NATIONAL NETWORK OF WOMEN'S LEGAL SERVICES SUBMISSION TO THE STANDING COMMITTEE ON LEGAL & CONSTITUTIONAL AFFAIRS INQUIRY INTO EXPOSURE DRAFT OF THE *FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL* 2005

BACKGROUND

The National Network of Women's Legal Services (NNWLS) is a national group of Community Legal Centres specialising in women's legal issues. It is comprised of the following agencies, some of which have been operating for over 20 years:

- Women's Legal Services located in capital cities in each State and Territory.
- Indigenous Women's Legal Services.
- ATSIC-funded Family Violence Prevention Services located in 14 rural and remote communities.
- Domestic Violence Legal Services.
- Rural Women's Outreach workers located at 9 generalist Community Legal Centres.

These services offer free legal advice, information, representation and legal education to women across Australia. We target disadvantaged women including women from non-English speaking backgrounds, rural women, women with disabilities and Indigenous women. As a consequence, the NNWLS has developed an expertise in family law, violence against women and children and the legal aid system, as these issues affect disadvantaged women.

The Network is regularly asked to respond to government and Court initiatives and reform proposals and has developed a reputation for providing considered responses which incorporate a broad cross-section of views.

The NNWLS made a detailed submission to the parliamentary inquiry into child custody as did many individual member organizations of the NNWLS and a range of other community legal centres. The NNWLS also provided responses to the 'Every picture tells a story' report, the first one addressing the critical issues in the report and the second providing our response to each of the 29 individual recommendations of the report. Finally, the NNWLS provided detailed comments on the Government's Discussion Paper *A New Approach to the Family Law System.* These documents are available on request should the Committee require them.

INTRODUCTION

Terms of Reference

The NNWLS notes that the Committee is asked to consider whether the provisions of the Exposure Draft of the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 ('the Exposure Draft') are drafted to implement the measures in the Government's response to the Every Picture Tells a Story report, namely to:

a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate;

b) promote the benefit to the child of both parents having a meaningful role in their lives;

c) recognise the need to protect children from family violence and abuse; and

d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

('the Government's measures')

We note that the Committee is asked not to re-open discussions on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility.

Key Concerns

Consultation Timeframe

The NNWLS welcomes the Government's decision not to re-open discussions on the proposal of 50/50 custody, this proposal having been thoroughly examined and rejected by the Parliamentary Inquiry into Child Custody Arrangements in the Event of Family Separation. However, we note that the Exposure Draft still makes very significant changes to family law – according to the Government, 'the most significant changes to the family law system in 30 years'.[1] We believe that the three week timeframe for consultation on these changes is patently inadequate and are concerned that there is insufficient time for carefully considered input to be obtained from the range of stakeholders who should be engaged in this process.

As a result of the very limited time available for submissions and the availability of staff in our member centres, our submission is necessarily able to raise only our key issues of concern. The fact that we have not discussed a provision in the Exposure Draft should not be taken as an indication either of support or opposition to that provision. Except for where we make specific recommendations to the Committee, we are not able (again due to time constraints) to provide a concluded view on how our concerns should be addressed but simply raise them for the Committee's consideration. We request that you consult with us further through the Hearings process.

Family violence and child abuse cases

The NNWLS' experience is consistent with the research that strongly suggests that children's safety and welfare is being compromised in the approach to interim decision making that has developed since the *Family Law Reform Act* 1995 which

[1] Attorney General's Department Media Release 116/2005, *Government Responds to 'Watershed' Child Custody Report*, 23 June 2005.

introduced the principle of the child's right to contact.[2] This was an unforeseen consequence of the changes made at that time and highlights the need for caution in amending the objects and principles underlying Part VII. Rhoades, Graycar and Harrison note that there is 'now effectively a 'presumption' (although not a legal one) operating in favour of contact with the non-resident parent'[3] despite the fact that the best interests of the child are still supposed to be the paramount consideration in interim decision making, notwithstanding the introduction of the child's 'right' to contact.[4] The research suggested that 'there is a significant proportion of cases where it can be shown, with hindsight, that the interim arrangements were not in the child's best interests, and may well have been unsafe for the child and the carer'.[5]

In our experience the presumption of contact has permeated family law practice and led to a pro-contact culture that promotes the right to contact over safety. This affects not only interim decision making but also the final outcome of cases. This occurs through the combined impact of Legal Aid Commissions' determinations about whether cases should be 'funded', the approaches of legal practitioners in advising their clients about raising allegations of domestic violence or child abuse (clients are frequently advised not to raise such allegations lest they are seen as 'hostile' to the other parent and this actually results in residence or substantial contact being awarded to the alleged abuser), the approaches of family report writers when considering such allegations and ultimately final court decisions.[6]

The NNWLS believes that this pro-contact culture undermines the child's best interests in that it fails to properly prioritise the adverse effects on children of being exposed to abuse either directly or by witnessing the abuse of their parent.[7] We have advocated for some time for changes to Part VII of the Act to ensure that greater weight is given to the need to protect family members from violence and abuse.

