Women's Legal Service (Brisbane)
Submission to the Standing Committee On Legal And Constitutional Affairs
Inquiry Into Exposure Draft Of
The Family Law Amendment (Shared Parental Responsibility) Bill 2005

Women's Legal Service

The Women's Legal Service (WLS) is a Brisbane based community legal centre which has been operating since 1984. Our income is not linked to litigation and we have no financial or other investment in promoting alternative dispute resolution or litigation. A key value of this Service is to promote safety in the lives of the women we see, and their children. We provide around 4000 advices each year. Over 80% of our advices are in family law, with the main issues being domestic violence, residence, contact and property entitlements. Because of our telephone advice service more than 30% of our clients are from outside the Brisbane metropolitan area. Our clients come from diverse racial, cultural and religious backgrounds, and at one time we had a specifically funded position for a solicitor to work with women with disabilities. For the past 15 years we have received State funding to employ a Social Worker who works specifically in the area of domestic violence.

We also undertake community education and community development work through which we learn about a wide range of women's experiences in the family law system.

During the late 1990s WLS was closely involved with a research project about contact arrangements for children. In 2000 we published a report on this research entitled *Unacceptable Risk: A Report on child contact arrangements where there is violence in the family.* We have provided 10 copies of *Unacceptable Risk* to the Committee Secretariat for the members of the Committee.

Preliminary Comments

We endorse the submission made by the National Network of Women's Legal Services (NNWLS) and have kept our comments on the Exposure Draft (ED) fairly targeted and focused on a number of changes that we believe should be made to the ED to address particular concerns that we have emphasised below.

In our view the time frame given to the Legislative and Constitutional Affairs Committee ('the Committee') for consultation and preparing the report for Parliament is completely inadequate. While many of the concepts in the proposed legislation have been under discussion since the 2003 "Joint Custody" Inquiry, the interpretation of these concepts will be shaped by the ED. In particular, we believe that the significance of the changes proposed and the increase in the roles and agencies that form part of the family law system will amplify the impact on families, Courts, policy makers and future families, Courts and policy makers. Careful analysis is required – and this takes time. To ensure that families under stress are not placed at greater risk and that important resources allocated to the family law process are both adequate and effective particular care must be taken to best ensure that the effects of the changes are both intended and right.

We believe that in finalising the changes to be made, it is important to reflect on what has and has not worked in the past. In particular, we believe that it is critical to reflect on the nature of the changes that were made in the Family Law Reform Act 1995 ('the 1995 reforms') and the impact of those changes. For us, we had hopes for some positive outcomes from those changes and we learned that seemingly minor changes have impacted significantly and negatively on the operation of Family Law.

In the current proposals care must be taken to ensure that initiatives such as the naming of protection from physical or psychological harm in s60B(2)(b) and s68F(1A) does not backfire because of the introduction of other conflicting provisions and result in greater risks to safety for women and their children. To minimise the stress to families after separation, especially where children are at risk, and to ensure the best use of the family law system and the agencies that form part of it, it is imperative that the changes introduced lead to parenting arrangements after separation that are sustainable for children and their parents. The best way to ensure this is to be clear about what effect the changes will have on the current system and outcomes for children. The best predictor for this is the past.

We believe that some changes that have been proposed in the ED will lead to an increase in litigation as processes introduced may be open to exploitation by abusive parents. In particular, we hold concerns about the proposed s61DA, the presumption of joint parental responsibility. Abusive men have learned that violence pays. They use their aggression and violence as a way of manipulating the family law system to get what

they want. We find under the current system that, even without the presumption, long-term decisions are used by violent partners to bring court applications as a way of continuing a pattern of controlling behavior after separation. In our view, the requirement in the ED for the parties to consult and for decisions to be made jointly will exacerbate the current situation. Further, the current law provides that parents share duties and decisions concerning the care, welfare and development of their children and adequate provision is made for a specific order to be made in relation to sharing of parental responsibility or any other order that meets the best interests of the child.

We are also concerned about the extent of the focus on parenting plans in the ED and in this regard we support recommendations 8 and 9 in the submission made by the National Network of Women's Legal Services (NNWLS) to this Inquiry. In line with our comments on the joint presumption, we also know that the less formal processes surrounding mediation and conferencing in the current system are the ones most commonly exploited by abusive partners to exert power and control over the proceedings and place pressure on their former partner to agree to a particular arrangement.

We hold concerns that focusing on parenting plans, and in particular making provision for plans to override an earlier court order, will expose more vulnerable parties to exploitation. At best we believe this will lead to a greater level of confusion for parents about their responsibilities and at worst, in some circumstances, will lead to unsafe parenting arrangements - both will almost certainly lead to litigation for the matter to be resolved. We submit that children, their parents and the Court must not be exposed to exploitation from the changes that are introduced.

