WOMEN'S LEGAL SERVICES NSW

Incorporating
Women's Legal Resources Centre
Domestic Violence Advocacy Service
WDVCAP Training & Resource Unit
Indigenous Women's Program
Walgett Violence Prevention Service

1 August 2005

House of Representatives
Standing Committee on Legal
and Constitutional Affairs
Parliament House
Canberra ACT 2600

By facsimile: (02) 6277 4427

Dear Committee Members,

Re: Inquiry into the Exposure Draft of the
Family Law Amendment (Shared Parental Responsibility) Bill 2005

We refer to the appearance of Ms. Hamey, Ms. Wong, Ms. Adams and Ms. Mifsud at the hearing before the Committee on Thursday 21 July 2005.

We confirm we received the proof of transcript from the hearing on 21 July 2005 and enclose a copy of the first page showing corrections.

We confirm that Women's Legal Services NSW ("WLS") is a statewide community legal service providing legal services to the most disadvantaged women and children in NSW. We prioritise services to Indigenous women, women from culturally and linguistically diverse backgrounds, women in rural areas, women with disabilities and women who are victims of violence.

WLS predominantly provides legal advice and representation in family law, domestic violence proceedings, sexual assault matters and victims' compensation.

WLS operates the following programmes:

- the Women's Legal Resources Centre (established in 1982);
- the Domestic Violence Advocacy Service (est 1986), and
- the Indigenous Women's Programme (est 1997.)

WLS also auspices:

- the Walgett Family Violence Prevention Unit (est 2000);
- the Bourke Family Violence Prevention Unit (being established), and
- the Training and Resource Unit of the Women's Domestic Violence Court Assistance Programme.

In the 2003-04 financial year, WLS had 20,000 client contacts across NSW. WLS provides telephone legal advice lines across NSW and we have a dedicated Indigenous Women's contact line. We provide face-to-face advice clinics in Western Sydney and in rural areas. We travel to some of the most remote areas in NSW to provide community legal education and advice clinics. We undertake casework and also provide training and resources to workers in the Women's Domestic Violence Court Assistance Schemes in NSW.

ADDITIONAL SUBMISSIONS

We expand on our submissions to the Committee at the hearing on 21 July 2005 as set out below. We note that the fact that we do not address a particular issue or proposed provision in the Exposure Draft, should not be taken as an indication that we support or oppose that provision.

Domestic Violence issues

The 1996 Australian Bureau of Statistics national benchmark study showed that 23% of women who have ever been married or in a de facto relationship have experienced violence in that relationship. In 98% of cases, it is the male who abuses his female partner or ex-partner and/or children.

Family violence is not just physical, but psychological, by harassment, manipulation and intimidation. The more insidious forms of violence are not always obvious.

The impact of family violence has long been recognised. For example, the Family Court of Australia has a Family Violence Strategy. It is recognised in this that family violence may occur prior to, during and after separation and may impact on a person's capacity to effectively participate in court events. It is recognised that family violence has a significant impact on the well being of children. There is evidence of a link between spouse abuse and child abuse – that is, a person who abuses their spouse is likely to abuse their child. There is evidence that being exposed to or witnessing violence is highly damaging to children causing a host of behavioural and emotional problems.

Apprehended Violence Orders (NSW) are not always obtained where there has been family violence. There are many factors that make women hesitate to apply for orders including community attitudes, pressure from their partner or his family and fears and concerns about the consequences of applying for an order, particularly in relation to safety of the children.

It is accepted that there is an under reporting of domestic violence and child abuse. There is evidence that family violence continues and may increase after separation and it is accepted that the separation and post separation period are the most dangerous times for women. The danger is often exacerbated by the commencement of court proceedings. A significant proportion of the Family Court's work involves cases where there are allegations of violence or child abuse. Research shows that these are the cases most likely to be litigated and least likely to settle. Forcing these cases to dispute resolution is unlikely to result in a settlement. Alternatively, forcing such matters to mediation may result in one party agreeing to a proposal because of fear of violence, intimidation or imbalance of power.

It is logical to assume that the majority of families that require Family Court intervention are families in high distress and who are unable to negotiate effectively between themselves to achieve a resolution of their dispute. It is clear that many of these will be families that have been affected by violence and abuse.

