications being used by ex-partners to legally harass residence parents, all applications for contravention proceedings should place the burden of proof on the party bringing the application. Further penalties should be available to the court when applications are found to be without substance and the party bringing the application is exploiting the family law system as a form of harassment and control.

That the capacity of parents to withhold contact to protect their children from exposure to violence or abuse be supported in the Bill

The NSW WRM would like the opportunity to support this submission with oral evidence.

Yours sincerely,

Catherine Gander
Executive Officer,
NSW Women's Refuge Resource Centre

Attachments

1. WRRC submission to Consultation Secretariat Family Law and Legal Assistance Division, Attorney-General's Department, January 2005
2. WRRC submission to House of Representatives Standing Committee on Legal and Constitutional Affairs, July 2005
3. Women's Safety After Separation Fact Sheets 2 and 3