House of Representatives Standing Committee on Family and Community Affairs
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Secretary:

Domestic Violence Advocacy Service
P O Box H 154
HARRIS PARK NSW 2150
Ph: (02) 9637 5020

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COMMITTEE SECRETARY
HOUSE OF REPRESENTATIVES STANDING COMMITTEE
ON FAMILY AND COMMUNITY AFFAIRS
PARLIAMENT HOUSE
CANBERRA ACT 2600

Dear Committee Members,

RE: INQUIRY INTO JOINT RESIDENCE ARRANGEMENTS IN THE EVENT OF FAMILY SEPARATION

The Domestic Violence Advocacy Service (DVAS) is a state-wide community legal centre for women operating in New South Wales. The DVAS operates a telephone advice line, provides legal representation in a number of Sydney metropolitan courts (particularly in western Sydney), conducts community legal education and is actively involved in policy work and lobbying for law reform. The DVAS as a direct service provider also plays an important role in the monitoring of the performance of other institutions that offer services to women experiencing domestic violence. The DVAS has been operating for the past sixteen years.

The DVAS is also the auspice body for the NSW Legal Aid Commission Women's Domestic Violence Court Assistance Program Training Resource Unit (WDVCAP TRU). This Unit brings the DVAS into contact with over 33 Local Court Women's Domestic Violence Court Assistance Schemes throughout NSW.

In the 2001-2002 financial year the DVAS had contact with 2485 women seeking advice, referral and legal representation. Additionally, over 900 people accessed the training provided by solicitors from the DVAS and by the WDVCAP TRU. Our submission to the Inquiry is informed by our work with the women of NSW who have experienced domestic violence and whose children have been directly and indirectly exposed to the violence perpetrated by their fathers on their mothers. The large majority of women we have advised and represented in domestic violence matters have children. Our solicitors also advise these women in family law matters, particularly in relation to contact and residence issues.

SHOULD THERE BE A PRESUMPTION THAT CHILDREN SPEND EQUAL TIME WITH EACH OF THEIR PARENTS FOLLOWING SEPARATION?

The DVAS strongly opposes the implementation of a presumption that children spend equal time with each parent (or a presumption of joint residence) after separation of the parents. We are concerned that such a presumption would result in the rights of the parent taking precedence over the rights of the child, a situation which is clearly out of step with internationally recognised human rights instruments and various family law systems throughout the world.

Under current Australian family law, a court, when determining the best interests of a child, may consider the need to protect the child from harm caused by being subjected or exposed to abuse, ill-treatment or violence, and also such behaviour that is directed toward or affects another person. Further, the court may consider any family violence involving the child or a member of the child's family. Our submission focuses on the impact of a presumption of joint residence on the safety of women and children. We believe that impact arises in several key areas:

- The safety of women and children during a relationship and after separation;
- Violence, abuse and harassment at the time of contact changeover;
- Consent orders and the issue of genuine consent;
- Inappropriate interim family law orders;
- Increased difficulties enforcing family violence orders made by State or Territory courts; and
- Inconsistent family violence orders and variation of contact orders

The safety of women and children during a relationship and after separation:

A presumption of joint residence ignores the current extent of violence perpetrated against women by their partners and former partners.

The 1996 Australian Bureau of Statistics national survey on the safety of women[1] reported that in the 12 months prior to the survey:

- 23% of women who were married or in a de facto relationship experienced violence by their partner. **This means that one in five Australian women have experienced family violence by their current or former partner representing a total of 1.4 million women.**
- 48% of women physically assaulted by a man in the previous 12 months sustained physical injuries in the last incident.
- 20% experience violence for the first time when they were pregnant.
- 61% of women who experienced violence by a current partner reported that they had children in their care at some time during the relationship and 38% said that their children had witnessed the violence.
- 46% of women who experienced violence by a previous partner said that their children had witnessed the violence.

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[1] ABS; *Women's Safety Australia,* Canberra 2000. catalogue No 4108.9 at page 51 and see Table 6.5 at page 53.

- 51% of women who experienced violence by a previous partner during the relationship stated that the main reason that they ended the relationship was because of the partner's violence towards them or threats to their children.