We know that Family Court litigation and processes are often "attractive" to violent and controlling men. These processes provide opportunities to harass and continue to exert control over their former partner and the children. It is not uncommon for men who have had little interest in their children's lives prior to separation, or may have been directly violent or abusive towards the children, to seek orders for contact or even residence.

Contact provides violent men with opportunities to continue to abuse or harass the mother behind the apparent shield of a Family Court order. The pursuit of contravention applications is particularly appealing as it gives the opportunity for harassment and the possibility that their former partner may be "punished". Hence it is important to ensure that contact orders are appropriate, including appropriate protections during changeover, and that women do not feel coerced into accepting inappropriate arrangements. Variations to contact orders are difficult to obtain and even more difficult where the women have consented to the original orders, even if they felt that they had no other choice.

Mediation and conferencing processes can leave women with the impression that the ultimate aim of the process is to reach an agreement as opposed to ensuring the safety and welfare of women and children. A mediation system does not promote women raising issues of violence and abuse, as these issues can be obstacles to the parties reaching agreement. Women who have experienced violence and participate in mediation processes may enter unsafe agreements. Understandably, many of these agreements break down at a later stage and many result in contravention applications or other litigation. Although the *Family Law Act 1975* requires orders to be in the best interests of children, there is no requirement that agreements resulting from mediations be in the best interests of children.

It can be assumed that a good proportion of matters in the proposed Family Dispute Resolution process will have domestic violence as a factor. Services providing Family Dispute Resolution need to be aware of the high incidence of family violence.

It is noted that Family Dispute Resolution will not be required where the court is satisfied on "reasonable grounds" that abuse or violence has occurred or there is a risk of it occurring. There is no guidance in relation to how a court will determine what are "reasonable grounds".

We are concerned that the onus is on the victim of violence to show that there has been family violence. Given the clear data on the low rates of disclosure of family violence we suggest that a sworn statement from a party should be sufficient to show family violence and that attendance at a Family Dispute Resolution session should be dispensed with on production of a sworn statement. The nature of family violence is that there are rarely independent witnesses or physical evidence to satisfy court standards of proof.

It is unlikely that people will make up allegations of violence to avoid attending free Family Dispute Resolution, when the alternative is to embark on lengthy and costly court proceedings.

If domestic violence is not initially disclosed, screening procedures before the commencement of Family Dispute Resolution are needed to determine if there has been family violence or if there is a power imbalance. However research and past experience have shown that family violence is not always detected at the intake stage.

There must be standards for facilitators of the dispute resolution to ensure they have the appropriate training and experience to recognise signs of family violence. The facilitator of a session should have the power to terminate a session if they become aware of family violence, imbalance of power in negotiations or if a party appears unable to equally participate in the resolution process.

It should be a pre-mediation requirement that each party has obtained independent legal advice and funding for this should be provided as part of the Family Dispute Resolution scheme. This would ensure that proper and appropriate settlements are reached. If legal representation is not to be allowed in Family Dispute Resolutions, the knowledge which prior legal advice gives can help to adjust any imbalance of power. Agreements would be informed by the principles of best interests of children set out in the Family Law Act.

We are concerned about security arrangements at the Family Dispute Resolution Centres themselves. Both facilitators and parties need to have confidence in their personal security. There should be standards laid down to ensure personal security during the session, and for protocols to enable a party to leave without a fear of being followed or intimidated outside the Family Dispute Resolution Centre.

It is submitted that clear standards and procedures for the Family Dispute Resolution Centres should be developed in consultation with Domestic Violence Services who have first hand knowledge of the issues and implications of family violence.

We have concerns regarding amendments to provisions regarding contact with children of the relationship. In our experience there is now effectively a presumption in favour of contact with the non-resident parent despite the fact that the best interests of the child are supposed to be the paramount consideration. This

presumption has permeated family law practice and led to a culture that promotes the right to contact over safety. The courts do their utmost to make some sort of contact order even where there is clear evidence of domestic violence or abuse, often using "supervised contact" arrangements which do not acknowledge potential danger to a child or the effect on a child of being with a person they have witnessed committing acts of violence.

We are concerned that the negative wording that the principles are to apply except when it would be contrary to the child's best interests would be better framed in the positive: if it is in the best interests of the child ....