We acknowledge the attempt that has been made in the Exposure Draft to address the issues surrounding violence and abuse. However, as noted in relation to the amendments made in 1996 by the *Family Law Reform Act* 1995, changes to the legislation can have unforeseen consequences if not carefully drafted. Changes that can appear to be relatively minor can be interpreted by the courts in a way that has a significant and unintended impact on the operation of family law. The NNWLS is concerned that a number of the provisions of the Exposure Draft which seem to be intended to implement paragraphs b) and c) of the Government's measures listed on page 2 above will conflict with each other, at the expense of paragraph c) – that is

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[2] 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

[3] Rhoades, Graycar and Harrison (note 2) at page 6.

[4] *B and B* (1997) 21 Fam LR 676.

[5] Rhoades, Graycar and Harrison (note 2) at page 7.

[6] See also Rendell, Rathus and Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family*, Women's Legal Service Inc., November 2000.

[7] For a discussion of the adverse effects on children of witnessing the abuse of their parent see Edleson, J, 'Children's Witnessing of Adult Domestic Violence', Journal of Interpersonal Violence, 14, 1999. See also Australian studies: 'Child adjustment in High Conflict Families', Child: Care Health and Development, Vol. 23., No. 2 p 113-133 and Mathias J, Mertin, P, Murray A, 'The Psychological Functioning of Children from Backgrounds of Domestic Violence, Australian Psychologist, vol. 30 no 1 pp 47-56.

that the provisions intended to promote the benefit to the child of both parents having a meaningful role in their lives may directly conflict with and override the provisions that are intended to recognise the need to protect children from family violence and abuse. We believe that clear and prescriptive changes are necessary to ensure that greater weight is given in family law decision-making to the need to protect family members from violence and abuse. We advocated in our Comments on the Government's Discussion Paper, *A New Approach To the Family Law System* for the introduction of the New Zealand *Guardianship Act* model (see Appendix).

The NNWLS is also concerned that a number of other provisions that seem to be intended to encourage agreements to be reached and to promote shared parenting (paragraph a) of the Government's measures on page 2 above) may further undermine the protection of children from family violence and abuse. We therefore question whether the Exposure Draft encourages and assists parents to reach agreement on parenting arrangements outside court where *appropriate.* Finally, whilst the provisions directed towards a less adversarial court system *may* make the court process easier to navigate and less traumatic we believe that other provisions in the Exposure Draft actively undermine these aims in the case of family violence and child abuse cases.

KEY ISSUES OF CONCERN

1. Changes to s60B Object of Part and Principles Underlying it

(1) The objects of this Part are:

(c) to ensure that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child.

(2) The principles underlying these objects are:

(a) except when it is or would be contrary to a child's best interests:

*(ii) children have a right to **spend time** on a regular basis with, and **communicate** on a regular basis with, both their parents and other people significant to their care, welfare and development; and*

(b) children need to be protected from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse or family violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse or family violence or other behaviour that is directed towards, or may affect, another person.

Response

- Introduction of s60B(2)(b) is welcome. Without the other amendments to s60B this might *assist* to redress the current prioritizing of contact with parents over safety (see discussion on pages 3-4 above).
- However, inclusion of s60B(1)(c) as currently framed and located is likely to undermine this:

- It is elevated over safety considerations (paragraph (2)(b)) as an object of Part VII rather than just a principle and is therefore likely to further promote the emphasis on contact over safety (see the discussion at pages 3-4 above).
- Wording is convoluted (compare s68F(1A)(a)) and reference to *'parents* having a meaningful involvement' in their children's lives may still tend to promote parents' rights and diminish the importance of what is actually in the best interests of the child;
- The phrase 'maximum extent' may increase the emphasis on contact over meeting safety concerns and tend to restrict genuine exercise of discretion about what is in a child's best interests.
- Although the object refers to the 'maximum extent consistent with the best interests of the child', the two new proposed primary considerations for best interests (see below) are likely to conflict with each other such that the presence of violence or abuse may not be sufficiently reflected in best interests assessments.

