Women's Legal Service

1. Introduction - who are we?

1.1 Women's Legal Service in Brisbane has been operating for 27 years. We provide legal advice, information and referral on legal issues to women across Queensland. We adopt a multi-disciplinary approach involving legal staff closely collaborating with staff that has extensive social science knowledge and experience (including social workers and domestic violence workers). This multi-disciplinary, collaborative model results in better outcomes for our clients and also informs our legal and policy reform and community development work.

1.2 Our work is 85% in family law with the majority of our ongoing and more intensive case work involving clients that have experienced domestic violence. As a result of this, over the past 20+ years WLS has closely aligned and linked in with the domestic violence sector in Queensland.

1.3 Our direct client service is provided both on a face to face basis (ie solicitor/ social worker appointments with clients) and also over the telephone. We also operate a night time legal advice service three times per week that is staffed by approximately 100 volunteers who are a mix of solicitors, social workers, counsellors, students and other committed professionals.

1.4 Our management committee provides strategic direction to the Service and, despite being a legal service, the Service has throughout its history been a mix of social work/ domestic violence workers and lawyers. Both professions have used this experience to learn from one another, not only in providing better outcomes for clients but by better informing our legal and policy reform and community development work.

1.5 We provide around 4000 advices each year. Because of our telephone advice service more than 30% of our clients are from outside the Brisbane metropolitan area. In 2009, we opened a new rural telephone advice line, staffed by a solicitor that operates 4 hours per week solely dedicated to women calling from outside the greater Brisbane area. Our clients come from diverse racial, cultural and religious backgrounds.

1.6 We also undertake community education and community development work through which we learn about a wide range of women's experiences in the legal system. The continuous issue our clients raise with us over many years, is that the family law system does not respond to their concerns about domestic violence and their fears for their children's safety and their own safety. Our clients often do not even have the opportunity to advise their fears to participants and decision-makers in the system. This can be for a range of very complex reasons including their own lack of identification of certain behaviour as domestic violence, the skill level of professionals in the system in relation to appropriately identifying and responding to domestic violence and the fact that many of our clients are unable to obtain legal aid to even have their "evidence" placed before the court. Even in circumstances when they do advise participants and decision-makers in the system about domestic violence, their fears and concerns can be ignored, dismissed or downplayed.

1.7 WLS commends this Government for listening to the experiences of many of these victims of domestic violence through agencies like our own who work with them and and introducing

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the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.* However, we hold serious concerns that the Bill does not go far enough. Although the Bill may be a 'step in the right direction' a lack of fundamental reform to the Family Law Act will continue to place women and children in danger.

1.8 We are a member of Women's Legal Services Australia (WLSA) and our main response to the Bill is contained in the WLSA submission. This submission has been written to provide a particular Queensland context on some issues and to highlight additional points that our clients have presented with but have not been picked up nationally. Our views are drawn from our direct client experiences and from a consideration of relevant literature. We would welcome the opportunity to explore any of these issues further (or provide you with additional reference material) if there are some issues raised that are of particular interest to you.

2. Child support – a driving force behind many family law disputes

2.1 In our experience a driving force of many family law disputes is the issue of child support. Historically, the family law policy position was always to keep the two issues separate. That is, even if a person was not seeing their children, they still had an obligation to financially support their children and vice versa, just because a person was not financially supporting their children was not a reason to deny contact. There is now an incredibly strong linkage between these two considerations and very little separation of them in practical terms. When we ask our clients why they are coming to see us it is not uncommon for them to refer to the fact that their former partner is, for example-:

- Now seeking equal time because of the amount of child support he has to pay; or
- their former partner has got a job and is now seeking more time with the children because of child support;
- their former partner has got a promotion and is now seeking more time because of child support.
- Additionally, our clients are now often describing their situation in terms of % of nights, referring to their care arrangements, which is an adoption of child support terminology.

2.2 The issue of child support being the driving force behind disputes is exacerbated by the amendments in 2006 that emphasized future arrangements rather than past care arrangements. Changes in the care arrangements seem to be more readily accepted. The family law system tends not to intensively scrutinize the reason why a father who has had little to do with the hands on care of their children might now want orders for substantial time that also might coincidentally align with the child support sliding payment scales.

3. Family violence matters – not a small minority of cases

3.1. There is strong anecdotal evidence that the majority of family law cases that formally interact with the family law system (eg. The system is wider than just courts and includes mediation agencies and Legal Aid Commissions) overwhelmingly concern issues of family violence. In our discussions with numerous family disputes resolution practitioners, they often sight their agencies identifying family violence as a factor between 60 - 80% of their cases, one agency referred to 100%. This obviously has major policy repercussions for the development of family law policy, which to date seems to be based on the fact that the Act speaks to all Australian families. However, although this might be the case what is becoming more and more clear is the matters that need and use the Family Law Act more than perhaps any other, are matters involving family violence. Clearly, in such a situation a

legislative framework that prioritises and supports safe outcomes throughout is required.