The reference in s 60B(2) to the right to "spend time" and "communicate" with both their parents may increase the risk of unsafe face-to-face contact being ordered. The "child's right" should never take precedence over the need to protect the child from violence. If inappropriate orders are made there is a danger that a parent may have to balance the protection of a child with the penalties for contravening contact orders.

While the court must consider a final or contested family violence order, we suggest that interim and ex parte orders also be taken into account, as there may be various reasons why these did not ultimately become final orders. We refer to the examples given by Ms. Hamey at the hearing on 21 July 2005.

Making orders for joint parental responsibility results in parents effectively having to consult each other over long-term decisions. Unfortunately this can, and often is, used by abusive non-resident parents to continue a pattern of controlling behaviour after separation. This is likely to be exacerbated by creating a presumption of joint parental responsibility. We would suggest that there be a presumption against equal shared parental responsibility where there is evidence of violence or abuse.

Rural, remote and Indigenous Issues

Compulsory Attendance at Family Dispute Resolution

We have some serious concerns in regard to Family Dispute Resolution Centres and women from regional, rural and remote communities. Under the new scheme it seems that people in remote communities will be required to travel to their nearest Family Court Registry to attend FDR, and if this is not possible, will be required to conduct mediation over the telephone.

It is our experience that Aboriginal women living in remote communities have limited financial means and no transportation. We are concerned that the proposed alternative to attendance in person is telephone mediation. We believe that this form of mediation is culturally inappropriate for many indigenous women and could potentially disadvantage their application before the Family Court or be a deterrent in using the system in the first place.

Communication with Aboriginal people from both urban and rural areas can be problematic because of the cultural and linguistic differences. "Many Aboriginal people in New South Wales speak Aboriginal English in their dealings with the law."[1] In New South Wales, English is the main language spoken by 96% of the indigenous community. Some 8% of the indigenous community in New South Wales noted that they had problems communicating in English and 66% of those experiencing difficulty would use an interpreter service if it were available.[2]

Issues around eye contact and the use of words have serious consequences when speaking to Aboriginal women; this would be near to impossible to monitor if mediation is conducted over the telephone without

[1] Eades, D. "Communicating with Aboriginal clients' (1993) 31(5) Law Society Journal at 41.
[2] ABS, *National Aboriginal and Torres Strait Islander Survey – New South Wales*, Canberra, Australian Government Publishing Service, 1996.

appropriate support for the Aboriginal woman. An Aboriginal person's "responses may be open to misinterpretation because of different meanings of common English words in Aboriginal English."[3]

Aboriginal speakers of English are also prone to 'gratuitous concurrence' when asked a series of questions. "Aboriginal people in all parts of Australia are seriously disadvantaged by the question-answer method of establishing the trust... Aboriginal speakers of English and traditional languages often agree with whatever is being asked, thinking that they will get out of trouble more quickly... this pattern of agreement, known as "gratuitous concurrence' is particularly common where a considerable number of yes-no questions are being asked – the situation with both police and the courtroom."[4]

Exceptions to attendance at Family Dispute Resolution

Where there has been family violence or abuse the party seeking to invoke this exception must satisfy the court that there are reasonable grounds to believe the abuse or violence has occurred or may occur.

Violence in Aboriginal communities is at epidemic proportions. An Aboriginal woman is 45 times more higher to experience violence that a non-Aboriginal woman (*Bringing them Home Report).*

The disempowerment of Aboriginal women in regard to violent relationships cannot be understated. There is a plethora of reports and statistical information that reflect this ongoing crisis in Aboriginal communities.

Violence and abuse is suffered in silence due to systemic conditioning created by colonisation and the stolen generation. [5] In getting help, dealing with authorities and the legal system, is often a last resort. Therefore Aboriginal women are in the most vulnerable position when attempting to navigate through the Family Court System. Aboriginal women in regional, rural and remote communities are even more vulnerable due to the lack of legal services and culturally appropriate assistance.