- S60B(1)(c) is not necessary to promote shared parenting. This aim is adequately reflected in s60B(1)(a) and s60B(2)(a)(i)-(iv).
- The framing of the current s60B(2) has been shown to have contributed to the prioritising of contact over safety (see pages 3-4 above). This framing includes stating that the principles are to apply *except* when it is or would be contrary to a child's best interests. The Exposure Draft essentially proposes to repeat this reference in the *negative* to best interests in s60B(2)(a). The paragraph could readily be framed with a *positive* reference to best interests: 'The principles underlying these objects are that, if it is in the best interests of the child...' This may better reflect the role that best interests of children plays in decision making and assist in ensuring that safety is properly prioritized.
- Framing of s60B(2)(a) by referring to *'time'* ***and*** *'communicating'* may increase the risk of unsafe face to face contact being ordered.
  - S60B already refers to the right to 'contact' and as noted at pages 3-4 above this has tended to lead to unsafe face to face contact being ordered, particularly at interim stages.
  - A direct reference to spending *time* rather than 'contact' (which can encompass indirect contact by telephone, email or letter) is likely to increase the risk of this occurring.

NNWLS Recommendation 1

That s60B(1)(c) not be introduced.

Alternatively, at a minimum, 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 this provision and s60B(2)(b) should be located *together* in either the Objects sub-section (1) or the Principles sub-section (2) AND NNWLS Recommendation 12 should be adopted.

NNWLS Recommendation 2

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

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2. Family Dispute Resolution (FDR)

The effect of s60I is that, with limited exceptions, parties will be required to attend FDR prior to issuing court applications. Cases where there has been family violence or abuse or where there is a risk of such violence occurring if a court application is delayed are exceptions. However, s60I(8)(b) states that the court must be satisfied on 'reasonable grounds' that abuse or violence has occurred or there is a risk of it occurring. Other exceptions include:

- Where there has been a serious contravention of a recent Order (8)(b)
- Where the application is urgent (8)(d); and
- Where one or more of the parties is 'unable to participate effectively in family dispute resolution (due to incapacity, remoteness from a service or some other reason)' (8)(e).

From 1 July 2008, even where a court is satisfied that there are reasonable grounds to believe that family violence or abuse has occurred, a person who wants to obtain a court order must still attend a family counsellor or family dispute resolution practitioner to get 'information about the issue' unless there are 'reasonable grounds' to believe that there would be a risk of abuse or family violence if a court application is delayed (s60J(1) & (2)).

Response

- The NNWLS does not see the need for the provisions in s60I that require a person to satisfy the court that there are 'reasonable grounds' for believing that violence or abuse has occurred in order to be excused from the requirement to attend FDR. In our view, given the clear data on the low rates of disclosure of family violence, if a disclosure is made this should be sufficient to enable that person to elect to use the court system rather than FDR, if they so choose. It is a highly questionable notion that people would 'make up' allegations of violence or abuse in order to avoid attending free FDR where their matter might be resolved so that they can, instead, with limited or no support embark on court proceedings that may be protracted, costly or that they are unlikely to be legally aided for. People generally issue court proceedings for good reasons and as a last resort.
- There is no guidance in relation to how a court will determine what are 'reasonable grounds'.
- The nature of family violence and child abuse is that it occurs behind closed doors, there are rarely 'independent' witnesses and there is often little physical evidence available. This can make it difficult to prove that violence and abuse has occurred to court standards of proof.
- S60I(8)(e) appears to require the court to determine whether the parties are unable to participate effectively in FDR. Judges may not be well-placed to make this determination given that they do not conduct FDR and will have limited time to assess the parties.
- Regulation 62 of the current *Family Law Regulations* provides a preferable framework for considering whether mediation should occur.

- These provisions appear to create significant obstacles for a potential applicant to negotiate to issue a court application where they allege there is violence or abuse. They appear to leave scope to require multiple court hearings to determine whether cases should be allowed to proceed. This makes the court process harder to navigate for applicants who fear violence or abuse and risks causing significant delays that may endanger the potential applicant or their child.
- There are already very high rates of non-disclosure of family violence. The above factors create a real risk that parents will be even more reluctant to disclose violence or abuse and/or that matters may be inappropriately pushed into FDR processes.
- The NNWLS supports the greater availability of alternative dispute resolution. However, we are opposed to compulsory dispute resolution and note that this arguably compromises the benefits of alternative dispute resolution simply because it is not attended voluntarily.
- The compulsion to attend mediation creates significant risks that cases where there has been violence or abuse will be pushed through the system, despite safeguards, because the court system is currently inaccessible to many due to insufficient legal aid funding and the costs of legal representation. The way in which the relevant FDR services operate in practice, both in conducting screening for violence and abuse, and in conducting dispute resolution in cases where there may have been such abuse, but it has not been disclosed, will determine the extent to which this new system creates even greater risks than currently exist for unrealistic, unfair and even unsafe agreements to be negotiated. Although these issues do not directly arise from the terms of the Exposure Draft we believe that they need to be addressed in order to give proper effect to the Government's measure c) on page 2.
- We provided detailed comments on the issues relating to 'screening' for violence and abuse and mediating in cases where there has been abuse in our Comments on the Government's Discussion Paper, *A New Approach To the Family Law System* (see Appendix). Note in particular our comments in relation to the importance of lawyer assisted mediation in family violence cases or, at a minimum, access to legal advice prior to mediation and prior to concluding an agreement. We note that it was a requirement of the previous *Family Law Rules* 1984 (now replaced) that mediators had to tell parties to seek advice from a lawyer.
- The NNWLS also has reservations about the way in which cases involving entrenched conflict may be dealt with in the new compulsory dispute resolution model. Mediation relies on people being the focus of discussions and not their positions but people in entrenched conflict find it hard to shift from their positions.
- We note that in some of the commentary on family law there is often a blurring between matters where there is entrenched conflict and matters where there is violence or abuse. We hold some concerns that violence and abuse is sometimes missed in those cases that are believed to involve entrenched conflict. However, in raising our concerns about how the proposed changes would operate where there is entrenched conflict we make a very clear distinction between cases that are actually characterised by entrenched conflict and those cases where there is violence and abuse. In cases where there is violence or abuse there is an element of fear or fear of harm and a power imbalance that is not present in other cases.

