

To: Committee Secretary
Standing Committee on Family and Community Affairs
Child Custody Arrangements Inquiry
Department of the House of Representatives
Parliament House
Canberra ACT 2600

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**THE NSW WOMEN'S REFUGE MOVEMENT SUBMISSION TO THE STANDING
COMMITTEE ON FAMILY AND COMMUNITY AFFAIRS**

**INQUIRY INTO JOINT CUSTODY ARRANGEMENTS IN THE EVENT OF
FAMILY SEPARATION**



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Background

The NSW Women's Refuge Resource Centre is the central contact for the NSW Women's Refuge Movement (WRM), which is made up of 55 women's refuges that are funded under the Supported Accommodation Assistance Program (SAAP). In the financial year July 2001 – June 2002 NSW women's refuges accommodated 5,140 women and 5,060 children. Of the clients accommodated during this time, 25.1% were Indigenous, and 18.6% were from non-English speaking background¹. The NSWWRM values diversity². The Movement is committed to promoting access to and equity of services for all women. This includes Aboriginal & Torres Strait Islander women and children, women and children from non-English speaking backgrounds, lesbians and their children, women and children in rural and isolated areas, older women, young women and women and children with disabilities.

Aboriginal women and children

The proposed changes to the Family Law Act would have profound effects on women and children escaping domestic violence. In Aboriginal communities domestic violence and child sexual assault is reaching endemic proportions: as Pam Greer stated in 1993 "it happens in every home, no matter how it looks to people on the outside"³. All women must have the right to protect their children from violence, as a first priority, and rebuttable joint residency is in complete contradiction to this consideration.

Aboriginal women and children may be wary of joining the legal system to rebut 50-50 residency due to factors including the history of colonisation and the stolen generation. Women and children often also face pressure in their communities and extended family to stay with an abusive male; the added pressure of having to rebut 50-50 residency arrangements will mean many Aboriginal women and children stay in a violent situation, rather than face their community and the courts.

Aboriginal women and children also face racism when escaping domestic violence:

Questions about alcohol, victims' compensation and promiscuity are regularly asked in relation to the credit of Aboriginal women. Myths and stereotypes of Aboriginal women as unsophisticated, vengeful and morally corrupt are also evident in the courtroom...language barriers and the use of jargon present particular difficulties for Aboriginal women⁴

As noted by Rathus, Rendell and Lynch in their report *An unacceptable risk: A report on child contact arrangements when there is violence in the family*⁵, Aboriginal women are finding it increasingly difficult to be successful in family proceedings when opposing white

¹ SAAP NDCA Ref 01/373 Request No.451

² NSW Women's Refuge Movement (1999) *An Open Door: Access & Equity Manual* NSW Women's Refuge Resource Centre

³ P Greer (1993) 'Bruises don't show on a Black Woman's Face' in *Seminar- Men and Women against Violence*, The National Council Women of New South Wales Inc p 101

⁴ Gender Bias and the Law Project (1996), *Heroines of Fortitude: The experience of Women in court as victims of sexual assault*, Department of Women, Sydney page 95

⁵ Rathus, Rendell and Lynch (2001) *An unacceptable risk: A report on child contact arrangements when there is violence in the family* Women's Legal Service, Brisbane p 12.

fathers. Their disadvantaged legal status when addressing family court matters can only be exacerbated by this proposed change to residency arrangements.

Case Study: An Aboriginal woman and her children left her violent non-Aboriginal partner. He abducted the children and moved to Queensland where the Queensland Department of Families (DoF) removed the children from his residency to make them state wards. The non-Aboriginal parent claimed that the Aboriginal mother was a drug addict; consequentially she was not notified that the children had become wards. Queensland agencies did not check the abusive ex-partner's accusation. The mother was, in fact, working for the NSW police and only brought the children back to safety after her ex-partner died, and legal action against her was stopped.

Women and children from Non-English Speaking Backgrounds

Women and children from Non-English Speaking Backgrounds (NESB) would also be affected by the proposed changes. It is essential that the child's cultural, religious and linguistic needs and their experiences be taken into consideration on a case by case basis, which can only be done if the proceedings are focused on the child and not on the perceived rights of the parents. A one-size fits all approach cannot work for the best interests of the child⁶.

For many cultures, traditional family arrangements result in women being the primary caregiver. Fathers, therefore, would not have the requisite skills to act in this role. Additionally, for recently arrived children, the destabilising effect of travelling between two homes after separation may add to the trauma of family break-up.

Women and children living in remote and rural areas

Women living in remote and rural areas are isolated, with few services, such as counselling and legal aid, to assist with family separation. Rural women most often have the primary care-giving role, and often also act as a teacher, where children study at home. Shared residency would also be particularly problematic for families who have to live apart (in different towns) for reasons of violence, or employment.

There is already an overwhelming lack of legal aid services available to families in remote and rural areas and this, combined with a lack of adequate public transport, makes access to many services extremely difficult and time consuming. Parents who wish to rebut a joint residency arrangement will have to travel hundreds of kilometres to have their views heard at court, an experience that is especially difficult for women and children escaping domestic violence, who will not have access to the family car.

While the presumption of this proposal is that the residency arrangements are rebuttable, it is debatable to what extent Aboriginal women, NESB women and women living in remote and rural areas would be able to afford this. This is particularly true when recognising the difficulties in accessing Legal Aid and Aboriginal Legal Centres.

