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***The Women's Legal Service of South Australia Incorporated Response to the Federal Governments' Family Law Amendment (Shared Parental Responsibility) Bill 2005***

**ABOUT THE WOMEN'S LEGAL SERVICE (SA) INC.**

The Women's Legal Service South Australia Inc (WLSSA) is a state wide community legal centre specifically established to assist with and address legal issues that affect women. The service provides assistance to over 3000 women annually. WLSSA provides a free and confidential service to women from varying social, political, cultural and economic backgrounds, as well as providing community legal education to women both in metropolitan Adelaide and locations around South Australia. WLSSA endeavours to facilitate an increased understanding of the law and legal rights amongst women, through provision of information to women themselves and to relevant agencies. We also offer a service providing opportunities for women in remote areas and Aboriginal women to have access and equal representation to and within the legal/justice system.

The matters that we most commonly advise on are Family Law, Family and Domestic Violence, Discrimination Matters, Sexual Assault, amongst others. Children's issues and Property Matters are the areas where women most frequently require our service. In light of our experience of and knowledge about family law issues as they affect women, the Women's Legal Service (SA) Inc is well placed to comment on the proposed amendments to the Family Law Act 1975. In considering the proposals outlined by the government in the exposure draft, we have serious concerns about the *Family Law Amendment (Shared Parental Responsibility) Bill 2005* (hereafter referred to as "the Bill") and its likely impact upon women.

The fact that we have not discussed a particular provision in the Exposure Draft should not be taken as an indication either of support or opposition to that provision.

## **1. Amendments to s60B – Pro contact**

### **60B Objects of Part and principles underlying it**

(1) The objects of this Part are:

(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.

(2) The principles underlying these objects are:

(a) except when it is or would be contrary to a child's best interests:

(ii) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development; and

(b) children need to be protected from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse or family violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse or family violence or other behaviour that is directed towards, or may affect, another person.

- **WLSSA supports the NNWLS in jointly welcoming the provision of s60B(2)(b) as recognition of the surrounding issues involving violence and abuse.**

**WLSSA opposes the introduction of the proposed change to amend section s60B to include s(1)(c) of the Family Law Act *“to ensure that children have the benefit of both of their parents...to the maximum extent..”***

- ...parents having a meaningful involvement in their lives...The intention of introducing these provisions is to encourage parental responsibility, and urge both mothers and fathers to focus on their children's future well being rather than their own anguish. This concentration on responsibilities rather than rights appears to have failed.

These proposals emphasize a push for a pro-contact environment, a change inconsistent with "*the need to protect children from physical or psychological harm*" a principle listed under the same provision. Is it in the best interests of a child to re-establish contact with a parent where the contact parent re-establishes contact and then stops taking contact again? Is it in the best interests of the child when contact is sought to simply make life difficult for the resident parent? If levels of conflict between the parents continue at very high levels after separation, and children are caught up as messengers or spies in these conflicts, then contact may impact negatively on children's well being.<sup>i</sup> Where parents are abusive, dysfunctional or unwilling to maintain contact, the research<sup>vii</sup> shows that the consequences for the children can be damaging. In these circumstances the research states that contact is inappropriate.

Is it reasonable to enforce the presumption of joint parental responsibility where the parent goes overseas for a number of years and has no contact with the child, then re-appears and under the provision exercises significant control over the child's life?

And what of parents/perpetrators who are known to use their children as vehicles for intimidation of the mother. A study of women's experiences of violence post-separation found that 73% reported that perpetrators used their children as a pawn or tool to get at the mother.<sup>viii</sup>

Perpetrators of domestic violence have been found to be more controlling and to be less consistent in their parenting than non-abusive parents. They are more likely to undermine the mother's parenting and the mother-child relationship.

