SUBMISSION RE EXPOSURE DRAFT OF THE *Family Law Amendment (Shared Responsibility) Bill 2005.*

The Albury-Wodonga Community Legal Service is a cross-border, generalist legal service. Whilst we give generalist advice, information and referrals we also provide services such as a family law advice clinics and an Intervention Order Court Support Scheme meaning we deal with numerous clients with issues relating to arrangements for children following separation.

Our service made a submission to the initial inquiry into child "custody" arrangements which can be provided if required. We note the short time that was provided to prepare submissions and advise that we have not addressed all proposals due to this.

We look forward to further consultation regarding these proposed amendments if appropriate.

Shared Parental Responsibility – s.61DA

Regarding the presumption of joint or shared parental responsibility this is provided for in the current legislation. In our experience when orders are sought or consent orders drafted both parents retain joint responsibility for long term matters and deal with day to day matters when the child is in their care. It is very rare for a court to remove a parent's parental responsibility. There is also the risk that this presumption maybe emphasised over the child's best interests or parents will feel pressured to make decisions which are ultimately not in the child's best interests.

We also have concerns that a presumption of "shared parental responsibility" may be misinterpreted by parents as a presumption of "shared care", ie. 50/50 care – which is not to be introduced under this Bill. Since the release of *Every Picture Tells a Story* we have found that this is occurring leading to a lot of confusion and often anger and frustration.

In relation to the requirement that parents must consult each other about "major long-term issues" under the Shared Parental Responsibility we note that in theory this is the case under the current law, however we often find that parents are unwilling or unable to do this. This new emphasis on genuine attempts to make joint decisions may lead to parents putting themselves in danger to attempt to reach agreement or violent partners using this as a tool to commit further abuse. In turn it will also lead to more contravention applications – against resident parents who make decisions without consultation. On the other hand it is unlikely (as is the case currently when contact parents refuse to have contact) that contravention applications would be successful against a parent that refuses to be involved in this decision making role.

This amendment is, in our view, unnecessary and should not be introduced.

Removal of the terms "residence" and "contact"

It is submitted that the removal of terms such as "residence" and "contact" and replacement with "parenting orders" and references to "parenting time" will create further confusion within the community. Despite terms such as "contact" and "residence" being introduced to remove concepts of ownership with amendments to the Family Law Act in 1995 individuals continue to refer to "custody" and "access" and it is submitted that regardless of education campaigns people will continue to use these terms. Whilst the attempt to focus on the relationship that the parents have with

their children rather than the amount of time they spend with them is commendable in practical terms there is the necessity to be able to identify whom a child spends the majority of time with (if this is the case and there is not shared care). The reality is that parents will still feel that there is a winner and a loser and this will be according to who "gets" the children or who has the most the time with them, regardless of what it is labelled. See below for a further discussion regarding the use of the term "time" within the Exposure Bill.

Parenting Plans and Parenting Orders

The inclusion of "other communications" which can be dealt with in parenting plans or orders is commendable and will hopefully result in parents looking at alternative ways to have "contact" with their children. There is concern, however, at the inclusion of "time" rather than "contact", as it is submitted that this will remain the focus of parents rather than the relationship they have with their child.

It appears that the "re-introduction" of Parenting Plans may create some confusion. These are not legally binding yet courts must have regard to these plans, which may be developed in inappropriate circumstances and may not be in the best interests of the child as they have not been through any checks such as consent orders when they are filed in court. By having Parenting Orders subject to subsequent Parenting Plans there will be more complexity, confusion as to a parent's obligations and potentially more contravention applications.

It is our view that regardless of these "parenting plans" legal advisors will continue to advise parents to formalise arrangements through consent orders to avoid confusion and to be able to enforce these orders if necessary.

Substantial Time

Requirements that advisors inform parents of the need to consider this and that courts are required to also consider this where parents both want "residence" appear to emphasise parents' rights over the children's. Parents may feel pressured into making arrangements that are not in the child's best interests. Again, there is concern with the use of the term "time" as discussed above, as this will divert focus from the relationship a parent has with their child. It is very rare for "shared care" arrangements to work and they require a lot of co-operation between the parents. If an application is before the court and both parent is seeking residence it is likely to be a high conflict situation and therefore shared care would not be appropriate.
It is submitted that s.63DA(2) and s.65DAA should not be introduced.

Two tiered approach to best interests of the child

The recommended first tier of consideration relating to the best interests of the child may, in our view, conflict and result in the first factor (a meaningful relationship with both parents) being the primary consideration while issues of protection from harm may not be addressed adequately. Currently court practices show that there has developed what appears to be a presumption of contact regardless of the presence of family violence or abuse. From our dealings with Intervention Order applications we see that even where there is violence towards the child contact will still be allowed, albeit it sometimes facilitated if the violence has been directed towards the children. It is submitted that protecting children from harm should always be the primary consideration in determining their best interests.

Role of Grandparents and other relatives
We submit that these amendments are not required given that the current law adequately provides for contact with "other significant people" in a child's life.

Children's views to be considered
We agree with promotion of child-inclusive practices, however it is submitted that legislative change could set out requirements to ensure this is done in a consistent manner by the relevant decision-makers. It is submitted that the removal of the child's "wishes" is appropriate as children are then not being asked to choose between their parents.

Compulsory mediation/dispute resolution prior to court
With the introduction of the Pre-action Procedure this "compulsory mediation" is already occurring with couples forced to attempt, or be seen to attempt, to reach agreement before going to court. Compulsory dispute resolution compromises the benefit of tools such as mediation as participants are not willingly or voluntarily attending with the goal of resolving the matter.
We also hold concerns regarding the exceptions to this requirement. For example, individuals will need to prove there are "reasonable grounds" established that family violence occurred to be granted an exception from mediation. Will this mean numerous court events to determine this? Given that in most cases of family violence there are no independent witnesses, individuals claiming family violence will have difficulty proving it (as is often the case). This will complicate the court process more for these couples and may result in more individuals being reluctant to disclose details of violence. This in turn may result in inappropriate matters being resolved at mediation despite intimidation and pressure leading to the agreement.
In relation to the exclusion of "entrenched conflict" as an exception to compulsory mediation we fail to see how mediation will assist these couples if they cannot speak to each other or are not willing to resolve the matter. Our experience is that often individuals are hell bent on having their day in court and therefore they will simply go through the motions with no real attempt at resolving the matter.
Whilst the approach to encourage mediation is commendable it is worth pointing out that not all mediated outcomes are sustainable, and often this is where problems arise.

Natalie Greenham
Community Lawyer
Albury-Wodonga Community Legal Service
29 Stanley Street Wodonga Vic 3690
PO Box 725 Wodonga Vic 3691
Telephone: 02 6056 8210
Fax: 02 6022 8099
Email: cls@umfc.com.au