We applaud the Government's efforts to improve the operation of the legislation for Aboriginal and Torres Strait Islander Families and refer the Committee to the National Network of Indigenous Women's Legal Services (NNIWLS) for feedback on those provisions of the ED. However, we are concerned that the time is now well over due for a review of the legislation in regard to it's capacity to meet the needs of children from culturally and linguistically diverse backgrounds. We call upon the Government to undertake the necessary consultation to ensure that the legislation and the Family Law

systems are improved to meet the needs of this diverse group of clients.

Domestic and Family Violence – Death Reviews

Any change to the family law system has an impact on families affected by domestic and family violence. Because of our work in the area of domestic violence we have observed the impact that changes to the family law system have on the families we have assisted. Of ultimate concern is when deaths occur in those families when there is a family law matter in progress.

Tragically, domestic violence takes a significant toll in human lives each year in Queensland. In 2003, Queensland Police Statistics report that at least 19 adults and 9 children lost their lives as a result of domestic violence.(This figure is incomplete due to limitations of data collection). Domestic homicides are not random acts and often follow a history of abuse and violence. Often many domestic homicides have predictive elements to them. Victims and/or perpetrators may have intersected with any number of agencies and systems prior to the homicide, with varying degrees of success. In many of these cases the families have had contact with the family law system and the Family Court.

We believe that much can be learnt from these deaths in terms of how systems can be changed to prevent future deaths.

The key to the prevention of domestic homicide is gaining a better understanding of patterns, prior indicators and gaps in current responses. Conducting fatality reviews is one way of gaining a better understanding of the nature and pattern of lethal domestic violence and abuse. In some States in the U.S.A. and in the U.K. the introduction of fatality reviews by governments has brought about positive change in the area of domestic violence.

A fatality review typically brings together representatives from various agencies: police, courts, coroner's office, community corrections, health, domestic violence services, shelters, perpetrator programs and child protection agencies and other professionals with relevant expertise.

This multi-disciplinary team conducts a detailed review of public records and other

documentation regarding domestic violence related homicides in order to identify gaps in community responses to domestic violence and barriers to effective intervention. The purpose of the fatality review is not to assign blame but to create change. Information from fatality reviews combined with other sources of information (research, crime data etc) allows for the identification of patterns in domestic violence fatalities. Conducting fatality reviews also enables the team to identify gaps in services and accountability structures and formulate recommendations for policies, services and resources to fill those gaps. The Domestic Violence Fatality Review Board would produce a yearly report with recommendations for broad systemic change.

There has been a call in a number of Australian States by workers in the domestic violence sectors for the introduction of fatality reviews. In NSW the Attorney General has commissioned a literature review by the Australian Domestic Violence Clearinghouse on fatality reviews. We are optimistic that it will only be time before such reviews are introduced.

In addition to ensuring that the changes to the family law system that are currently under review best protect families from domestic homicides after separation, we submit that the Federal Attorney-General's Department and the Family Court must work with the States and Territories to ensure that fatality reviews are undertaken of any death where there have been interactions with the family law system. This process must sit alongside any changes that are made from the current Inquiry to ensure that the Law and the systems are continuously reviewed to best protect children from homicide.

A Framework of Safety

Violence is not caused by Family Law or legal processes. Domestic Violence is characterised by power and control and separation is a time when violence commonly escalates. In matters where there appears to be an escalation of violence after the denial of contact it is dangerous for legislators to consider that the denial of contact or the actions of resident parent may be the reason for the violence. Responding with violence is a choice made by the perpetrator to use that violence particularly as violence has worked for him in the past. It is notable that many perpetrators of domestic violence do not 'lose control' in other circumstances such as when they are involved in disagreements at work or with their friends. Retaliation with violence can never be excused. It is the conduct of the violent parent that must be examined and not that of a

protective parent. It is important in these cases to look at why contact was refused in the first place.

In our experience, most commonly long before women make a choice to refuse contact and despite concerns that they may have for the safety of their children, they look for ways that contact might still be able to occur[1] that is safe for their children.

Organisations like ours, work with the women to explore the safest option. As an example, a woman contacted our service approx. 3 months ago.[2] They had recently moved to Brisbane from Sydney. Her husband had been violent throughout the marriage and, of late, was abusive towards their child. A risk assessment alerted us to characteristics and stresses which put the child in danger of a possible murder suicide. A safety plan was formulated and she was able to leave. She was then able to organize for contact to take place between the child and her husband whilst there were other adults present. These adults were aware of his violence and were prepared to respond if necessary. The contact went well. She then made plans to provide similar contact on a regular basis.