The paramount consideration of what is in the best interests of the child is child focused but there is no reference to child-inclusivity/or inclusiveness. There is no provision to include opportunities for the child to express his/her views on the way her/his time is spent and with whom in line with the provisions of the United National Convention on the Rights of the Child. It is concerning that there is no systematic attempt to include children in the determination of their lives through either parenting plans or orders. *Even children as young as five years' of age can talk about their feelings and what situations mean to them despite the complexity of the experiences....the view that children's capacities to understand and participate have been underestimated.*<sup>ix</sup>

- **WLSSA strongly supports the NNWLS Recommendation 1 and 2.**

## **2. Parenting Plans s63DA**

- S63DA requires advisers to inform people of the option of entering into a parenting plan and where they can get assistance in developing such a plan.

The heavy emphasis on developing parenting plans which legal advisers or the court have not checked may translate to families agreeing to plans that are impractical and/or not in the best interests of the child. This in turn will add to the growing number of court applications in the courts. How will advisers address the issue of a parent who displays greater negotiating skills, or asserts more power and dominates the negotiation process to the detriment of the weaker party? Agreements should not necessarily be assumed to be 'truly consensual'.

- The proposed reforms are not child focused, there is a move away from the best interests of the child as the paramount consideration, especially in cases of domestic violence and abuse.

Such a stance is likely to subject numerous children having contact with violent fathers in the mistaken belief that any father is better than no father at all.<sup>ii</sup> 'Legislating for good

relationships is unlikely to create the trust, cooperation and goodwill required to co-parent successfully after separation, but a non-adversarial approach can help...separating adults who are able to safely co-operate will continue to do so no matter what system is in place, the problem is with the deaths and injuries and continuing damage to people who are forced to continue relationships with people who have abused them'.<sup>iii</sup>

### **3. Family Relationship Centres (FRC) s10E & s10N**

The prerequisites for organisations seeking approval as agents of dispute resolution have been amended. The requirement that the organisation be 'voluntary' or non-profit has been removed. Organisations that operate on a for-profit basis can now tender for these increased services. The Women's Legal Service strongly opposes the position that Family Relationship Centres' case management approach is based on outcomes. We fear that these services may be driven by fulfilling a quota at the cost of what is in the best interest of the children, it is concerned with ends rather than means. When the focus is on quantitative outputs and the sustainability of FRC, the result may be that less time and effort will be used in drafting a parenting plan. This can only mean an increased number of litigants in the Family Court – not less as is intended, when the terms of the agreement do not emphasise as paramount the best interests of the children.

We raise a number of concerns in relation to the formation and the operation of the Family Relationship Centres, a majority of the services that have been outlined in the exposure draft are already provided by many organizations such as Centacare and Relationships Australia. Why not inject those funds into these existing services, allowing them to expand into regional and remote areas of Australia. A common obstacle faced by regional, remote and rural communities is access to services – government or non-government. Are we to burden struggling families from remote or rural areas with few resources and on low or no income to access and where applicable compulsorily attend mainly metropolitan based FRC? Such impracticality will undoubtedly ensure that Indigenous and rural families fall through the cracks again.

There are also concerns about the FRC being run by community organisations and the implementation of the FRC as a screening process, the implications of bringing to the table their beliefs and objectives and how this may impact on the nature of service they provide. We see this as a major issue to be dealt with, particularly where community organisations are tendering for these services.

There needs to be in place a system of accountability for FRC, an independent complaints body must be established to deal with and monitor the provision and quality of service provided by FRC.

#### **4. Parental Advisers & Family Dispute Resolution (FDR)**

There are serious concerns in regards to the level of staff training and cultural appropriateness to be offered by Parenting Advisers, the qualifications of whom are yet to be identified. We express concerns about the ability of such advisers in regards to their professional expertise, life experience, ability to screen and assess situations of violence, especially the more subtle forms of violence such as ongoing emotional abuse, financial control, social isolation etc. Will parenting advisers be able to offer a highly vigilant level of supervision so they can adequately address the issue of safety?