The requirement of attending Court to prove on 'reasonable grounds' that there is violence, so that they can avoid FDR with a violent partner, makes the Court process more litigious and complicated. Much violence and abuse occurs behind closed doors and again there are copious amounts of research and statistical data that show the high rates of under reporting among Aboriginal communities. "Many surveys include statistics that demonstrate that Aboriginal people do not always report crimes against them. Aboriginal people, according to the NSW Bureau of Statistics and Research, are less likely to report crime to police than non-Aboriginal people. This has lead to a general under-reporting of crime by Aboriginal people to the police."[6]

With expense of travel and the limited access to legal representation, if faced with having to attend Court to prove the violence suffered, many Aboriginal women would concede to the ex partner's demands. "A pronounced lack of self-esteem and confidence in asserting their basic rights has resulted in Aboriginal women accepting acts of violence being perpetrated against them as their 'lot in life'."[7]

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[3] Eades, D, *Aboriginal English and the law: communicating with Aboriginal English speaking clients: a handbook for legal practitioners*, Brisbane, Continuing Legal Education, 1992 at 93.

[4] Eades, D, "Communicating with Aboriginal clients' (1993) 31(5) Law Society Journal at 41.

[5] Memmot P et al, *Violence in Indigenous Communities: Full Report*, Commonwealth Attorney General's Department – Crime Prevention Branch, Canberra, 2001, at 11.

[6] Fitzgerald J & Weatherburn D, *Aboriginal Victimisation and Offending: the picture from police records* (2001) NSW Bureau of Crime Statistics and Research, at 1.

[7] Queensland Office of the Director of Public Prosecutions, Violence Against Women Unit, *Indigenous Women within the Criminal Justice System*, Brisbane, Office of the Director of Public Prosecutions, 1996 at 45.

Aboriginal and Torres Strait Islander Children

We applaud the Government for recognising the unique experience of the Aboriginal communities of this country. We welcome the proposed amendments that have resulted from the Family Law Council's December 2004 report.

However, the proposed amendments in relation to presumption of joint parental responsibility, the operation of joint parental responsibility, the best interest of the child, role of grandparents and other relatives, children's wishes and views potentially conflict with the recognition of the special circumstances of Aboriginal and Torres Strait Islander Children.

What happens in circumstances where a non-Indigenous parent refuses to allow their child to participate in their Aboriginal families traditional practices?

There is a presumption of joint parental responsibility on major long-term issues. While this presumption is rebuttable, the situation is litigious regardless, and problematic for regional rural and remote women with limited access to services and no transportation.

Objects and principles: s.60B

It is important to note, as was seen with the *Family Law Reform Act 1995*, where there were unforeseen consequences of the changes made at that time (Rhoades, Graycar & Harrison Report) that any amendments to the current legislation need to be thoroughly drafted, or potential loopholes may be created which are not the intention of the amendments. If any blanket joint presumption in relation to parenting is enshrined in legislation a dangerous expectation of parents may be created that may not be in the best interest of the child, which is the paramount consideration.

We agree to the inclusion of the principle in Part 7 (s.60B(2)(b)) that children need to be protected from physical and psychological harm, but we argue that protection of children from such harm should be included as an object in s.60B(1), not just a principle. The inclusion in the objects that parents having meaningful involvement in their children's lives to the maximum extent possible, is likely to be applied and interpreted as more important than the need to be protected from physical and psychological harm

The protection of children from harm is as important, if not more important than parents having a meaningful involvement in their lives.

We are concerned that parents are still likely to consider that they have "rights" in relation to the child, due to the language used in the objects, (s.60B(1)(c)) ie. "parents have meaningful involvement" . It will be perceived and likely to be interpreted by parents and the court (especially at interim hearings), that a parent's right to meaningful involvement in the child's life is more important than the right of a child to protection from harm.

We submit that there should be a positive reference to the best interests of the child in the objects and principles, so that they commence with "if it is in the best interests of the child..."

The terminology used in the objects and principles of "maximum extent possible", "spend time on a regular basis" and "communicate on a regular basis" can easily be interpreted as another way of saying "parents have shared residence" and therefore become the starting point in mediation, negotiations and court potentially leading to unsafe and/or care arrangements that are not in the children's best interests.

