Submission No 24

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

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WOMEN'S LEGAL SERVICES NSW

Incorporating
Women's Legal Resources Centre
Domestic Violence Advocacy Service
WDVCAP Training & Resource Unit
Indigenous Women's Program
Walgett Family Violence Prevention Legal Service
Bourke/Brewarrina Family
Violence Prevention Legal Service

23 October 2006

Director
Standing Committee on Law and Justice
Legislative Council
Parliament House
Sydney NSW 2000

Dear Director,

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

Thankyou for the opportunity to make a submission to the Inquiry into the impact of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) (the *Act*) and note the Inquiry terms of reference as:

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

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

Introduction

Women's Legal Services NSW (WLS) is a statewide community legal centre providing legal services to the most disadvantaged women and children in NSW. We prioritise services to Indigenous women, women from culturally and linguistically diverse backgrounds, women in rural areas, women with disabilities and women who are victims of domestic violence.

WLS predominantly provides legal advice and representation in family law, domestic violence proceedings, sexual assault matters and victim's compensation.

WLS operates the following programs:

- Women's Legal Resources Centre (established in 1982);
- Domestic Violence Advocacy Service (established in 1986), and
- Indigenous Women's Program (established in 1997).

WLS also auspices:

- Walgett Family Violence Prevention Unit (established in 2000);
- Bourke/Brewarrina Family Violence Prevention Unit (established in 2005); and
- Training and Resource Unit of the Women's Domestic Violence Court Assistance Program (established in 1996).

WLS provides telephone legal advice across NSW and we have a dedicated Indigenous Women's legal contact line. We provide face-to-face advice clinics in Western Sydney. We travel to some of the most remote areas in NSW to provide community legal education and advice clinics. We undertake casework and also provide training and resources to workers in the Women's Domestic Violence Court Assistance Schemes in NSW.

Our work provides us with the capacity to monitor and assess the impact of the law on women in NSW. Since the *Act* only commenced on 1 July 2006, we believe it is too early to realistically assess the impact of the changes on women and children in NSW. However, we will highlight issues that are of concern in relation to women and children in NSW and provide some early experiences and observations of the operation of the new family law system.

Terms of Reference 1 - Impact of the Act on women and children in NSW

The *Act* introduced significant amendments to sections of the Family Law Act dealing with children. A strong emphasis is placed on a child's right to a meaningful relationship with their parents and on encouraging co-operative parenting after separation.

The reviewed Objects and Principles, the best interests of the child considerations, the presumption of equal shared parental responsibility and the emphasis on mediation (to be called family dispute resolution) and parenting plans highlight this shift.

In an ideal world this shift is commendable, however for women and children experiencing family violence the time of separation is when they are at most risk. It is also the case that where family violence is present mediation is inappropriate. The new family law system may undermine the significance of family violence perpetrated on women and children.

Part VII of the Act deals with Children. The Objects and Principles of Part VII have been extensively re-written. The focus is still on emphasising the best interests of the child but it is clear that this

includes the meaningful involvement of both parents in the child's life to the maximum extent possible. The Objects include the need to protect the child from harm however it is couched in a number of provisions that encourage involvement with each parent. Of concern, is the apparent balancing exercise that arises: both parents having meaningful involvement with their children and the need to protect children from harm. We are concerned that in balancing these potentially contradictory provisions that the importance of protecting children from harm will be diminished.

Also, despite the Act prioritising the best interests of the child, a two-tiered hierarchy of considerations now exists of 2 primary considerations and a number of secondary considerations. In addition, there is a new subsection in the 'best interests of the child' provisions which require the court to take into account the behaviour of parents in facilitating a relationship with the other parent (known as the 'friendly parent' provision). It is not clear how the Family Court will interpret the primary and secondary considerations and the friendly parent provision, but initial concerns exist where family violence is present and the form of spending time and communicating arrangements with the abusive parent is being considered.