Research has shown dispute resolution services that already exclude cases involving family violence or child abuse continually include family members in the process who are exposed to violence, and are forced to relive the trauma.<sup>iv</sup> The advisers would require experience in identifying signs of violence and/or abuse, this calls for research to be conducted to identify effective screening processes. In many cases a series of interviews is required to identify undisclosed violence in the home<sup>v</sup>, and it is imperative that during this process the preservation of the safety of women and children is not jeopardised.

Staff at Family Relationships Centres should be provided with thorough training in the dynamics of domestic violence on an on-going basis. Training needs will have to cover domestic violence, child abuse, the interface between the child abuse and domestic

violence, the impact of domestic violence on women and children, the increased likelihood of separation being caused by domestic violence and child abuse, and the increased risk of escalating violence and abuse following separation.

The question is raised whether these advisers need to be independent of the FRCs and not have a vested interest in making their quota for a preferred non-adversarial solution and are not encouraging parties to enter agreements that are not in their best interests.

WLSSA members hold the belief that FRC mediation should not begin until a parenting advisor performs a checklist ensuring each party has had an opportunity to obtain independent legal advice. Legal advice should be sought before parties agree to finalise a parenting plan.

- **We support the NNWLS submission that each party produce a certificate of independent legal advice.**

WLSSA believes that the role of the adviser should not be restricted to just providing information about parenting plans to clients but should extend to providing clients with a full range of options including referrals to other more appropriate organisations so that clients are in a position where they can make a fully informed decision about what is in the best interests of the child.

- S60I will require parties to attend FDR prior to issuing court applications.

The exception is where there has been family violence or abuse or a risk of such violence occurring.

The standard of proof under s60I(8)(b) requires the court to be satisfied on 'reasonable grounds' that abuse has occurred or a risk of it occurring. The ability of victims to produce evidence that satisfies the legal criteria can in some cases be difficult if not impossible to meet. Where a person does not attend FDR, and met the standard of proof that there are reasonable grounds to believe that there had been or there is the risk of

family violence, they may still be directed to attend FDR by the court under the operation 'the court must consider making such an order' of s60I(9).

- S60I(8)(e) requires the court to decide whether parties are ...*unable to participate effectively in family dispute resolution*... Without further training judges may not be the preferred choice to make this determination given that they do not take part in the FDR process and may have limited time to assess the parties.

- **The WLSSA adds its support to the NNWLS' Recommendations 3 and 4.**

## **5. Shared Parental Responsibility s 61DA**

- The current law already deals with parents consulting one another over long term decisions regarding the welfare of the child unless there is a contrary court order.

Whose interests are we promoting? The measures proposed in the Bill do not seem to reinforce the entrenched legal priority of the best interests of the child. On the contrary they appear to promote parent's rights over children's welfare.

- S61DA provides a new presumption, or a starting point that the court must take into account when making a parenting order.

Therefore the starting point is joint parental responsibility for the child, in other words parent's rights to equality and not what is in the best interests of the child. It appears that no one has considered what this may mean for children if they are presumed to be shared by parents – instead of the usual focus on what it means for their parents. Parenting arrangements should be determined on the basis of the best interests of the child in the context of the particular circumstances of each child. There should be no presumptions in law that one parenting arrangement is better than another.

- **WLSSA strongly opposes the introduction of s61DAC and believes the current law adequately provides for parents to consult with each other over long term decisions where they share parental responsibility for a child.**



- The WLSSA supports the NNWLS' suggestion that if s61DA is introduced, a presumption against joint parental responsibility where there is family violence or abuse also be introduced.

## 6. S63DA(2) Obligations of Advisers to Raise 'Substantial Time' Arrangements

- Section 63DA(2) requires advisers (lawyers, counsellors, dispute resolution practitioners and family and child specialists) who give advice on parenting plans, they must inform people that *'if the child spending substantial time with each of them is...practicable; and...in the best interests of the child: they could consider the option of an arrangement of that kind'*.