4. Complexity of the *Family Law Act* – an issue of community understanding

4.1 Successive amendments to the Act have resulted in complexity, duplication and too much layering of the provisions to be considered. The proposed changes will add to this complexity in the absence of a complete restructure and rewrite at least of part VII of the Act. Laws are meant to be written in a way that is easily understood by the community. If lawyers and judges have expressed difficulty in understanding the cumbersome nature of the Act, how can ordinary Australian citizens expected to understand? It is little wonder that myths are rampant in the Australian community about what people believe the law says rather than what it actually says. Perhaps, consideration really needs to be given to a complete re-write and simplification. Any restructure should make family violence central to the determination of parenting matters and central to the provisions in the Act.

5. The connection between 'mental health' issues and domestic violence

5.1 In our experience, the mental health of women is considered by the courts without reference to a broader consideration of the issue and impact of domestic and family violence. Mental health is cited as the reason in 31 per cent of court cases where the mother receives less than 30 per cent of time and where the mother receives no time. This is compared to 2 per cent of cases where the father receives no time. (1) Given the high incidence of domestic violence and the impact this has on women's health,(2) it seems likely that cases involving women's mental health issues may also involve serious issues of violence and abuse. The mental health of women in these circumstances is clearly exacerbated by lengthy court and legal processes and by a system in which it is difficult for them to be believed. Further investigation and analysis is required to track matters and explore the experience of mental health issues by women proceeding through the family law system

5.2 WLS believes there is also a strong connection between these cases and the ones described by commentators as 'intractable disputes' or 'high conflict'. Many of our clients spend years seeking to have violence and abuse taken into account by the family law system. Often these matters end up focussing on the 'difficult mother' often described as experiencing a mental illness. Issues of violence and abuse raised early in the life of these court matters are often ignored over the passage of time and mothers feel punished for their attempt to protect their children. Unsustainable orders for the father to have unsupervised time are a common outcome in these matters and, as the dispute continues, sometimes 'residence' is reversed with some women receiving orders for no 'time with'. This also highlights some of the difficulties faced by women who have mental health issues, including the re-victimisation suffered by women who have lived with domestic violence and have mental health issues.

6. The sexual abuse of children – a system in disarray

6.1 This is an issue that has concerned the Women's Legal Service throughout it's life-time.

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1 Family Court of Australia (2009), *Shared Parenting Responsibility*, 2 March, accessed 20 August 2009 at <http://www.familycourt.gov.au/wps/wcm/resources/file/eb6b6e03325f52f/SPR_org_02_03_09.pdf>.

2 Intimate partner violence contributes to 9% of the total disease burden of Victorian women aged 15-44 with 60% of this burden attributable to mental ill health: VicHealth (2004), *The health costs of violence: Measuring the burden of disease caused by intimate partner violence: A summary of findings*. Women previously or currently abused are 4-5 times more likely to report depression than women free of violence: Lee, C (ed) (2001), *Women's Health Australia: What do we know? What do we need to know? Progress on the Australian Longitudinal Study of Women's Health 1995-2000.*

Women have always and continue to seek advice from our service about concerns about possible sexual abuse of their children by their former partner or the father of the children. Some of our clients were sexually abused as children themselves. We are aware of the devastating and life-long impact on women's physical and mental health of this type of abuse, especially when it occurs at a very young age, was on-going through significant periods of childhood and was perpetrated by a family member.

6.2 The very nature of the crime – that it is perpetrated against children, (who may or may not be verbal or to provide testimony in a way the legal system requires), usually in secret, without other witnesses or often any physical evidence, by trusted members in the family, has always meant that the legal system has grappled with an appropriate response.

6.3 Added to this is the strong links between and often co-existence in families of issues of domestic violence and child abuse and that children disclose to a person they trust, often their mother when they feel safe. In our experience, little regard is had to the fact that the mother herself is a victim of abuse from the same perpetrator and her actions/ reactions can come under close scrutiny and sometimes harsh criticism. This is because again the legal system tends to concentrate on the 'child abuse' aspect of the matter, ignoring the domestic violence. Issues of child abuse are of course important but it must be placed within a dynamic of violence and the mother's reactions to her child's disclosure should be considered, also within this context.