How long these plans will last and he will be satisfied is not known. In cases like this his behaviour can change dramatically and she then has to make other decisions around safety. .Sometimes women go to extraordinary lengths to find a way for it to work because they are more frightened of the consequences for the safety of themselves and their children of not providing contact than of providing it. When informal arrangements break down it is critical that there is the option of the court to provide some safety around decision making.

It is critical that infrastructure and legal changes are incorporated into a whole framework that ensures the law works for and protects the most vulnerable families as these are the families that need the greatest level of support and intervention to ensure that the outcome is in the best interests of the child. It must be remembered that whilst the law must reflect the needs of the community, the unintended consequences for those

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[1] Kaye, M., Stubbs, J and Tolmie, J (2003) *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, Griffith University, p 139; See also - a 2003 analysis of income and labour data suggested that some 40% of resident mothers would like to see more father-child contact taking place: Smyth B and Parkinson P; 'When the difference is night and day: Insights from HILDA into patterns of parent-child contact after separation', Paper presented at the 8th Australian Institute of Family Studies Conference, March. 2003

[2] Some of the details have been changed to protect the privacy and safety of the family.

families who are at risk may be more dangerous. These families are over represented in the family law system and they are the ones that the legislation will have the greatest impact on as, rather than being able to reach an agreement, they are more likely to need a court determination. A safe outcome early on can provide the greatest opportunity for the best long-term outcomes for these families. In a USA study on 'high conflict divorce' cases, researcher, Dr Janet Johnson, concluded that:

> Children [in high conflict cases] need custody and access arrangements that minimize the potential for ongoing inter-parental conflict.
>
> [In these cases] ...custody arrangements should allow parents to disengage from their conflict with each other and develop parallel and separate parenting relationships with their children ...
>
> A clearly specified regular visitation plan is crucial, and the need for shared decision-making and direct communication should be kept to a minimum.[3]

The best interests of the child is central to decisions about children under the Family Law Act[4] and to this extent it is important that the drafting of the legislation reflects the role of this consideration. We have been concerned since the 1995 reforms that when decisions about children have been made contact, at least at Interim Hearings, has been prioritised over safety[5].

The culture that has developed that sits behind the Court's decision making has permeated into agreements negotiated at court, Legal Aid conferences and other dispute resolution processes. In our view, post separation parenting arrangements have become much more unsafe for woman and their children. Attached to this submission in Appendix A are some case studies of parenting arrangements that have been influenced by this culture. The case studies have been provided to us by an organisation that works closely with families and children affected by violence and abuse. We believe that the case studies help demonstrate the prioritising of contact over safety.

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[3] See: Johnson J (1994), 'High-Conflict Divorce' in *The Future of Children: Children and Divorce*, Vol 4, No 1, Spring, p 172. Dr Johnson is the director of research at the Center for the Family in Transition in California.

[4] *B and B: Family Law Reform Act 1995 (1997) FLC 92-755.*

Having regard to the evidence on the negative effects on children of being exposed to abuse either directly or by witnessing the abuse of their parent, in order to truly protect a *child's best interests* it seems clear that safety must be given top priority in decision-making.

We applaud the fact that safety for children has been incorporated into s60B, the objects and principles section. This section has set the tone for the interpretation of s68F(2) and the rest of Part VII of the FLA since its introduction in 1995 and the absence of any reference to safety until now, we believe, has prevented adequate weight being given to the consideration of family violence and abuse in parenting cases.

However, there is a sense from the 1995 reforms that the objects have been given greater priority than the principles in terms of the hierarchy of importance and therefore we believe that it is critical that the issue of child safety be moved from the end of the principles and incorporated into the object in s60B(1). It must be carefully positioned to ensure that it is given the top priority. We submit that Family Law and the systems that underpin it must be constructed within a framework of safety. This framework can only be achieved if we ensure that safety is properly positioned within the legislation. Further, it is this framework of safety that will meet the needs of the most vulnerable families - those families where there are children at risk.

To reflect the role of best interests of children in decision making and address concerns about the need for adequate weight to be given to the consideration of safety and protecting children from physical, emotional or psychological harm in decision making we recommend that s60B be amended as follows:

Recommendation One

> ***That s60B(1)(c) be redrafted by removing the reference to 'maximum extent' and to focus more clearly on children's rights (eg wording similar to that proposed for s68F(1A)(a) is preferable) AND that s60B(1)(c) and s60B(2)(b) should be located*** **together in** ***the Objects sub-section (1) AND***

[5] Dewar and Parker, 'The impact of the new Part VII Family Law Act 1975 (1999) 13 *Australian Journal of Family Law* 96 at 109; Rhoades, Graycar and Harrison, *The Family Law Reform Act 1995: the first three years*, 2001.

