

Submission No. 35.
Date Received.....

Women's House Shelta

14/7/05

NAH

The Secretariat
House of Representatives Standing Committee
On Legal and Constitutional Affairs
Parliament House Canberra ACT 2006
E-mail: laca.reps@aph.gov.au

RECEIVED
15 JUL 2005
BY: LAEA

Dear Secretariat

Please find below the Women's House Shelta response to the Draft Exposure Family Law Amendment (Shared Parental Responsibility) Bill 2005.

Women's House Shelta is a community-based service, operated by the Women's Community Aid Association. Shelta provides emergency accommodation and support to women and children escaping violence.

We appreciate the opportunity to provide comment on these proposed changes, as we believe that, if implemented, this Bill will have enormous ramifications for women and children escaping violence.

Yours truly,

[Redacted Signature]

Women's House Shelta

**Re: Draft Exposure Family Law Amendment (Shared Parental Responsibility) Bill
2005**

Overview

Our concerns lie with how these proposed changes will affect those women and children escaping a violent or otherwise abusive ex-partner or father.

It is our view that this Bill, its contents and purpose, represents a misunderstanding of the nature of domestic violence.

Numerous research papers and reports have already outlined the deficiencies of the current Family Law System with regard to domestic violence and child abuse. (Family Law Council's 2002 report "Family Law and Child Protection"; "Negotiating Child Contact and Residence Against a Background of Domestic Violence" 2003, Kaye et al; "An Unacceptable Risk" 2000 Rendell et al, "Child Abuse and the Family Court" 1998, Brown et al; etc) We believe that, if implemented elements of these proposed changes will further entrench the current problems in the way in which the family law system deals with families in which violence is an issue.

It is our opinion that the myth of epidemic false allegations of domestic violence and child abuse by women engaged in family law disputes, has influenced both the contemporary socio-political context in Australia and internationally and the current direction of changes to the family law system.

The following aspects of the proposed amendments are likely to accentuate the risk of violence for women and children.

- Pressure to engage in family dispute resolution processes
- Reliance on successful screening to identify violence and abuse
- Conflict between pressure to consider shared parenting time and consideration of the safety of children and their protective parent
- Pressure to consider shared parenting time

- Plans to adopt a “friendly parent” model (**68F(2)(b)**)
- Plans to punish parents who contravene orders or who refuse to engage in family dispute resolution processes by imposing a variety of sanctions ranging in severity.

These amendments will also be operating in a system where there is still no agency or other adequate means to investigate matters in the Family Court relating to violence, abuse and child protection.

Shared Parental Responsibility

We agree that there should not be a presumption of shared parental responsibility where violence or child abuse is an issue. However, we also submit that the violence and child abuse experienced by women and children accessing our service is often not addressed when they’re engaged in Family Court matters. **It is therefore our view that a presumption of shared parental responsibility further entrenches these shortcomings.**

The Government’s proposal to introduce a rebuttable presumption against shared parental responsibility where there is evidence of violence, child abuse or entrenched conflict will have little or no positive impact. While there is no agency to investigate allegations of violence or abuse for the Family Court and problems in the Justice and Child Protection Systems remain, in terms of substantiating child sexual abuse, this presumption will be ineffective.

“reasonable grounds to believe..” –Determining violence or abuse and the need for full and proper investigation

Through various sections of these proposed amendments there are references to exemptions to processes where:

“the court is satisfied that there are reasonable grounds to
 28 believe that:
 29 (i) there has been abuse of the child by one of the parties to
 30 the proceedings; or
 31 (ii) there would be a risk of abuse of the child if there were

32 to be a delay in applying for the order; or
 33 (iii) there has been family violence by one of the parties to
 34 the proceedings; or
 35 (iv) there is a risk of family violence by one of the parties to
 36 the proceedings;"

What will form reasonable grounds to believe that there has been abuse or violence or that there is a risk of abuse or violence? Will the Government be consulting with Domestic Violence and Child Abuse specific services to seek advice as to how this will be determined?

Alison Hay outlines below the difficulty of substantiating allegations of domestic violence and child abuse in the Family Court, in her 2003 paper "CHILD PROTECTION AND THE FAMILY COURT OF WESTERN AUSTRALIA: THE EXPERIENCES OF CHILDREN AND PROTECTIVE PARENTS".