6.4 Unfortunately, over the last decade or so the system's response to child sexual abuse has got worse principally because of the Family Law Act's shift away from taking a protective decision (an unacceptable risk of abuse) and adopting a more criminal-like approach to decision-making "if you can't prove it, its irrelevant to the decision". This regressive approach is closely aligned to changes in the Family Law Act in 1996 that promoted a shift towards elevating issues of ongoing contact over safety and the changes in 2006 that in practice, entrenched an attitude by many in the system of achieving shared parenting outcomes 'at almost any cost'.

6.5 Some of the reasons for our concerns are outlined below-:

- Criminal action is difficult to take especially where children are pre-verbal or just verbal (4 or 5 years) and are unable to provide an oral statement of evidence in a clear, coherent manner and to a standard that an evidence based court system requires (or is used to) and there is no other forensic evidence;

- If there is a protective parent (usually the mother), Child Safety may not even investigate the issue or provide any advice or support and refer the mother to the Family Court;

- It is extremely difficult for the mother to even get legal aid because there is no other 'hard' or 'forensic' evidence. Disclosures the child has made to the mother or another person, concerns raised by professional people about behavioural issues will be looked at but *may* not given a lot of weight. Often the only disclosures have been to the mother and the system views her evidence with an 'eye of suspicion';

- Mothers making these types of allegations in the Family Courts can be vilified especially when acting for themselves – in our experience it is not uncommon for their concerns to be disbelieved and they risk being regarded as emotionally abusing the children and losing significant time with the child. Rarely is it taken into account that these mothers are commonly victims of domestic violence by the same perpetrator and little

consideration is given to how this issues impacts on the decisions/ course of action a mother may take in trying to protect her child.

- Some of the most difficult cases that the Women's Legal Service has to provide advice on commonly have the following attributes-:
  - The child has made disclosures of sexual abuse concerning sexual behaviour by an adult towards them;
  - The disclosure is usually made to the mother and sometimes to other family members/ friends;
  - There is no physical evidence of abuse;
  - The child may be exhibiting sexualised behaviour;
  - The mother is unable to obtain legal aid and is often acting for herself;
  - There is a history of domestic violence towards the mother.

- The court appointed experts lack the appropriate clinical experience and understanding of working with victims of child sexual abuse and domestic violence. We would question the expertise of some report writers to provide opinion evidence in this area and believe it can be dangerous as it misinformed and can lead to unsafe outcomes.

- The expertise of other counselling agencies who see the children and the professional opinion evidence they can bring can be dismissed 'out of hand' or given little weight because they are believed to be 'tainted' and not independent. The lack of independence relates to the fact that the mother may have organised the counselling herself, the agency may have interviewed the mother to put themselves in the picture, the agency may be a domestic violence agency and therefore an agency that begins from a basis of believing that the abuse has occurred rather than scrutinising victim's stories.

- Mothers can be advised by their solicitors to not raise their concerns about abuse because it places them in a position of possibly losing time with their children and an order for the transfer of 'residence' to the perpetrator. Although a concerning trend, unfortunately it is a reality. Clients of the Women's Legal Service have lost time with their children after raising issues of sexual abuse and being completely disbelieved.

6.6 The system's flaws (including inadequate legislation and court resources and processes) become self-perpetuating because cases are mediated and compromises reached on women and children's safety in matters that should not be mediated. When consent orders are entered into on a compromised set of facts or violence/abuse issues are not raised at all, it can be very difficult to raise the issues at a later time, if further concerns about the children are identified.

6.7 As has been explained, these issues although exacerbated by the 2006 amendments predated those amendments. They raise fundamental flaws with the family law system that the proposed amendments in the Bill, we fear will do little to address.

6.8 Additionally, we believe that significant changes are needed to section 60CC of the Act, in how the court determines what is in a child's best interests. As set out above, our main response to the Bill is contained in the WLSA submission, however we have raised additional issues below which we believe will enhance the effectiveness of the amendments and provide better protection for victims of family violence.

7. The need for future stability of parenting arrangements

7.1 The 2011 Bill retains the element in section 60CC(3)(l) that requires the court to consider whether it would be preferable to make an order that would be least likely to lead to the institution of further proceedings in relation to the child.

7.2 Research has demonstrated that equal time parenting arrangements are some of the least stable of parenting arrangements and can break down months or even weeks after being entered into or ordered. It is not uncommon for our clients to refer to the fact that their former partner is breaching the terms of the order soon after the order was made or alternatively, their former partner is choosing not to spend time with the child in accordance with the time stipulated in the orders.