⁶ See Mazzone M (2001) *Submission of the NSW Immigrant Women's Speakout Association on Child Custody Arrangements* for more information regarding NESB women, children and domestic violence

Having regard to the Government's recent response to the Report of the Family Law Pathways Advisory Group, the Committee should inquire into, report on and make recommendations for action:

- (a) *given that the best interests of the child are the paramount consideration:*
- (i) *what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted; and*

The NSW WRM feels that the current legislation clearly takes into account those factors we feel should determine residency and contact. The Legislation should not be amended at this point. Enshrined in the Family Law Reform Act 1995 is the presumption that the best interests of the child are paramount, *and* that it is in the child's best interest to have contact with both parents.⁷ This is a position that already holds contradictions, especially in cases where domestic violence, and child sexual assault are reported.

Ninety-seven percent of family break-ups arrange residency and contact issues without the intervention of the court. To impose intervention on those families who are able to negotiate these issues, by lumping them in a one-size fits all group, will lead to an increase in litigation, costs and belligerence between the parties. Of the 3%: "the core business of the Family Court now compromises cases involving issues of violence or child abuse"⁸. These are exactly the cases when joint residency will not work. As Justice Demack said:

....in most instances, once the matter comes to Court, there is no place for an order for joint custody. To make such an order once the parties have chosen the path of litigation is to either encourage further litigation or to require the parties to achieve some kind of compromise, which will almost inevitably have disturbing effect upon their relationship with the child⁹

Children who are witnesses of domestic violence can suffer from anxiety, depression, aggressive behaviour, decreased self-esteem, disobedience, emotion distress and carrying out abuse in the future¹⁰. It is clearly not in the child's best interest to live with an abusive parent, even if that child is not the direct target of the violence.

In child protection cases, if these changes proceed, the onus of proof of the abuse will be higher on the non-abusive parent (in the majority of cases the mother). Children will then face further abuse post-separation.

Recent Family Law reports¹¹ are critical of interim contact orders, due to a culture of reluctance to deny contact. Where violence or abuse has occurred, the strong emphasis on a

⁷ Family Law Act section 60B

⁸ Rhoades, Graycar, Harrison (2000) *Family Law Reform Act: The first three years* University of Sydney and Family Court of Australia p6.

⁹ Justice Demack, Yann and Yann (1976) FLC 60-027 at 75,120

¹⁰ Irwin J and Wilkinson M, (1997) 'Women, children and domestic violence' *Women against violence* 3, 15-22

¹¹ See Rhoades et al (2000) *Executive Summary and Recommendations*; and Family Violence Committee (2003) *Family Violence Consultation Report* Family pp20-27 Court of Australia

child's right to contact with both parents, set out in the 4 principles of the Family Law Act¹², often overrides what should be the paramount interests of court - the best interests of the child. Many interim court orders allowing contact with the non-resident parent are later overturned, when sufficient evidence is collected to prove abuse and violence- a situation that means many children are unnecessarily exposed to abuse in the interim.

We believe that a legal assumption of rebuttable joint residency will be harmful to children and should not be adopted.

- (ii) *in what circumstances a court should order that children of separated parents have contact with other persons, including their grandparents.*

Where it is in the child's best interest, it is vital for children to maintain a relationship with extended family, especially in Aboriginal families. However, the safety of that child must be a paramount concern¹³. During contact, children must be protected from violence, from being exposed to violence between others, and from hearing either parent being denigrated.

- (b) *whether the existing child support formula works fairly for both parents in relation to their care of, and contact with, their children.*

The NSW WRM fears that an emphasis on child support reduction is what is driving this proposed legislative changes. The level of child support and issues surrounding residency and contact should not be confused. Parents pay child support to support their children, for whom they have a life-long responsibility. Parents can have contact or residency with children only if they are suitable caregivers. It is in the best interests of the child to have adequate child support, a stable home environment and the influence of *positive* role models. Parents have a responsibility to their children to supply their children's daily requirements, regardless of residency or contact levels.

Interestingly, 25% of resident mothers believe there is not enough contact between their children and ex-partners, suggesting that many non-resident fathers do not wish to increase contact hours.¹⁴ Non-resident parents who wish to increase contact hours may do so based solely on the connected reduction in child support, or as a form of harassment against the residential parent¹⁵.

An obvious outcome of using joint residency arrangements to reduce child support payments is the increase of children living in poverty. A recent NATSEM report on child poverty shows that the introduction of child support payments reduced the instances of child poverty, it would be devastating if this trend was reversed.

By focusing on levels of child support payments, non-resident parents are focussing on issues other than the best interest of the child. This can include resentment at "supporting" the resident parent, rather than acknowledging the supportive payment is for the child/ children; and retaining control over or punishing an ex-partner by threatening to withdraw payments.

¹² Section 60B (2) of the Family Law Act

¹³ See section 68F(2) of the Family Law Act

¹⁴ Smyth B and Parkinson P (March 2003) "When the difference is night and day", Conference Paper, Australian Institute of Family Studies Conference

¹⁵ Rhoades et al (2000) p1, 8, 68, 74

Conclusion

The best interests of the child can only be served on an individual case-by-case basis rather than one size fits all legislation. The vast majority of family break-ups arrange residency and contact between parents and children without using the Family Law Court. Those families that do become involved in the Family Law system are often those families least likely to make joint residency work. These changes will only serve to increase litigation, confusion and acrimony between separating parents.

Aboriginal and NESB women and children, and women and children from remote and rural areas, especially those escaping domestic violence, could be further disadvantaged by these proposed changes.

The reality of parenting in Australia means that mothers do the vast majority of child rearing, both pre- and post-separation. The current legislation enshrines both the principle of the child's best interests as paramount, and the rights of the child to maintain contact with both parents. There is no need to make these changes to the current Family Law Act.

The NSW Women's Refuge Resource Centre welcomes the chance to highlight these issues with the Committee, and look forward to speaking with the Committee regarding this important issue.