Encouraging lawyers to advise clients to strongly consider shared parental responsibility places lawyers in an undesirable position not taking into account the professional and ethical issues that this raises. This can be viewed as undermining and even fettering a lawyer's ability to freely advise their client what is appropriate in the circumstances. And what of the practicalities of enforcing such a plan? The day to day practicalities such as; the distance each parent lives from the child's school, the suitability of each parent's home, the parent's mental and physical health and work responsibilities. And what of the emotional burden and responsibility this places on a child - asking a child to pack up their life, their sentimental possessions, their homework, their school uniform on a continual basis, and what of the consequences when they forget something? We reiterate the view of the NNWLS that equal time parenting is only appropriate in particular circumstances and where there is a high level of cooperation between the parents and they live in close proximity. What is the case when parents live at a significant distance from one another?

### Case Study 1

*Mary and John have been married for ten years. They have two children of the marriage David and Louise aged ten and six. The family moves to a regional area for John's work. Mary and John then separate. Mary cannot find work, has no extended family in the area, no resources of any kind and needs to move to a metropolitan area with the children.*

*Regardless of what is in the best interests of the children and under these reforms Mary is required to stay in the area.*

The proposal assumes that neither parent will ever need to move away, there are many reasons for a parent to relocate and these are heavily based on what is in the best interests of the children. This is not a feasible proposal, equal parenting time can only be achieved if parents live near each other ad infinitum, it would be unreasonable to tie one parent to a regional or remote area just so that the other parent can exercise their equal parenting responsibility.

There is very limited data in regards to parents who opt for equal shared parenting. Of their children, how are these arrangements structured and how well do they work? Available research<sup>vi</sup> does suggest that these arrangements are often logistically complex, and that those who opt for shared care appear to be a relatively distinct group of separated parents.

We do know that in order for parents who opt for a fifty/fifty care of their children, a number of conditions appear necessary to make shared care a viable option, including:-

- (a) geographical proximity;
- (b) the ability of the parents to get along in terms of a businesslike working relationship as parents;
- (c) child focused arrangements (with children kept "out of the middle", and with children's activities forming an integral part of the way in which the parenting schedule is developed);
- (d) an established history of cooperation and shared parenting, a commitment by everyone to make shared care work;
- (e) that both parties are capable of and available to care for the children.
- (f) family friendly work practices;
- (g) a degree of financial independence, especially for mothers.

These conditions need to be satisfied so that the welfare of the children is maintained, but how many parents are able to “get along” and are able to keep the children “out of the middle” during parental conflict?

Parents who have cooperated and decided on equal parenting time have already reached an agreement and do not require any legislative change to do this. Parents who are able to reach an amicable agreement regarding parenting time rarely decide on equal parenting time. Studies show that these parents agree to one parent having substantial care and the other having arranged contact times, what is practical and workable for both parents.

We feel that where both parents are seeking and demanding substantial parenting time with their child/ren, serious concerns should be raised by advisers in Court or in the FRC, these are the cases where conflict is an issue amongst the parents and substantially shared parenting time is least suitable.

The focus of the proposals appears to be favouring fathers’ rights and agendas rather than prioritising the best interests of children. We hold considerable concern that such reform appears to be privileging father’s rights to contact over the principle of the best interests of the child. Research has shown that the ‘right to contact’ principle within family law has taken precedence over concerns about children’s exposure to domestic violence and child abuse. The emphasis on promoting a parent’s right to have a meaningful involvement in their children’s lives would shift the focus from safety to contact. Furthermore the proposal for equal shared parenting will place undue pressure on women who are already in a disempowered position to agree to an arrangement, which may well put themselves and their children at risk. According to Amato and Gilbreth (1999), these studies found that the *quality* of contact is more important than the amount of contact in terms of good post-divorce outcomes for children. Accordingly, they suggest that future research adopt more comprehensive and rationally based measures of contact quality instead of relying on simple measures of contact frequency. The notion of a preconceived template for dividing children between their parents on the basis of parental rights does not ensure that the best interests of children will be given priority. The child’s best

interests need to be at the centre of any arrangement, and those best interests need to be assessed based on the unique situation of every child. In particular, all decision-making needs to be on the basis of protecting children and other family members from abuse or violence.