"Cases before the Family Court involving allegation of domestic violence and child abuse pose many challenges to the Court and are therefore often difficult to determine. Often they may not have been substantiated but this does not mean that abuse has not occurred. Frequently discussed in literature is the inherent difficulty in discovering the truth where allegations are contested and where it is very difficult to obtain corroborative evidence that can support the allegations of the parent or the purported disclosure of the child (Behrens and Bolas 1997: Thoennes and Pearson 1988). Domestic violence and child abuse by their very nature are maintained through secrecy. In relation to most child sexual abuse cases, clinical evidence is not available to confirm the abuse (Myers, 1989: 6). According to Professor Patrick Parkinson problems in relation to the nature of child sexual abuse makes it harder to prove than any other crime (Parkinson 1998:2). Cases involving young children are especially problematic because they do not have the linguistic skills or knowledge to articulate precisely what happened in an adult like way that is often expected by the evidentiary standards of the legal system.

When allegations of child abuse are made in the context of a family law dispute there is theoretically two independent sources of assessment. The first source is the state or

territory statutory child protection agency. The second is the evidence of Court Experts appointed to provide assessments under Order 30 A of the Family Law Rules. A number of studies (Brown et al 1998; Hume 1997) have identified that even when notification are made to the state child protection service investigations are not necessarily conducted. In cases where the child protection agency does not substantiate the child abuse allegations for whatever reason, the Family Court is left to both investigate and determine intervention over the abuse through residency and contact proceedings.”

The Family Law Council, in their 2002 Report “Family Law and Child Protection”, also points out, below, the difficulty of substantiating allegations of violence or child abuse before the Family Court.

“Currently there is no capacity for the courts to investigate such complaints. The Family Court’s Mediation services are designed to promote conciliation, not fact-finding. The courts are reliant on the evidence presented by the parties. The Family Law Act requires reports of child abuse concerns to be made to the State or Territory child protection authority, and there is an assumption that the relevant authority will then investigate the case and either substantiate the child protection concerns or declare them to be lacking in substance. However, this misunderstands the role of the State and Territory child protection authorities. They do not have a general investigatory role in child protection. Their mission is tied to their statutory responsibilities.

The core responsibility given to State and Territory child protection authorities by legislation is to intervene when children are not being properly cared for by their parent or parents, or are not safe in the family home. The orders which can be made by Children’s and Youth Courts typically involve supervising the parents’ care of the children or taking parental responsibility away from them with the consequence that the children must be placed in alternate care. Many child abuse concerns raised in family law proceedings will not be investigated by child protection authorities because, although the issues may be of considerable importance in the family law litigation, the information provided does not indicate that the child is currently at risk.”

We are aware that the Standing Committee of Attorneys General has been examining ways to better coordinate the Commonwealth's family law system with State and Territory child protection systems. However, we have heard of no further plans to implement any related proposal. We are also aware that there is still no agency mandated to investigate allegations of domestic violence or other child abuse for the Family Court. We therefore seek the following clarification.

Will the Government establish a national agency to thoroughly investigate allegations of violence or abuse on behalf of the Family Court? Or does the Government have further plans to integrate the operation of state child protection systems with the Family Court, to allow for the proper investigation of child protection concerns arising in Family Court cases?

The need to prioritise safety

While we appreciate attempts within the proposed legislation to provide protection for children from "physical or psychological harm", we believe that the emphasis on contact with both parents already overrides and conflicts with the child's best interests in regard to safety.

These amendments are a product of a climate in which there is a deep suspicion of women's allegations of violence and other abuse in a family law setting. Violence and abuse are '*alleged*' and require evidence to support its existence. The "right to contact" is a clear underlying principle within the Act and underpins much of the direction of the current 'reforms' to the family law system. According to the introduction to the Government's discussion paper A NEW APPROACH TO THE FAMILY LAW SYSTEM, "Changes to the law will promote the objective of both parents having a meaningful role in their children's lives". The Government is now proposing to change the Act to require those advising families to consider equal parenting time. Women and children reporting their experiences of violence or child abuse are not only likely to be viewed with suspicion or disbelieved, but they also remain at risk of being coerced into inappropriate court orders for contact with an abusive ex-partner / father.

We believe that safety should be made a priority in the Family Law Act.

Screening

Our experience as domestic violence Support Workers is that many women do not initially identify their experience as having been domestic violence. Perpetrators of violence and abuse often manipulate their victim's perceptions of reality by denying, minimising and hiding their behaviour and by isolating those they seek to control and abuse. Women often report that they hadn't seen their experience as domestic violence even though they may have been raped, humiliated in front of their children or peers, isolated from family and friends, been choked or had threats made to kill them and their children. For many women, identifying as a "victim" means a loss of esteem and control they understandably may not be prepared to concede.