NNWLS Recommendation 12 should be adopted.

That s60B(2)(a) be redrafted to read 'The principles underlying these objects are that, if it is in the best interests of the child:

(i) etc

Recommendation Two

A clearer pathway for cases where there is violence or abuse must be introduced. We recommend that Project Magellan be extended to cases involving domestic violence and rolled out across Australia.

The priority given to safety must be consistently named throughout the legislation. We submit that the priority to be given to safety must also be incorporated into the first of the principles (set out in s60KB) which the Court is to give effect to when determining children's matters under the new less adversarial systems proposed in the ED. We believe that these new systems must be developed in a way that is consistent with a framework of safety and with the processes used in Project Magellan, especially if our proposal for the expansion of Project Magellan is adopted.

Joint Parental Responsibility and "Substantial Time" Arrangements

Central to the philosophy and culture intended to be adopted by the ED is the encouragement of joint parental responsibility and "substantial time" arrangements. Separating parents and all practitioners involved in family separations will study the new provisions for guidance in post-separation parenting arrangements. Therefore, it is critical that the provisions are clear and provide straight-forward guidance which protects against misuse of the concept or the making of inappropriate "agreed" arrangements or court orders.

In general we support the Family Dispute Resolution (FDR) processes introduced in the ED and we support the introduction of measures to ensure that there is clear infrastructure for substantial time arrangements where it is appropriate and it is in the child's best interests. However, in line with our comments about the need for a framework of safety, safety must be central to the consideration of what is in a child's best interests. If it is made clear in the legislation, in accordance with recommendations we have made, that safety is consistently given the same priority throughout the family law system then we submit that this will pave the way for the reforms to meet the needs

of families where there is violence and abuse and those families where there are not those concerns.

The legislation must make it clear that shared parental responsibility, "substantial time" arrangements and spending time with each parent are *only* encouraged where it is in the best interests of the child and that parenting arrangements are not linked to parents' rights. The encouragement of these parenting arrangements must sit within the framework of safety. In our view the notions of "time" introduced in the ED are dangerous as they shift the focus away from the different options that are available for contact between a child and parent. We believe that this will put greater emphasis on face to face contact and put women and their children at greater risk.

It seems clear that s65DAA(1)(a) is intended to ensure that cases involving violence, abuse or other dangerous conduct are excluded. However, we believe that clear guidance is needed in the legislation to ensure that "substantial time" arrangements are only made in appropriate circumstances and within the framework of safety. Research suggests that substantial time arrangements do not work for even a significant proportion of children and that it is only in some limited circumstances that it is successful. It has been reported that children have felt the pressure of trying to make things fair for both of their parents[6]. In Washington State, strong positive features must be present for an order to be made that involves a child moving regularly between two households over significant periods of time.

Recommendation Three

We recommend that:

- **the requirement for advisers to raise substantial time arrangements proposed under s63DA(2) not be introduced; AND**
- **the requirement for the Court to consider substantial time arrangements under s65DAA not be introduced; OR**

[6] Wade A and Smart C, As Fair as it can be? Childhood after Divorce, to be published in A Jensen & L McKee (eds)(2002), *Children and the Changing Family,* London, Lalmer Routledge, p 4; See also Smart, C., (2001) *Children's Voices,* paper presented at the 25th Anniversary Conference of the Family Court of Australia.

- **If, in certain circumstances, the Court is still directed to consider substantial time arrangements that the Family Law Act be amended to include requirements to be satisfied for a determination to be made that a substantial time arrangement is in the best interests of the child. We recommend the adoption of the following pre-requisites to such an order being made which are set out in the Revised Code of Washington (26.09.187 3 (a) (i)-(vii))[7]:**

    1. **That there are no contra-indicators**
    2. **That the order is in the best interests of the child; and**
    3. **A set of logical positive features**

        - **That the parties have a satisfactory history of cooperation**
        - **A history of shared performance of parenting functions [This can include an examination of the pre-separation roles played by each of the parents]**
        - **Geographic proximity**

<u>Recommendation Four</u>

We recommend that the presumption of joint Parental Responsibility set out in the proposed s61DA not be introduced.

In this regard we also support recommendations 6 and 7 in the NNWLS submission.

[7] See also the factors identified by the Federal Magistrates Court case of H & H (2003) FLC 93-168.

S68F – Determining the Best Interests of Children

Recommendation Five

That s68F(1A)(b) in the ED (the consideration relating to safety) be elevated to be the only primary consideration.