The previous provisions in the Family Law Act created a tension between the 'child's right to contact' in the Principles and the safety considerations in the 'best interests' section. The tension had tended to be resolved in favour of the right to contact. In the current form of the Act, we are concerned that the tension between 'meaningful relationship with both parents' and 'protection from harm' is even more likely to be resolved in favour of contact with both parents. In our view, the meaningful relationship must be recognised to be a positive relationship and free from violence. There are early signs that this is not likely to be the case as the following recent case study highlights:

> *The client is on a temporary resident visa and her ex-husband is a resident of Australia. The client, her husband and 1 yr old child live in a small community in regional NSW. The client is a victim of domestic violence. The violence not only included severe emotional, psychological and financial abuse, but the client had been physically and sexually assaulted on a number of occasions. The child was a victim of emotional and psychological abuse. Some of the physical abuse to which the mother was subjected occurred whilst she was holding the child.*
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> *In July this year, the client escaped the violence and moved to a refuge with their child. However, since the community was very small, she was concerned that her ex-husband would locate her very quickly. Her friends informed her that her ex-husband had called them and was looking for her. On hearing this information, the client felt unsafe and became very scared of her ex-husband. She moved through two refuges in a month, however continued to feel unsafe in the community, which motivated her to relocate interstate urgently, to where all of her friends and supports in Australia lived.*

On the client moving interstate, her ex-husband applied for a recovery order. The recovery order was successful and the Federal Police located the child and returned the child to NSW. The client also returned to NSW with the child. Initial interim orders were then made for 50/50 shared care.

At a later interim hearing, the client sought orders that the child live with her and have supervised contact with the father. The father sought "equal time" living arrangements. The client provided an affidavit detailing the domestic violence in the relationship and the father's limited contributions to the child's daily care. The client also provided two supporting affidavits that confirmed this violence. The client advised the court that there was a contested interim AVO in place against the father listing both the child and the mother as protected persons. The father also provided an affidavit, which did not deny or even address the violence.

The Court ordered that each week the child live 3 days with the mother and 4 days with the father. These orders were made, despite the significant evidence supporting domestic violence. It appears that the Court relied on evidence from police notes detailing an incident where the mother stated that "she had no fears for herself and her child" indicating a lack of understanding of the dynamics of domestic violence. It also appears that the court took account of s. 60CC(3)(c) – the 'friendly parent' provision to give additional time to the father.

One significant consequence of the changes is a change in community expectations and assumptions by legal advisors that the courts will interpret the new provisions by ordering more equal time or substantial and significant time. Anecdotal feedback we have received from women seeking advice on our telephone advice service includes an apparent shift in the approach taken in negotiating parenting arrangements towards more shared time arrangements without adequate reference to 'best interest of the child' or 'reasonable practicality' considerations. For example:

A client contacted WLS advice line for family law advice. Recently she entered into a 50/50 shared care agreement with her ex-partner for their two children, a toddler and a teenager. The client entered into this agreement on the advice of a previous solicitor. However, the client was concerned that her ex-partner works two jobs and is required to care for the children 50% of the week. On the other hand, our client is willing and able to care for the children for the majority of the week as she only works part-time.

As well, WLS is concerned that the presumption of equal shared parental responsibility and the consequent requirement to consider equal shared time or substantial and significant time may further inhibit the ability to relocate. For example:

A client contacted WLS advice line for family law advice. The client had been in a defacto relationship for five years and had one child who was 21 months old. At the time, the client's partner was contemplating separation. Three months prior to the advice call, the client, her partner and child moved to NSW from another state. All of the client's family and social support was in the other state. If the parties separate there is concern

that it may be difficult for her to relocate, as the partner wants to remain in NSW.

WLS believes this will be particularly acute in circumstances of domestic violence when relocating is likely to be part of an imperative to escape the violence.

Family Dispute Resolution

The changes to the Family Law Act emphasise participation in family dispute resolution for children's matters. Mandatory family dispute resolution requirements will be introduced over a three-year period, with the requirement to produce a certificate from a family dispute resolution practitioner when filing a court application commencing from 1 July, 2007.

There are some exceptions to the mandatory requirement, for example in cases where there has been, or there is a risk of, family violence or abuse; where a party has a disability or remoteness of location mean access to family dispute resolution is not practical. Parties will have to file affidavit evidence explaining why they were not able to obtain a certificate from this date.

Of particular concern is the expectation that requirements for mandatory family dispute resolution are likely to impact more on Aboriginal women and women from culturally and linguistically diverse (CALD) communities.