- No model of dispute resolution is identified. This will be very relevant to the success or failure of the new system.
- In our experience mediated outcomes are not *necessarily* sustainable or best for children. We therefore welcome the Government's proposal for a research project (see the Government's response to Recommendation 19 of the Every Picture report) to examine the outcomes of judicial decisions and mediated outcomes.

NNWLS Recommendation 3

That any provisions directed towards requiring parties to attend FDR prior to issuing court proceedings should not:

- make the court process harder to navigate for applicants who have concerns about violence or abuse;
- increase the risk of delays that might endanger potential applicants or their children;
- increase pressure not to disclose concerns about violence or abuse.

At a minimum:

- There should be an additional provision in s60I(7) that allows for FDR practitioners to certify that a dispute was not suitable for FDR due to family violence or other issues
- The additional requirements applying to cases where there has been violence or abuse in s60J should not be introduced.

Where a person does not attend FDR, having satisfied the court that there are reasonable grounds to believe that there had been or could be family violence or abuse or where one of the other exceptions applies, they may still be directed to FDR by the court (s60I(9)); the court *must* consider making such an order.

Response

- No criteria are provided to guide the making of such a decision.
- Once an application is issued it is simpler and clearer for parties if dispute resolution services are provided in the court and it should be noted that the Family Court process provides multiple opportunities for matters to be resolved.
- It is particularly inappropriate that cases where there has been family violence or abuse should be *directed* against their will to FDR outside the court, having previously been exempted from the requirement to attend FDR prior to issuing.

NNWLS Recommendation 4

That ss60I(9) not be introduced. Or, at a minimum, that it not apply to cases where there has been family violence or abuse.

3. S61DA Presumption of Joint Parental Responsibility & S65DAC Effect of Order for Joint Parental Responsibility

S61DA provides that, when making a parenting order, the court must apply a presumption that it is in the best interests of children for their parents to have joint parental responsibility for them. The presumption does not apply if there are 'reasonable grounds' to believe there has been family violence or child abuse. S65DAC says that the effect of an order for joint parental responsibility is that decisions about 'major long-term issues' must be made 'jointly'; that is parents must consult each other and make a genuine effort to come to a joint decision. 'Major long-term issues' include decisions about the child's education, religious upbringing, health, name and significant changes to the child's living arrangements.

- It is unclear what the effect of s61DA might be because the law already provides that 'parents share duties and responsibilities concerning the care, welfare and development of their children' and they each have 'parental responsibility for the child' unless there is a contrary court order.
- The current provisions are clear enough to require and make specific orders in relation to sharing of parental responsibility or to make any other order that meets the best interests of the child.
- A 'rebuttable presumption' might create greater pressure than already exists to share responsibility for children in inappropriate cases and strict equality of parents' responsibilities could be emphasised over the best interests of the child, which would be highly undesirable.
- Under the current law parents *effectively* have to consult each other over long term decisions where they share parental responsibility for a child, which is the norm. Unfortunately, this can, and frequently is, used by abusive non-resident parents to continue a pattern of controlling behaviour after separation.[8] This situation is likely to be exacerbated by emphasizing the sharing of parental responsibility by creating a presumption and by making a requirement to consult over 'major long-term issues' explicit in the legislation and by the provisions which encourage the detailing in parenting plans and orders of 'the form of consultations' parents are to have with each other about decisions (s63C(2)(d), s64B(2)(d)) and s63DA(d)(i)).
- The NNWLS notes that the 'Every Picture' report recommended that entrenched conflict should also be an exception to the presumption of joint parental responsibility but that this does not appear in the exposure Draft. Where relationships are bogged down in conflict, notions of lengthy shared parental responsibility can be problematic as entrenched conflict can have a significant impact on children. Similar considerations to those discussed in the above paragraph apply in these cases.
- It is unclear how the provisions will actually ensure that decisions are made jointly and what the effect will be of one parent refusing to make a decision 'jointly' as the Government's Explanatory Statement simply says that in this case the other party will be able to make an application to the court to deal with the dispute.
- The introduction of a presumption of joint responsibility is likely to lead to increased litigation.[9]
- There is no guidance in relation to how a court will determine what are 'reasonable grounds' to believe that family violence or abuse has occurred.