The 2003 paper by Stubbs, Tolmie and Kaye, Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence, shows that 70% of the women interviewed said they would feel uncomfortable disclosing their experience of domestic violence to a professional. **Even the best of screening processes will not identify all those who should be exempt from mediation. Any service that is established as a contact point for separating couples should therefore operate from the assumption that they will also be frontline domestic violence workers and plan security, support, policy and practice accordingly.**

Family Dispute Resolution

Our service regularly comes across women who have inappropriately been made to mediate with their violent or abusive former partner, during the course of their Family Court case. This results in unsafe court orders for contact. One woman reported how she had agreed to her husband having contact with their children, during a shuttle mediation session, despite fears for the children's safety. She said she agreed to whatever her husband asked for because she was so terrified knowing that he was in the same building. Another woman told how, during a mediation session, she agreed to her husband having

residence of her son and contact with her other children. She said that her husband had previously threatened to kill her and that “he’d make sure she never saw any of her children”, if she didn’t agree to this demand. This woman had contacted our service for advice after her children complained that their father had assaulted them and renewed threats to kill her.

Given that even the best of screening processes may not identify all those who should be exempt from such processes, Women’s House Shelta does not support the “Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order”

The ‘friendly parent’ and compliance regimes

We note that Schedule 2 deals with compliance regimes and allows for the making of orders for costs, compensation for parenting time lost through contravention of parenting agreements and the imposition of bonds.

Given the failure of the relevant systems to protect women and children escaping violence and abuse, and the difficulty in presenting and substantiating these concerns in the Family Court it is entirely predictable that it will be women who will be identified as uncooperative or as the “unfriendly parent” and subject to the proposed compliance regimes.

In their research paper Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence, 2003, Kaye et al have this to say about the way in which men and women’s behaviour is seen differently. “Our findings concerning the coincidence of violence against women and child abuse are particularly important given that professional discourses and practices typically have treated the two as entirely separate. Moreover, in different areas of professional practice the same behaviours may be met by quite different responses. For instance, Eriksson and Hester argue that in child protection cases mothers may be expected by social services to actively protect their children from abuse, and yet in divorce cases ‘mothers who bring up problems related to men’s

violence are likely to be considered uncooperative'. They argue that these distinctions in professional practice are so great as to constitute 'two different planets' and have a tendency to negate recognition of the links between men's violence to women partners and the abuse of their children."

Questions need to be asked when orders or 'agreements' are breached. It is our experience that women may initially agree to contact between the children and their father and then subsequently seek to change the order to supervised contact after their children disclose abuse. Research by Rendell et al (2001) and Kaye et al (2003) note that Family Court orders for contact give abusive men an opportunity to continue to harass and abuse their former partner. According to findings by Thea Brown and the Magellan Project 95% of applications for contravention orders are made by the non-resident parent, and 69% of those were found to be unfounded. The Court or other authority hearing complaints needs to ascertain whether there are any allegations of violence or abuse and take steps to have the matter investigated accordingly. If inappropriate orders were not made in the first place, we believe that would be far fewer breaches.

Women's House Shelta is against the introduction of the proposed compliance regimes.

Conclusion, questions and recommendations

Women's House Shelta holds grave concerns for the safety of women and children escaping violence should the Government pass this Bill.

We do not support a presumption of shared parental responsibility. Neither do we support legislative requirements for advisors to discuss with parents that they consider substantially shared parenting time.

Women's House Shelta does not support the "*Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order*"

Women's House Shelta is against the introduction of the proposed compliance regimes.

We ask for clarification regarding the following points:

- **What will form reasonable grounds to believe that there has been abuse or violence or that there is a risk of abuse or violence?**
- **Will the Government be consulting with Domestic Violence and Child Abuse specific services to seek advice as to how this will be determined?**
- **Will the Government establish a national agency to thoroughly investigate allegations of violence or abuse on behalf of the Family Court?**
- **Does the Government have further plans to integrate the operation of state child protection systems with the Family Court, to allow for the proper investigation of child protection concerns arising in Family Court cases?**

We recommend that:

- ◆ Any service that is established as a contact point for separating couples should operate from the assumption that they will also be frontline domestic violence workers and plan security, support, policy and practice accordingly.
- ◆ Safety be made a priority in the Family Law Act.
- ◆ The Government consult with Domestic Violence specific services and agencies specifically dealing with abused children before making further changes to the Family Law System.
- ◆ The establishment of a national agency to investigate child protection concerns raised in the Family Court.

We do not support the proposed legislative changes contained in the "Exposure Draft – Family Law Amendment Bill 2005". We ask that you withhold the passing of any further legislation regarding Family Law until such time that the safety of women and children escaping violence has been prioritised in the Family Law Act and the above issues have been addressed.