We also support recommendation 13 in the submission by the NNWLS.

We believe that the willingness of the parents to promote the relationship of the child with the other parent is linked to breaches and contraventions of orders. Breaches tend to occur in the most complex families facing a range of social problems – domestic violence, child abuse, substance abuse, gambling, poverty, etc. There are reasons for breaches and in any analysis of breaches consideration must be given to the risk of discouraging parents from protecting their children when they are fearful of abuse and also to the complexities surrounding disclosure of violence and abuse.

It must be noted that, by definition, a parent who withholds their child from contact in a way that would be consistent with s68F(1A)(b) proposed in the ED will not also be able to demonstrate a willingness to promote the relationship of the child with the other parent in accordance with s68F(2)(ba) proposed in the ED.

Recommendation Six

That s68F(2)(ba) in the ED not be introduced.

In our experience interim family violence orders are frequently made in urgent and dangerous circumstances and can provide good evidence of the power and control exerted by the abusive partner. Further, for a range of reasons including pressure from the abusive partner not to proceed many women drop out of the state systems of protection before the matters reach final determination. We believe that adequate discretion already exists to enable the Court to determine the weight in a particular case to be given to an order that may have been obtained ex parte.

Recommendation Seven

That s68F(2)(j) in the ED be amended to require the Court to have regard to all family violence orders, including interim orders.

We are concerned that the tone of the ED focuses on future parenting. For example, it appears under s60B(2) that the question a decision-maker would have to ask themselves is whether or not there is a risk that the relevant child will be abused or exposed to abuse. This will shifts the focus of the inquiry to the likely or possible behaviour of one of the parents while the child is with them. However, we submit that the history of parenting is equally relevant in the decision making process.

The history of parenting is important in assisting decision makers to ascertain the child's relationship with each of the parents and maintain stability for the child after separation.

Also, the relevance of violence and abuse is not limited to whether or not it is likely to be repeated. The fact that it has happened in the past is also of critical importance and extremely relevant to determining what post-separation parenting arrangements are likely to be in the best interests of a particular child. Adults capable of abuse generate fear for those living with them because the victims have learned from past experience that the violence is often sudden and unpredictable. Children watch for the warning

signs, are fearful of attack and experience problems with trust and confidence in their relationship with a parent who been abusive.

The Committee acknowledged in *Every Picture Tells a Story* that the "negative impact of family violence on children's emotional stability and future development is widely accepted". This statement implicitly acknowledges that having lived with violence continues to impact on children throughout their development and sometimes throughout the rest of their lives.

It is critical that the changes to the Family Law Act are carefully worded to ensure that the history of parenting can be taken into account and that both safety from future abuse *and* the impact of past direct and indirect abuse on the child's emotional and psychological well-being are taken into account in decisions about post separation parenting arrangements.

Recommendation Eight

We recommend that a new factor be introduced - the history of parenting.

Family Dispute Resolution

We oppose compulsory FDR and as set out in recommendation two submit that a clear pathway must be created for those cases that involve violence and abuse. In families where there are allegations of violence and abuse, parties must be able to choose not to utilise FDR processes. In an age where legal costs are high and the demand for legal aid assistance far outstrips supply choosing the court processes for many will inevitably be choosing the process where they will be less supported. We submit that women will only choose to go to court for good reason. Paradoxically some abusive partners will choose the court as a way of continuing the abuse of their former partner - again we submit that these are not the cases that are suitable for FDR processes.

We are concerned that the provisions in the ED relating to FDR, particularly in Part II Division 2 Subdivision A, leave too much to implication and do not set out the exact nature of the model of dispute resolution that will be adopted nor the functions and responsibilities of family dispute resolution practitioners. It is critical that the role of the FDR practitioner and assessments for suitability for FDR, including screening for violence, are designed in a way that provides a safe alternative to Court and will best

protect women who chose FDR. Factors to be considered by all FDR practitioners in all FDR processes when determining if FDR is appropriate must be clearly set out in the legislation.

Recommendation Nine

We recommend that:

- **The development of models of FDR to be used in Family Relationship Centres and other dispute resolution centres that will be involved in the Family Court process be informed by and done in consultation with Domestic Violence services and mediators who have expertise in understanding the role that mediation can play where there has been violence and abuse.**
- **Provisions such as those contained in Reg 62 of the *Family Law Regulations 1984* should be introduced to apply to all FDR processes and set out in Subdivision E of the *Family Law Act* to ensure that the provisions are given certainty and the priority to be given to them is clear.**

We also support recommendations 3 and 4 in the NNWLS submission.

Women's Legal Service (Brisbane)

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