The Bureau of Crime Statistics and Research had found over the two year reporting period January 2000-December 2001 an upward trend of 10.2% in the level of domestic assault.[2]

Australian Institute of criminology statistics show that 61% of all female victims of homicide in Australia over 1989 to 1996 were killed by an intimate partner.[3]

In the year 2000, a total of 15,584 Apprehended Domestic Violence Orders (ADVOs) were made by the Local Courts in NSW. This represented an increase of 731 ADVOs from the previous year.[4]

Whilst these statistics focus on the incidence of physical violence, women and children who experience domestic violence are subjected to a wide range of abusive behaviours. Clients of the DVAS have reported that they and/or their children have experienced, the following abusive behaviours:

- *Physical violence*: punching, hitting, slapping, shoving, pulling hair, twisting limbs, choking or serious injury requiring surgery, such as broken bones, having teeth knocked out;
- *Sexual assault*: rape, being forced to perform sexual acts without consent;
- *Use of weapons*: actual or threatened use of guns, explosives and knives;
- *Psychological and emotional abuse*: continual put downs, verbal harassment, making the victim think they are crazy, intermittent rewards, threatening harm to the victim and/or their friends or family, threats of suicide. Such actions are intended to destroy a person's self-esteem and distort their perception of the right to be safe and free from violence and harassment.
- *Stalking and intimidation*: acts directed at intimidating and frightening a person, injuring or destroying pets, throwing items which just miss them, damaging personal property including cars. Stalking can include following the victim about, or waiting outside their home, place of employment or other premises they frequent.
- *Social isolation and abuse*: isolating a person form family and friends, not allowing them to leave the house (including locking them in the house), denial of access to a car or public transport, restricting them from using the telephone, controlling who they see and where they go, humiliating them in public.

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[2] New South Wales Recorded Crime Statistics 2001, Bureau of Crime Statistics and Research

[3] "Homicide in Australia 1989-1996", Australian Institute of Criminology Research and Public Policy Series No. 13.

[4] NSW Criminal Court Statistics-Local courts (for the years 1999 and 2000), Bureau of Crime Statistics and Research.

- *Financial abuse*: preventing a person from having access to financial resources, not allowing them to have their own bank account, demanding that they hand over wages, depriving them and/or their children of basic physical needs.

A presumption of joint residence does not take into account the violence and abuse that women and children experience throughout a relationship - it assumes that both parents are safe and non-violent to children. Clearly, this is not always the case. Indeed, it is the experience of the solicitors at the DVAS that the catalyst for women ending a relationship is often the point when violence is directed toward children as primary victims (rather than as observers or secondary victims).

Violence, abuse and harassment at contact changeover:
A presumption of joint residence or equal time with each parent ignores the research, and experience of the DVAS, that violence against women continues after separation and often escalates following separation.

An Australian study in 2002 examined the experiences of 40 women who were required to negotiate and facilitate contact arrangements with an ex-partner who has abused them. A further 22 interviews of individuals and representatives of bodies professionally involved in the process of facilitating the development or implementation of contact orders were conducted. [5] The study found that of the 35 women who were resident parents, 86% had experienced violence at contact changeover.[6] Three of the women who reported no violence at contact changeover described intimidating or frightening behaviour by the father of the children during contact changeover.[7] The study found that any assumption that contact changeover at a public place (for example a police station, McDonalds or a train station) or with the assistance of a third party ensures women's safety is wrong. The safest contact changeover occurred when the parents did not come into contact with each other at all.[8] Further the children of the participants in the study often witnessed the abuse of the mother during contact changeover, or were directly involved (for example by the father dragging the child kicking and screaming).[9] This study supports the first hand experience of the solicitors at the DVAS when advising and representing the victims of domestic violence.

Such a presumption will exacerbate the violence (in all its forms) that women and some children experience. The presumption will force some children to live with violent fathers

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[5] Kaye M, Stubbs J and Tolmie J; *Domestic Violence and child contact arrangements"*, 17 Aust. Journal of Family Law, No. 2, pp93-133 (being an outline of the full report by the authors, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence"*, Family Law Research Unit Working Paper, No. 4 2003).
[6] Ibid, p 116
[7] Ibid, p116.
[8] Ibid, pp132-133 and for a detailed description of the experience of violence at different changeover venues see pp117-120.
[9] Ibid.pp120-122.

and will force mothers to have to regularly negotiate with and be in the presence of violent and/or controlling ex-partners. It provides a dangerous tool in the hands of abusive men who wish to control their women partners after separation.