In obtaining help, Aboriginal women often avoid dealing with authorities and the legal system. Additionally, research has provided evidence that there are high rates of under reporting of violence and abuse in Aboriginal communities. Therefore, Aboriginal women are in the most vulnerable position when attempting to navigate through the Family Court system and family dispute resolution. For Aboriginal women in regional, rural and remote communities, it is significantly more difficult due to the lack of legal services and culturally appropriate assistance.

For women from CALD backgrounds, language difficulties may also arise in attempting to mediate parenting arrangements. Despite the provision of interpreters and extra time to resolve parenting arrangements, issues arise in relation to cultural awareness training particularly in instances of domestic violence.

WLS is concerned that the introduction of compulsory family dispute resolution will have a negative impact on women in NSW. Since mandatory family dispute resolution commences next year, protocols and other procedures are yet to be finalised by family dispute resolution centres. However, it is unclear how well centres will screen clients for power imbalances and domestic violence.

Serious concerns remain about the risk to women and children who have experienced family violence and the requirements to attend family dispute resolution. While the legislation contains some safeguards for victims of family violence, their implementation will depend on the quality of the screening and

risk assessment, the training of professionals, services available, interpretation of legislation and administrative guidelines and other practical considerations.

There are some early experiences which provide examples of poor implementation. We refer to anecdotal evidence provided by the Combined Community Legal Centres Group to support its concerns in relation to family dispute resolution:

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

Although the presence or a history of domestic violence indicates that family dispute resolution is not appropriate, many women may be in a position where their options are limited and may wish to choose to participate in family dispute resolution. Women need to be able to make an informed decision about this and need access to information and advice about the process and dynamics of mediation and assistance in preparation and ideally advocacy at the mediation. The current Legal Aid Commission family law conferencing service provides legal advocates at mediation as well as providing telephone and shuttle mediations. This service provides important safeguards and offers an essential option which should be retained.

Family Violence and Abuse

WLS believes that the amended definition of family violence will have an adverse impact on women and children. The Act has amended the definition of family violence from a subjective to an objective test. It is now defined as follows:

> ***family violence*** *means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.*
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> *Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.*

The Family Court of Australia's own Family Violence Strategy, recognises that family violence may occur prior to, during and after separation and may impact on a person's capacity to effectively participate in court events. It is recognised that family violence has a significant impact on the well being of children. There is a link between spouse abuse and child abuse – that is, a

person who abuses their spouse is likely to abuse their child. Being exposed to or witnessing violence is highly damaging to children causing behavioural and emotional problems.

WLS believes the introduction of an objective test will have a negative impact on women and children in NSW. The introduction of this test adds undue pressure on women to objectively prove the existence of violence and fails to recognise the many forms of family violence. Family violence is not just physical, but psychological, by harassment, manipulation and intimidation. The more insidious forms of violence are not always obvious. Often, this violence is ongoing and perpetrated in ways that are particular to the victim, but not necessarily obvious to the objective bystander.

The requirement to satisfy the Court on reasonable grounds that there has been violence and abuse in the relationship will impact more significantly on Aboriginal women. An Aboriginal woman is 45 times more likely to experience violence than a non-Aboriginal woman[1] and are less likely to report this violence.

WLS is of the view that the reference to family violence is also insufficient in the best interests considerations. As already stated, the Family Law Act now prioritises the best interests of the child into primary and additional considerations. Of the primary considerations, the need to protect the *child* from harm is accounted for, however it is only the additional considerations that reference is made to family violence, as follows:

> *(j) any family violence involving child or member of child's family*
> *(k) family violence order if final or contested order*

In particular, WLS is concerned regarding the demotion of family violence to the additional considerations. As well, it provides that the court is to only recognise a final or contested family violence order ie an Apprehended Violence Order (AVO) in NSW. Therefore, for a woman who has been a victim of domestic violence and the only evidence of this violence is an interim AVO by consent, the Court may not recognise the violence in its subsequent parenting orders.

In addition to this, anecdotal evidence suggests that some family law practitioners are advising women to refrain from applying for AVOs if family law proceedings are ongoing. This is in circumstances of emotional abuse, which are less likely to lead to a final order. Women are advised that due to the introduction of an objective test to prove family violence applying for a contentious AVO may have an adverse outcome on their family law proceedings.

The Act also introduces a section that provides the court power to make costs orders where a false allegation or statement is knowingly made (s117AB). WLS believes that the inclusion of this

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[1] Human Rights and Equal Opportunity Commission, *Bringing them Home Report Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* April 1997

test is unnecessary and may impact more on women, who are more likely to be victims of domestic violence.