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[8] Rhoades, Graycar & Harrison (note 2) at page 2.

[9] This should not come as a surprise given the massive increase in litigation following the amendments made to the *Family Law Act* in 1996; see Rhoades, Graycar & Harrison. (note 2)

- The formulation of s61DA(2)(a) appears anomalous – if a parent or person who lives with a parent has abused a child who is *not* a family member, the presumption still applies such that it could apply in the case of a convicted pedophile.
- In its discussion paper on *A New Approach to the Family Law System*, the Government proposed that there would be a presumption against equal shared parental responsibility where there was evidence of violence or abuse. This does not appear in the Exposure Draft. If a presumption in favour of joint parental responsibility is to be introduced in other cases, a contrary presumption against joint parental responsibility might assist to redress the prioritizing of contact with parents over safety (see discussion at pages 3-4 above).

NNWLS Recommendation 5

That s61DA (presumption of joint parental responsibility) not be introduced.

NNWLS Recommendation 6

That s65DAC (specific legislative requirement to consult) not be introduced.

NNWLS Recommendation 7

That if s61DA (presumption of joint parental responsibility) is introduced, a presumption against joint parental responsibility where there is family violence or abuse also be introduced.

4. Emphasis on and Priority to Parenting Plans

S63DA requires advisers (lawyers, counsellors, dispute resolution practitioners and family and child specialists) to inform people that they could consider entering into a parenting plan and where they can get assistance in developing such a plan. S64D states that:

Unless the court determines otherwise, a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:

(a) entered into subsequently by the child's parents; and

(b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.

S65DAB requires courts, when making parenting orders to 'have regard to the terms of the most recent parenting plan.. if doing so would be in the best interests of the child'.

Where a contravention application is made in relation to an alleged breach of a parenting order and the parenting order does *not* include a provision that the order is subject to a parenting plan but a parenting plan has subsequently been entered into, a court will be directed, in exercising its contravention powers to have regard to the terms of the parenting plan and to consider varying the parenting order to reflect the terms of the subsequent parenting plan (s70NGB(2) and s70NJA(2)).

Response

- Emphasis on agreements which have not been checked by legal advisers or the court and that are not legally binding may well result in greater numbers of court applications and greater complexity to the cases that end up in court.
- Lack of clarity in Consent Orders and parenting plans already seems to be a major contributor to the total number of court applications. The layer of confusion that could be added by the way parenting plans will sit alongside parenting orders and override them has implications for how parties will understand the nature and effect of the decision/agreement and what their roles and responsibilities are. This is a crucial part of promoting less-conflictual parenting after separation and parties' obligations must be clear given that there are penalties for non-compliance.
- Agreements that have not been properly checked can be exploited by violent parties to enable them to continue to contact and threaten the non-violent partner and even to access the home.
- There are no checks and balances for parenting plans (compare Consent Orders which must be approved by the court) to ensure that they are actually in the best interests of children rather than just the arrangement the parents could most easily agree to – where a power imbalance may be skewing the result in favour of the more powerful negotiator. If there is going to be such an emphasis on parenting plans there should be some process through which they are scrutinised.
- S64D will increase the risks associated with such flexible agreements if they are able to 'terminate' the parenting order 'to the extent of inconsistency with the parenting plan'. There is a real risk that one parent could be pressured into entering into a subsequent parenting plan and, unlike with court orders, this could be sanctioned without any independent scrutiny by a court.
- This may be unintended but the current wording of s70NGB(2) and s70NJA(2) appear to require courts to 'have regard to' parenting plans in considering how to exercise *any* of their contravention powers under s70NG and s70NJ respectively (when dealing with contraventions of orders stated *not* to be subject to subsequent parenting plans). If this is the case it will be very unclear to a person whether or not they will be considered by a court to have breached a particular parenting order.

NNWLS Recommendation 8

If the legislation is to introduce this emphasis on parenting plans, the effect of this should be properly evaluated: Who are the people using them? Are they similar to the people who previously had no written agreements about how they managed their children? Are they assisting any people who would have previously had to go to court? Has it resulted in more sustainable agreements? Has it reduced the use of other dispute resolution services? Has it reduced the use of the court? Has it been cost effective? And most importantly, have the plans kept parents and children safe and been in the best interests of children?

NNWLS Recommendation 9

That s64D (parenting orders to be subject to parenting plans) should not be introduced.