As previously stated, domestic violence encompasses a wide range of abusive behaviours, including harassing behaviours. An increasingly common form of harassment experienced by our clients is the sending of numerous text messages. Many women who report these behaviours to police are told they should not disclose their mobile telephone number, or they should change their number to prevent further harassment. Clearly, this is not satisfactory advice as Family Court order often require women to be available during specific times for contact purposes. A presumption of joint residence will likely increase the amount of time women are expected to be contactable and therefore will increase the amount of harassment they may be exposed to.

For any joint residence arrangement to promote the best interests of the children, the parents will need to be in constant verbal and often physical contact about the children's care and activities. Given the research identified above, this will expose women to an even greater risk of violence in its many forms from the father of their children.

Consent orders and the issue of genuine consent

If there is a presumption of joint residence or equal time with each parent, many mothers who are the victims of violence will be forced to consider commencing Family Court proceedings to rebut that presumption. The inclusion of the presumption in the Family Law Act, however, will mean that women may find it more difficult to obtain a grant of Legal Aid for such proceedings. Thus, a very real risk is that women who are victims of domestic violence will be forced into joint residence arrangements because they have been denied Legal Aid, they cannot otherwise afford a private solicitor and they are overwhelmed by the thought of representing themselves in legal proceedings.

There is evidence that mothers are currently entering into consent orders (on a final and interim basis) that do not ensure their safety or that are not necessarily in the best interests of children. Issues arise as to whether such consent is genuine.[10] Many of our clients report that they feel intimidated or pressured into agreeing to family law arrangements they are not comfortable with. The following are typical examples of our clients' comments:

- "He told me if I didn't let him see the kids, that he'd take them and make sure I never saw them again"; or
- "He's got lots of money – his family is behind him all the way. What's the point of fighting?"; or
- "He'll give me my AVO if I make arrangements for him to see the children. Otherwise, he says he'll make my life hell."

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[10] Ibid pp101-105. and H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: The First Three Years, Final Report,* University of Sydney and the Family Court of Australia, 2000, pp96-97

If there is a presumption of joint residence or equal time with each parent in the Family Law Act, there will be increasing incidences of consent orders that place women and children at risk of violence – orders that have not truly been entered into voluntarily by the mother.

Inappropriate interim orders
It is not enough to simply have a provision that the presumption of joint residence can be rebutted by evidence of family violence or child abuse. When mothers apply for parenting orders they nearly always need to seek interim as well as final orders, due to the need to protect their children (either by ensuring that they are properly cared for and supervised, or at worst not harmed) and themselves.

A report in 2000 on the effect of the 1995 reforms to the Family Law Act found that due to the principle expressed in the Act that the child has a right to contact with both parents - and the interpretation given to that principle by the Courts - an increasing number of interim orders were made that maintained contact between a parent and children, even where there were allegations of violence or concerns about the safety and welfare of the children. However, the rate of orders made for no contact after a final hearing, remained substantially the same as before the 1995 reforms.[11] The findings of this report *"suggest that there is a significant proportion of cases where it can be shown, with hindsight, that the interim contact arrangements are not in the child's best interest, and may well be unsafe for the child and the carer."*[12]

Decisions by the Court at an interim hearing are based on affidavit evidence only. Cross-examination is not permitted and a maximum of 2 hours (although usually less) is allowed for a hearing. This leaves little time to present evidence to Court that may be available under subpoena or obtainable with more time (for example expert or family report). If there is a presumption of joint residence in the Family Law Act it is highly likely that the interim orders made will be for joint residence and will last for between 6 to 12 months until a final hearing. This will place even greater numbers of women at risk of violence, and children at risk of being inappropriately cared for, unsafe or exposed to the violence perpetrated on their mothers. This situation cannot be in the best interests of the children.