- **WLSSA welcomes the presumption against equal shared parental responsibility in cases involving violence and abuse.**

However, we are concerned about the standard of proof that would be required to prove violence or abuse has occurred. The ability of victims to produce evidence that satisfies the legal criteria can in some cases be difficult if not impossible to meet. Unfortunately, there is no provision for how to ensure that such evidence can be presented to courts. Greater consideration and clarification of this process is needed, training is required to ensure that professionals are able to pick up cases where violence and abuse is involved, and education is imperative to change entrenched attitudes and inform women what services are available to them.

- The formulation of s61DA(2)(a) is irregular and raises uncertainty.

If the parent or person living with the parent has engaged in child abuse against a child who is not within the parent's family, the presumption still applies. The presumption could apply to a parent who is a convicted paedophile or who uses child pornography within the home. Family violence is not qualified so the presumption might not apply in the case of an isolated incident that the child may not be aware of. The provision of s61DA(2)(a) is anomalous and calls for clarification. The Government proposed a presumption against equal shared parental responsibility where there was evidence of violence or abuse in its discussion paper on 'A new Approach to the Family Law System', there is no mention of this proposal in the Exposure Draft.

## **7. Definition of Shared Parental Responsibility to include requirement to consult s65DAC**

- The WLSSA opposes the specific legislative requirement for parents to consult each other about major long-term decisions in regards to the children's care, welfare and development.

The onus is put on the residential parent to consult on every issue with the non-residential parent and they are left with the responsibility of ensuring that all these decisions are fulfilled.

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| <ul style="list-style-type: none"><li>• WLSSA agrees with NNWLS' Recommendation 5 not to introduce s65DAC.</li></ul> |
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## **8. Compliance Regime s70NEAB**

**s70NEAB Court has power to make, and must consider making, order compensating person for time lost**

(1) The court:

- (a) may make a further parenting order that compensates the person referred to in paragraph 70NEAA(d) for time the person did not spend with the child (or the time the child did not live with the person) as a result of the current contravention; and
- (b) must consider making that kind of order.

The Exposure Draft requires the court to consider make up contact time even where there has been a reasonable excuse for contravention unless *....the court must not make an order under paragraph (1)(a) if it would not be in the best interests of the child for the court to make that order.*

The court must consider awarding compensation for reasonable expenses incurred where a breach resulted in a parent not spending time with the child. This provision suggests

- that resident parents (mainly mothers) are frivolously denying the non-resident parents contact. What of the non-resident parent who fails to collect the child when arranged to, who intermittently has contact, who establishes contact temporarily only to break it for long periods of time? When will they be held accountable? And what of the resident parent's frustration by the non-resident parent's lack of interest in having contact with the child/ren? In Britain, Bradshaw et al. found that 21 per cent of non-resident fathers had not seen their children for at least a year; and that another 10 per cent had only seen their children once or twice in the past year; Maclean and Eekelaar; Simpson et al. 1995 found that 27 per cent of non-resident fathers had no contact with their children. In New Zealand, Lee (1990: 47) found that one-quarter of children had lost contact with their fathers within two years of their parents' divorce. In the United States, Maccoby and Mnookin (1992: 172) found that "by the end of our study, the proportion of mother-residence children who were no longer visiting their fathers during regular portions of the school year reached 39 per cent"..