Alternatively, at a minimum, that s70NGB(2) and s70NJA(2) be amended to clarify that courts hearing contravention applications are only required to have regard to subsequent parenting plans (where the parenting order being considered is stated *not* to be subject to a subsequent parenting plan) in determining whether to vary the relevant parenting order – and not in determining whether and how to exercise any of its other powers under s70NG and s70NJ.

5. S63DA(2) Obligations on Advisers to Raise 'Substantial Time' Arrangements

Advisers who give advice on parenting plans *must* 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 the option of an arrangement of that kind'.

Response

- Although this requirement is qualified by reference to the best interests of the child, directing advisers to specifically raise one model for caring for children after separation gives inappropriate priority to an arrangement that is no more likely to be appropriate than any other arrangement. This might project a level of authority that means that substantially shared time arrangements would be given more weight than they should be in the particular circumstances and pressure vulnerable parties to accept such arrangements even where they may not be best for children.
  - Absence of evidence to suggest that substantially shared time arrangements are best for children in a significant proportion of cases.
  - Evidence suggests that they may in fact only be appropriate in very particular circumstances, including where there is a high level of cooperation

between the parents and they live close together (see discussion of the Washington Code provisions at 6. below).

- This diminishes focus on what is in the best interests of children and tends to emphasise parents' 'rights' to equality.
- It may also de-prioritise safety issues as it increases pressure for equal time arrangements.

NNWLS Recommendation 10

That s63DA(2) not be introduced.

6. S65DAA Court to Consider Substantial Time Arrangements

S65DAA provides that:

(1) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have parental responsibility for the child jointly; and

(b) both parents wish to spend substantial time with the child;

the court must consider making an order to provide (or including provision in the order) for the child to spend substantial time with each of the parents.

Response

- Although the note to s65DAA makes it clear that a decision about whether to 'go on to make' a parenting order for substantial time with both parents would still be determined according to the child's best interests, this still prioritises consideration of one model over any other – even though it is no more likely to be appropriate.
- Tends to diminish the importance of the best interests of the child.
- See our comments in relation to emphasizing equal time arrangements above.
- Cases where both parents want substantial time with their child are exactly the cases least suited to substantially shared parenting time because this is often a reflection of a belief that the other parent is not capable of parenting. This does not nurture the high level of cooperation that is necessary for substantially shared parenting time.
- The Revised Code of Washington (RCW 26.09.187) provides a useful and appropriate model for considering when substantially shared parenting time may be ordered. Essentially it may only be considered as a *possible* model where it is in the best interests of the child, the parents agree to it, have a history of cooperation and sharing parenting and are available to each other. It is also excluded in cases where either parent has abandoned the child or refused to parent the child, or there is a history of violence or abuse.

NNWLS Recommendation 11

That s65DAA not be introduced.

7. S68F Changes to Determination of the Best Interests Of Children

The Exposure Draft introduces a two tiered system for determining the best interests of children.

7.1 First Tier Primary Considerations

The first tier two primary considerations are listed in s68F(1A). They are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm caused, or that may be caused by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.

Response

- These new primary considerations may conflict with each other.
- The research discussed at pages 3-4 demonstrates that the introduction of the 'child's right to contact' led to an effective "presumption' (although not a legal one) operating in favour of contact with the non-resident parent'.
- The inclusion of s68F(1A)(a) as a primary consideration in directly determining best interests is therefore likely to create even greater pressure for contact to be maintained. Placing s68F(1A)(b) alongside it may ameliorate this and just result in the two considerations cancelling each other out.
- Clear and prescriptive legislative change is needed to address the extent to which the presumption of contact has permeated family law practice and led to the prioritising of contact over safety (see discussion at pages 3-4).
- The proposed wording of s68F(1A)(b) omits direct mention of family violence in contrast to s60B(2)(b) and contrary to the Government's measure c) on page 2. It is important that the prevalence and impact of family violence is not obscured in the best interests factors.

NNWLS Recommendation 12

s68F(1A)(b) should stand alone as the primary consideration in decisions about a child's best interests.

NNWLS Recommendation 13

S68F(1A)(b) should refer directly to 'family violence' and 'abuse' in the same way as proposed new s60B(2)(b) does.

7.2 Second Tier Other Considerations

Changes to the other considerations in s68F(2) (which are now to form the second tier of considerations the court must address in determining best interests) include:

7.2.1 The addition of paragraph (ba):

The willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent.