7.3 Litigation does not necessarily result from the latter type of circumstance, especially if it is a reversion to primary carer/contact arrangement. The mother may be satisfied with this arrangement but perhaps it is the order that should have been made in the first place.

7.4 WLS recommends that section 60CC(3)(l) should be redrafted as follows:
Whether it would be preferable to make the order that would be least likely to break down or lead to the institution of further proceedings in relation to the child.

8. The history of care of the child and attachments – relationships more clearly defined

8.1 The importance and impact on past care arrangements and attachments for the child is not adequately addressed in the proposed changes. The 2011 Bill retains broad considerations to take into account the child's relationship with a parent which are set out in the additional considerations contained in section 60CC(3) of the Act as follows:

- the nature of the relationship of the child with:
  - each of the child's parents; and
  - other persons (including any grandparent or other relative of the child);
- the likely effect of any changes in the child's circumstances, including the likely effect on the child of any separation from:
  - either of his or her parents; or
  - any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living.

8.2 The above provisions do not adequately encapsulate the history of the care of the child or the child's attachments. We consider it is imperative that the role of the primary care giver and the child's attachment to a parent are included as considerations in determining the best interests of the child, particularly where the child is young or has been exposed to family violence. In circumstances where a child has been exposed to family violence, it is imperative that the history of the carer's role is taken into account in ensuring the child is adequately protected and cared for into the future.

8.3 WLS recommends that the additional considerations contained in section 60CC(3) should be redrafted to include the following:

The history of care for the child and a consideration of the continuity of existing parent-child attachments.

8.4 This wording would specifically refer to the history of the relationship as an important consideration for determining future parenting arrangements. Additionally, by including the wording 'attachment', the court can then refer to the relationship rather than just the amount of time a parent has spent with the child.

9. Abolishing vs. "watering down" the "friendly parent" provisions

9.1 The Exposure Draft Bill proposed to repeal all of section 60CC(4) that requires the court to consider the extent to which each parent has fulfilled or failed to fulfil responsibilities as a parent (the "friendly parent" provisions). The 2011 Bill now proposes to remove only some aspects of the friendly parent provisions, namely, that the court would no longer be required to consider the willingness and ability of the child's parents to facilitate a relationship with the other parent, and the extent to which they have done this.

9.2 While WLS supports this removal, we oppose the retention of remaining elements currently contained in section 60CC(4)(a) and (c) of the Act that require the court to consider each parent's participation in decision-making about major-long term issue relating to the child, spending time with and communicating with the child, and maintaining the child. These elements are included in the 2011 Bill in proposed section 60CC(3)(c) and (ca).

9.3 The culture of the "friendly parent" is alive and well in the court and judicial decision making. This culture has been long-standing as a similar provision existed in the section 68(F)(2) provisions in the 1996 Act. It is our position that the 2011 Bill simply "waters-down" the friendly parent provision. We are concerned that the proposed provision will still be used against women in domestic violence cases, where the mother will be forced to explain why she has chosen to limit her communications with the other parent about long-term decisions, spending time or communicating with the child or maintaining the child, when in fact the mother is acting to protect the child. In reality, the remaining provisions are likely to be used by the other parent to argue about the mother's failure to facilitate a relationship, despite the abolishment of the court to consider the extent to which the mother has facilitated a relationship with the other parent.

10. Extending the family violence provision

10.1 The 2011 Bill retains the consideration set out in section 60CC(3)(j) of the Act to take into account any family violence involving the child or a member of the child's family in determining the best interests of the child.

10.2 WLS recommends that this consideration should be redrafted as follows:

"any family violence involving the child or a member of the child's family or household including a consideration of-:

i. The nature and seriousness of the violence used; and

ii. How recently the violence occurred;

and the consideration of the impact of the family violence on the child or members of the child's family or household including:

i. Any physical, psychological , sexual and emotional harm caused;

ii. Any impact on safety, including emotional safety;

iii. *The child's need for stability;*

iv. *Any future needs arising out of the violence, including but not limited to, counselling and/or therapeutic needs;*

v. *The extent to which the order would require the parties to communicate with each other about issues in relation to the child and whether such communication would expose the child or members of the child's family or household to on-going or future family violence; and*

vi. *Any other matters the court considers relevant.*

10.3 The proposed broadening of the consideration would provide the court with more guidance and insight about the impact of the family violence and how it affects a child and other members of the child's family, as well as taking into account any on-going or future risk of violence. The above considerations further recognise the impact on the capacity of the caregiver to parent when they have been subjected to family violence (eg. because of post traumatic stress and the other impacts of family violence). The above definition also aligns with definitions in Canadian and New Zealand family law legislation.