Increased difficulties enforcing family violence orders made by State or Territory courts
Clients of the DVAS have identified problems they have had in having the police enforce ADVOs that are subject to parenting orders. Many clients inform us that when they have contacted police to report experiences of abuse, harassment and even physical violence by their children's father they are told words to the effect of "It's a family law issue, we

[11] Ibid pp71-82 has a detailed analysis of contact arrangements when domestic violence is an issue.
[12] Ibid p91.

can't help you." The study by Kaye *et al* describes similar experiences of the participants.[13]

A real concern of the DVAS is that if there is presumption of joint residence or equal time, particularly if it is maintained by consent orders or following a hearing, the police will find it more difficult to determine if there has been a breach of the ADVO. The amount of contact the parents will need to have for contact changeover, making decisions about the day to day care of the children and arranging for the children to have everything they need from time to time will dramatically increase. The ADVO will be less effective in protecting women who are the victims of violence.

Inconsistent family violence orders and variation of contact orders
Mothers who are victims of violence continue to face significant difficulties in having parenting orders made that are consistent with ADVO provisions, despite the introduction of Section 68T in the Family Law Act in 1995.

Section 68T allows a Local Court to make, revive, vary, suspend or discharge a contact order when making or varying an ADVO. This provision was introduced with the aim of ensuring that victims of domestic violence are safe and that contact orders can be made or varied by the Local Court in a way that is consistent with the provisions of the ADVO. If an ADVO and contact order are inconsistent, the contact order prevails, as it is made under Commonwealth law and overrides state law (under which the ADVO is made).

Research shows that Section 68T is not being used and that its under-utilisation is probably risking the safety and well-being of women and children.[14] Local Court magistrates seem reluctant to vary contact orders made by the Family Court or Federal Magistrates Court, and professionals involved in the AVO process (for example police prosecutors and some solicitors) are reluctant to make application for orders pursuant to section 68T. The experience of the DVAS is that when an ADVOs is made there is a standard condition that the ADVO is subject to any Family Court orders about parenting. It is the experience of the DVAS that many women who have Family Court orders and ADVOs find that they are inconsistent with each other. So whilst the ADVO may restrict the father from coming to the mother's house, the Family Court orders allow the father to collect the children from the house. The study by Kaye *et al* describes the lack of protection from violence that the participants experienced as a result of the conflict between ADVOs and Family Court orders.[15]

The under-utilisation of Section 68T Family Law Act and the continuing conflict between Family Court orders and ADVOs jeopardises the safety of women and children. It is

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[13] Ibid pp99-100. See also H Katzen, *"It's a family law matter, not a police matter: The enforcement of Protection orders"* (2000) 14 AJFL 119

[14] M Kaye, *Section 68T Family Law Act 1975: Magistrates powers to alter Family Court contact orders when making or varying ADVOs,* 15 Judicial Officers Bulletin.No.1 pp6-8.

[15] *Supra* Kaye et al pp97-100.

therefore not sufficient to argue that section 68T can be used to ensure parenting orders are made that provide for women's safety if there is presumption of joint residency, as it is even less likely that a Local Court dealing with an ADVO matter, would vary such parenting orders or make orders that do not provide for joint residence.

If violence continues after separation and occurs during contact changeover, the mother can apply to the Family Court/Federal Magistrates Court to vary existing parenting orders if they do not provide for her safety. However, there are currently significant impediments to a woman obtaining a variation of a parenting order:

- It is necessary to show that there has been a significant change in circumstances since the original order was made, before the Court will even hear the substance of the application;
- If the original order was by consent it is more difficult to convince the Court to hear the application to vary; and
- A grant of Legal Aid is less likely to be made for an application to vary.

If there is a presumption of joint residence and court orders are made based on that presumption, it will be difficult for a mother who is the victim of violence to apply to vary those orders therefore seriously compromising her safety.

In conclusion, the experiences of many of our clients demonstrate that domestic violence is not given the weight it should be by some legal professionals and some personnel in the Courts. Not all professionals understand the complex nature of domestic violence and how it impacts on the lives of the women and their children. Many clients report that it is only physical violence that is acknowledged and even then, it is not recognised as having an impact on children. We believe that a presumption of joint residence or equal time after separation of parents, will further compromise the safety of those in our community who are already vulnerable – the women and children who live daily with the effects of domestic violence.

Yours faithfully
Domestic Violence Advocacy Service

Per:
Catherine Carney
Principal Solicitor