Response

- It is impossible to anticipate which parent is more likely to facilitate and encourage a relationship between the child and the other parent.
- Family law decision making already places great emphasis on who is the parent more likely to facilitate a relationship with the other parent in determining residence and contact arrangements. In our experience, this often fails to recognise that a reluctance to facilitate a relationship with the other parent can be borne of a genuine and well-founded concern about that person's capacity to parent or their actually being abusive to the child concerned.
- As indicated above, clients are often told by experienced family law practitioners that they should not raise allegations of abuse because they may be seen as 'hostile' to the other parent. This leads to some parents who fear abuse giving up and handing children over to the very person they believe is perpetrating the abuse. Any additional pressure in the legislation not to raise allegations of abuse must be avoided.
- Any amendments to promote the importance of a close relationship with the other parent *must* take into account the reality that protective decisions may be made by parents. These decisions relate to issues of violence and abuse rather than an unwillingness to facilitate close relationships with the other parent. See also the discussion below about the complexities around breaches of intervention orders. The introduction of such a provision is a blunt and inappropriate instrument to deal with these complexities.
- The reality is that most resident parents facilitate contact and they are the silent majority.

NNWLS Recommendation 14

That s68F(2)(ba) not be introduced.

7.2.2 Changes to paragraph 68F(2)(j) to require that the court only have regard to family violence orders that are final or contested.

Response

- We do not consider that this amendment will make much difference in practice as it is our experience that the Family Court pays little regard to family violence orders that are not final or contested in any event.
- However, this sends an unfortunate and inappropriate message about the weight to be given to orders legitimately made by other courts to promote non-violent behaviour.

- It also fails to recognize that interim and ex parte orders are frequently obtained in urgent circumstances for good reasons but, due to the documented problems with family violence order processes, victims of violence can drop out of the system before obtaining a final order.

NNWLS Recommendation 15

That paragraph 68F(2)(j) not be amended.

7.2.3 Changes to all relevant paragraphs to refer to children's 'views' rather than 'wishes'.

Response

- The NNWLS welcomes this change, which is consistent with the Convention on the Rights of the Child, as an appropriate indication that children should not be asked to choose between their parents or make decisions about their future but should be able to express their views.

8. Compliance Regime

The Exposure Draft directs the court to consider ordering make up contact even where there has been a reasonable excuse for contravention unless this is not in the best interests of the child. It also gives the court a wider range of options to consider at stages 2 and 3 of the compliance regime, namely:

- At both stages the court must consider awarding compensation for reasonable expenses incurred where a breach resulted in a person not spending time with the child.
- The court would have the option at stage 2 of a bond with civil penalties attached and is specifically authorized to order costs.
- The court *must* consider compensatory parenting time at stage 2 unless this would not be in the best interests of the child.
- The option of compensatory parenting time is also included as an option at stage 3.
- At stage 3 there is to be a presumption that costs will be ordered unless this is not in the best interests of the child. Where costs are not ordered the court *must* make one of the other orders available to it.

Response

- Welcome the Government's decision to move away from the very prescriptive regime proposed in its discussion paper.
- The current contravention regime in the Act is adequate to promote the object of children having a meaningful relationship with both parents.
- The focus on strengthened enforcement seems to reflect a notion that resident parents are gratuitously denying contact to non-resident parents with impunity. In our experience the far greater problem is with resident parents being brought back to court frivolously to 'enforce' contact orders whilst having no legal rights to require non-resident parents to see their children.

- The Rhoades, Graycar & Harrison research shows that in the years 1996-1999, 45% of contravention applications were dismissed and a further 17% were considered trivial.[10] Rather than mothers wanting to deny fathers contact with their children, a 2003 analysis of income and labour data suggests that some 40% of resident mothers would like to see *more* father-child contact taking place.[11]
- Increasing punitive contravention measures risks increasing pressure on parents who fear abuse is occurring to nevertheless hand over the children to the other parent. Any additional pressure in the legislation not to raise allegations of abuse should be avoided.
- If there are to be changes to the compliance regime, contravention proceedings should incorporate an analysis of how the original agreement or order was made and the real circumstances of the breach. They must also account for the complexities of disclosures and fear of abuse and the complexities more generally of families that tend to be involved in these sorts of cases – who often face a range of social problems in addition to violence such as substance abuse, gambling and poverty. Very often there are good reasons for breaches.

9. Changes to the Conduct of Child Related Matters

The Exposure Draft introduces changes aimed at promoting less adversarial conduct of child related matters. These changes can be applied to other proceedings that arise from the marriage breakdown if both parties consent. According to the Explanatory Statement 'this approach largely reflects that taken by the Family Court of Australia in its pilot of the Children's Cases Program'. The court is directed to give effect to four principles in dealing with child related matters (s60KB). These focus on the child and the parties' parenting relationship, the active case management of matters and the avoidance of formality and delay.

The Court's general duties in giving effect to the principles are set out in s60KE and include considering whether the likely benefits of a particular step being taken justify the costs.