In NSW there is a very poor success rate for applications for AVOs brought by police where the application is defended. In our experience police prosecutors are not well enough resourced to prepare adequately for a defended hearing leaving women whose application for an AVO is defended by the perpetrator at risk. It is often the case that perpetrators who defend applications are more likely to be doing this as a form of on-going harassment and control and the failure rate of the police applications being of even more concern. Where an application for an AVO fails, as well as being left without the protection of an AVO, the woman complainant is more at risk in family law proceedings of being able to prove the violence and / or have it taken seriously.

Terms of reference 2 - Impact of the Act on operation of the courts that can prevent family violence perpetrators coming into contact with their families:

WLS refers to Division 11, Part 7 of the *Act*, which deals with the interaction of family violence orders and family law orders. Difficulties have always existed in relation to the prevention of family violence, as state courts deal with family violence orders, in NSW by Apprehended Violence Orders (AVOs), but family law is a federal jurisdiction. Division 11 attempts to provide instruction to both jurisdictions in relation to these issues. For the purposes of this inquiry the relevant state legislation is Part 15A *Crimes Act* 1900, which deals with AVOs in NSW.

The emphasis on parent contact is again provided for in Division 11, however a child must also be protected from harm. The *Act* again highlights the necessary balancing exercise between the protection from family violence and the desire for the child to have a meaningful relationship with both parents.

If an AVO exists and family law proceedings are subsequently heard, the family court must provide reasons for orders that are inconsistent with state-issued AVOs. The court must:

- specify in the order it is inconsistent
- give a detailed explanation in the order as to how contact is to take place
- explain the order to all people affected by the order
- serve a copy of the order on various named parties eg police, Local Court.

The *Act* retains the power of state courts to vary a parenting order on making an AVO where there is an inconsistency. To vary a parenting order, a state court can now only exercise its power if the court "has before it material that was not before the Court that made the order". This places an extra onus on state courts to have sufficient reasons to vary, suspend or revoke an order. It was previously difficult to persuade police prosecutors and Local Courts to use this provision in the Family Law Act and the effect of the changes in our view will mean that there will be more reluctance to vary existing parenting orders when making AVOs.

WLS believes that this will have a negative impact on women and children in NSW. Throughout the amendments, emphasis is placed on contact between parents and children. If state courts only refer to new evidence, without referring to earlier evidence of family violence and/or child abuse, which was before the Family Court, it may skew the court's view of the violence, and influence its discretion to vary a parenting order.

For women, it may undermine the relevance of the domestic violence previously suffered in that relationship. If a state court is reluctant to vary parenting orders due to lack of fresh evidence, a woman may be forced to interact with the perpetrator so that the parenting orders are not contravened.

Conclusion

Women's Legal Services NSW commends the NSW Government commitment to women and children in NSW and the Committee's Inquiry into the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). We encourage the NSW Government to ensure that this scrutiny is ongoing.

WLS provides recommendations below to address some of the issues that have arisen from this Inquiry. It is possible for the NSW Government to respond in a number of areas to reduce the potential impacts that the Act may have on women and children in NSW. The recommendations are:

1. To liaise with the Commonwealth government to ensure that proper screening and risk assessment for family violence and child abuse is included as part of the accreditation and provision of family dispute resolution services as well as adequate training, resources and services to ensure proper implementation.

2. That the NSW Government educate police prosecutors about the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and its effect on AVO proceedings so that police prosecutors are more willing to request variation, suspension or revocation of family law orders.

3. That the NSW Government monitor and improve the success rate of defended applications for Apprehended Violence Orders brought by the police.

4. That the NSW Government provide education and training to magistrates in the operation and interaction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and Part 15A *Crimes Act 1900* (NSW) and the soon to be introduced *Crimes Amendment (Apprehended Violence) Bill*.

5. That the NSW Government continue to support the Legal Aid Commission's Family Law Conferencing Program and ensure that independent chairpersons become accredited as family dispute resolution practitioners.

Please contact Ms Brigid O'Connor of our service if you have any questions or issues to discuss in relation to this submission.

Yours faithfully,

Janet Loughman
Principal Solicitor
Women's Legal Services NSW