- **WLSSA recommends the inclusion of a provision that requires the court to exercise punitive and /or compensatory measures on a non-resident parent who fails to meet their contact obligations**

## **9. Grandparents s60D(1) & Definition of Family**

The existing legislation gives appropriate avenues for grandparents to have an on-going relationship with their grandchildren after separation.

The current definitions of family are clearly outdated and are based on obsolete moral codes that do not reflect the changed social and economic environment. We need to broaden our definition of families, ideas about what a family is need to be adaptable and flexible and keep up with our changing society. The traditional idea of a nuclear family consisting of a mother, father and child/ren is no longer representative of today's society,

it has been replaced by the extended family including mixed families, community and friendship families, subsequent relationships, defacto relationships and same sex couples. Do the provisions provide for all of these types of families, will they have access to FRC?

- **WLSSA believes that the Bill does not acknowledge a significant sector of the community let alone provide provisions for all these kinds of families.**

## **10. Removal of references to residence and contact**

- **The WLSSA welcomes the introduction of neutral language.**

The terms custody and access were replaced because they implied a sense of ownership of children and inferred a winner/loser scenario. What purpose will it serve to again alter those terms? Changing terminology does not modify people's perceptions, their attitudes or their responsibilities in regards to the welfare of their children. Making the terms "family friendly" such as 'lives with' and 'spends time with' will accomplish nothing if more funding and assistance is not used to educate the eroding family culture. Changing the terminology does not detract from the fact that parents have responsibilities towards their children and sugar coating it does not address the failure of meeting those obligations.

## **11. s68F(2) Provisions from overseas models**

- These amendments introduce a new factor that the court must consider which is the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent.

- **WLSSA categorically rejects the adoption of the two provisions from the State of Florida being included as factors in deciding the best interests of the child. The introduction of these provisions from Florida would put additional pressure on parents who suspect abuse is occurring, to facilitate contact.**

A parent may be unwilling to assist and encourage shared care if there are concerns that the children are being exposed to violence and abuse. The parent may be unable to meet the evidentiary legal requirements to prove this. It should not be inferred that not meeting these requirements means her allegations are false, rather that the requirements are not appropriate. In fact, behaviour that prevents or reduces contact may be an indicator of genuine parental responsibility: actions to protect a child from abuse. The Florida legislation will punish victims of violence, while arming perpetrators with the legal right to further harm children.

### **Conclusion**

WLS believes that more public debate is required on the proposed changes that are currently being championed by the government. Discussion is needed to ensure that the implementation of these proposed reforms do not result in any unintended consequences that places the lives of innocent children unnecessarily at risk. WLS firmly believes that the need to satisfy a handful of fathers should not outweigh the right to safety of hundreds of thousands of women and children fleeing violence.



**Footnotes:**

<sup>i</sup> Silent Tears and Anguish, Zita Ngor, Women's Legal Service SA Incorporated 2004

<sup>ii</sup> Dr Elspeth McInnes NCSMC

<sup>iii</sup> R Rendell, Z Rathus and a Lynch, *An Unacceptable Risk; A report on child contact arrangements where there is violence in the family*, Women's Legal Service Inc., November 2000

<sup>iv</sup> Contrary to some views, 70.9% of women found it very difficult to disclose domestic violence to professionals they came in contact with, at least initially. Other women, especially Indigenous women, were reluctant to report the abuse for fear that statutory child protection authorities could take their children away from them.

<sup>v</sup> Australian Institute of Family Studies, 2003.

<sup>vi</sup> Mbilinyi, Edleson, Beeman and Hagemiester (2002) cited in Judicial Council of California, p.8

<sup>vii</sup> Lamb, Sternberg, & Thompson 1999<sup>viii</sup>

<sup>viii</sup> JB Kelly, 'Current Research on Children's Post Divorce Adjustment: no Simple Answers,' (1993)

<sup>ix</sup> Mayall, 1994; Simpson, 1989 Access and Other Post-Separation Issues – A Qualitative Study Research Report, University of Otago, July 1997.

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