S60KG makes significant changes to the rules of evidence – essentially most of the rules of evidence will not apply unless the court considers it is in the best interests of the child to apply them. The rules that *will* apply in all cases are those which support the court's active case management such as the court's control over questioning etc. The court's duties and powers relating to evidence are set out in s60KI.

Response

- In principle, the NNWLS supports the adoption of less adversarial processes in the courts provided:
  - Parties are still able to have legal assistance and representation.
  - Judges and magistrates are properly trained on how to conduct this new quite different role and on issues relating to family violence and abuse to ensure that evidence is not excluded due to lack of understanding of its

[10] Rhoades, Graycar & Harrison (note 2) at page 9.
[11] 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.

relevance and significance. There must be consistency in decision making and evaluation to ensure that there is consistency.
    - Any increased role for family and child specialists in hearings is accompanied by training on issues relating to family violence and abuse to ensure that they do not reach conclusions regarding such matters without properly understanding the issues.
    - There is also a simplified path for review/appeal so any appeal process is consistent with the simpler procedures that will apply at first instance.
- The Children's Cases Program pilot in Sydney and Parramatta has not yet been evaluated. A full report is expected to be available early in 2006. Reports on the progress of the program demonstrate the very significant influence individual judges have on processes and outcomes in less adversarial systems. Other concerns about the Program include the way in which its emphasis on being 'future-focussed' may obscure issues of violence or abuse as parents who raise such issues may be constructed as destructive and 'past-focussed'. Issues also arise in cases where there has been violence with the quasi-mediation style that can be adopted, including encouraging parties to sit together at the bar table and speak to the Judge directly even where they have representation. It appears that nearly all the parties that have opted in to the program have been represented. There may well be significant lessons to be learned from these and other aspects of the Children's Cases Program.
- The obligations imposed on the court to actively control proceedings and evidence cannot be implemented without additional funding. There are already significant delays in getting matters heard in the court without these greater duties to actively manage proceedings.

NNWLS Recommendation 16

That legislative changes to promote less adversarial proceedings be deferred until proper consideration has occurred of the evaluation of the Children's Cases Program.

NNWLS Recommendation 17

That any legislative changes to promote less adversarial proceedings are accompanied by the necessary additional funding to the Family Court to enable the court to actively manage proceedings.

10. Changes to Dispute Resolution

Although the changes to dispute resolution continue to allow for family dispute resolution and family counselling to occur within the court system, there is an emphasis on directing matters outside the court.

Part III of the Exposure Draft deals with 'family and child specialists' who will be appointed by the family courts to provide services to people in family law proceedings and the courts. Their functions will include (s11A):

- Assisting and advising people involved in proceedings
- Assisting and advising courts and giving evidence in proceedings
- Helping people involved in proceedings to resolve disputes.

It appears from the Explanatory Statement that even where a family and child specialist is helping people resolve disputes, communications with them will be admissible.

Response

Clarification of the distinction between dispute resolution and counselling is welcome. This is currently a source of considerable confusion. The NNWLS notes that the term 'family dispute resolution' could promote creative development of alternative dispute resolution processes. This could well be a positive thing, however, because the term is broad there is no guidance as to what models of dispute resolution will be acceptable and the precise models used will be very relevant to their success or otherwise.

- Once an application is issued it is simpler and clearer for parties if dispute resolution services are provided in the court.
- Even if the majority of cases are to be directed outside the court for FDR it is still important to have *confidential* dispute resolution within the court, at least for those who have not attended FDR prior to filing a court application.
- Concerns about what 'advice' family and child specialists will be tasked to give parties to proceedings if they are to be non-lawyers.

11. Removal of References to Residence and Contact

The Exposure Draft removes references to 'residence' and 'contact' and generally replaces them with the terms 'lives with' (residence) and 'spends time with' and 'communicates with' (contact).

Response

- Constant changes to the language of the *Family Law Act* should be avoided as they lead to confusion.
- New terminology is unlikely to change attitudes:
  - This has not occurred to any significant degree with the changes to 'residence' and 'contact' from 'custody' and 'access' that occurred in 1996.
  - Separated parents who are in conflict are still likely to see themselves as 'winners' or 'losers' regardless of the terminology used.
- New terminology may make parenting orders even harder to understand.
- In the explanatory statement the Government says that 'the intention is for parents to consider a variety of ways by which they can have a meaningful involvement in their children's lives, which is not just physical time spent with a child' (p7). However, the new terminology may lead to, the perhaps unintended consequence of actually increasing pressure for parents to have *both* time and communication with their children (see our comments re the changes to s60B(2)(a) above).

12. Changes to give greater recognition to indigenous family structures and culture

The NNWLS has members from Indigenous Women's Legal Services and Family Violence Prevention Services. Please refer directly to the National Network of Indigenous Women's Legal Services for comment on these provisions:
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NATIONAL NETWORK OF WOMEN'S LEGAL SERVICES
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