Presumption of joint parental responsibility

We oppose the inclusion of s.61D that requires the court to apply a presumption that it is in the best interests of children that both parents have joint parental responsibility. This places an onus on victims of violence to show why there should not be the presumption. This onus can perpetuate the violence and intimidation of an abusive partner. Parents already have joint parental responsibility under the *Family Law Act 1975* until an order says otherwise (if there is such an order this implies that it is in the best interests of children for their parents not to have joint parental responsibility)

Most orders already include a provision that there is joint responsibility for long term welfare issues concerning the child; having a presumption is likely to be used by an abusive partner to continue a pattern of controlling behaviour after separation.

Court to consider substantial time arrangements

The Exposure Draft emphasises the "substantial time" model and proposes no other models to suggest and therefore assumes that if the parents want it that it must be okay. The fact that the parties are at court implies in itself that it is probably not appropriate.

The requirement of the Court to consider substantial time arrangements where both parties seek residence, ignores the skill and ability of the Judges in the Family Court to assess all of the factors relating to the best interests of the child. The Court currently will make substantial time orders where it in the best interests of the child and both parents wish to spend time with the children. Enshrining this requirement to consider it will create a presumption in the minds of parents that it will occur or be desirable. It will lead to a focus on the parents' wishes and not the child's best interests. It is contrary to the best interests of the child principle to include a provision in the *Family Law Act* that uses the language of "parents wishes'.

Obligations on advisors to raise "substantial time" arrangements

We are seriously concerned that there is a requirement for advisors to 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 an arrangement of that kind".

It is our experience that our clients want their children to spend quality time with the father, but are very concerned about stability in accessing schools, after school activities, care arrangements while the other parent is working long hours, ability of the other parent to tend to the needs of the child and safety issues. The vast majority of our clients want stability and certainty for the children and have their best interests uppermost in their minds when trying to reach an agreement with the other parent.

Children need stability and minimal disruption during the week (especially school age children) and a focus on considering shared care as a starting point will only lead to unreasonable expectations of a parent that the children have to accommodate the parent, regardless of how disruptive or unsafe it may be for the children.

Specifying a shared care arrangement and not any others to consider will lead to the assumption that there is only one model of caring for children that is appropriate after separation. There will be pressure on vulnerable parents to accept such arrangements when they are not safe for the parent, child or otherwise not suitable for the children. It is not prudent to advocate a shared care model (which most of the public will interpret as equal time) when there is an absence of evidence to suggest that substantially shared time arrangements are in the best interests of children in a significant proportion of cases.

Conduct of child related matters

We support the adoption of less adversarial procedures in parenting matters in the Family Court and Federal Magistrates Court. We note that the Children's Cases Program was piloted in the Parramatta and Sydney Family Court registries this year. A final review of the pilot is being completed at Griffith University and

we submit that final amendments to the Family Law Act relating to the less adversarial procedures should be delayed until the Committee and public can assess the review.

We note that anecdotally the pilot seems to have been reasonably successful. However we point out that the Court and Legal Aid resource the project intensively and it required an enormous amount of resources and time for all participants, including the Judges. Nearly all parties have been legally represented. If the less adversarial procedures and intensive case management are to be implemented in all parenting cases, the Government will need to inject substantial funds into the Court system and Legal Aid to ensure that the changes work and there are not extensive delays in having matters finalised.

We also note that individual judges a very significant influence on the processes and outcomes in the pilot programme. We have concerns about women being asked to put domestic violence issues in the "past" and insufficient acknowledgement being given to how those issues impact on the best interests of the child.

The Committee asked us at the hearing what we thought about Registrars taking over the role of the Judge in case managing parenting matters. We argue that determining evidentiary issues and how much weight they should be given in assessing the best interests of the child is a judicial function. The function cannot be delegated and if Registrars are required to be involved in the intensive case management function the system will be practicably no different to the current system in all parenting matters. The benefit of the pilot programme is that the judge is actively involved from the first court event and can make judicial decisions about the evidence, a function that a Registrar cannot exercise. The Judge's initial and ongoing involvement to case manage and determine evidentiary issues from the outset results a speedier resolution of the matter.

Conclusion

We otherwise refer to our oral submissions at the hearing on 21 July 2005. If you have any questions or require further information please telephone Dianne Hamey, Supervising Solicitor, on (02) 9749 7700.

Yours faithfully,

per D Hamey

Judit Solyom
Acting Principal Solicitor
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