Submission No. 22

Date Received

NSW Women's Refuge Resource Centre

TOWARDS A SAFER FUTURE

14th July 2005

The Secretariat
House of Representatives Standing Committee on
Legal and Constitutional Affairs
Parliament House
Canberra ACT 2600
e-mail: laca.reps@aph.gov.au

RECEIVED
15 JUL 2005
BY: LACA

Dear Secretariat,

Please find attached the submission of the NSW Women's Refuge Movement (NSW WRM) to the inquiry into the provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 ('the Bill').

The NSW WRM is a statewide representative body of 55 refuges with a specific focus on providing accommodation and quality support for women and children escaping domestic violence and child abuse. In January 2005, the NSW WRM submitted a response to the Family Law Discussion Paper: 'A New Approach to the Family Law System'.

It is of deep concern to the NSW WRM that the proposed Bill does not sufficently address the issue of the safety of women and children.

An increased availability of information and other assistance to parents who are cooperative in their approach to future parenting after separation is likely to be of benefit. However the NSW WRM is concerned that the the Bill does not adequately acknowledge or make provisions for the levels of domestic violence and other abuse often involved in separation.

While there are exceptions provided within the Bill in relation to child abuse or family violence and discretion around the 'best interests' of children, there are no proactive steps to screen domestic violence or address the gaps in providing safety for women and children after separation. Given that violence and safety concerns are the key reason for many women and children entering the Family Law Court, the Bill may actually increase the risk to safety for women and children.

The submission specifically addresses the terms of reference drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled *Every Picture Tells a Story*, namely to:

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

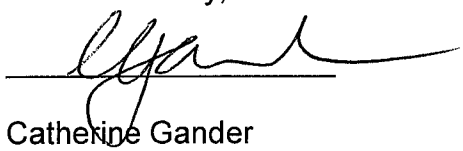
b) promote the benefit to the child of both parents having a meaningful role in their lives

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 NSW WRM would like the opportunity to support this submission with oral evidence.

Yours sincerely,



Catherine Gander
Executive Officer,
NSW Women's Refuge Resource Centre

Schedule 1 – Shared Parental Responsibility

Content

Item 2 of the Schedule amends the objects provision of Part VII of the Act to provide that, subject to safety issues, children have the right to know and be cared for by both parents.

Comment

The concept of a child having a meaningful relationship with both parents after separation and being protected from harm are in practice often diametrically opposed.

While this provision may support separations that occur in low level conflict situations, the fact remains that violence and safety concerns are the key reason for many women and children entering the Family Law Court. Research by the Australian Institute of Family Studies identified violence as being present in 66% of all marital breakdowns, 33% of the violence was identified as serious[1]. The prevalence of domestic violence is even higher than this with families going through the Family Law Court. A 2003 Family Law Court survey showed that over 66% of cases which make it to the final stage of judgment in the Family Court have issues of serious physical domestic violence.[2]

The WRM believe that priority should be given to the safety of children from abuse and violence. The primacy of safety has not been sufficiently emphasized.

Recommendations

Give expression to the primacy of human rights to safety in the definition of the child's rights.

Give expression to children's right to live free from continuing parental conflict.

The Family Law Act adopts safety first principles, policies and practices that recognize domestic violence as a mainstream problem affecting a majority of FLC cases.

Family Dispute Resolution (FDR)

Content

Item 9 provides that people applying for a parenting order will be required to first attempt to resolve their dispute using family dispute resolution services. A court cannot hear an application

[1] Australian Institute of Family Studies, 2000

[2] Submission of The Family Court of Australia: Part B Statistical Analysis, to the HoR Inquiry into Child Custody Arrangements, Feb 2004

for a parenting order unless the applicant provides a certificate of attendance at family dispute resolution or that failure to do so has been caused by the other party's refusal or non-attendance.

Exceptions to attendance are

1. Where the parties have agreed to consent orders.
2. Once substantive court proceedings have commenced.
3. Where there is or has been family violence or abuse, subject to the party satisfying the court that there are 'reasonable grounds' to believe that abuse or violence has occurred or may occur.
4. Where there is an existing order relating to an issue in a current contravention application and the person has shown 'serious disregard' of the order.
5. In cases of urgency such as relating to location and recovery of a child including cases of child abduction,
6. Where a party is 'unable' to participate effectively in family dispute resolution due to incapacity (significantly intellectually impaired or substance addicted) or physical remoteness without access to a telephone.

Even where a person meets a ground of exemption, the court may still order them to attend family dispute resolution.

Where a party does not attend family dispute resolution due to the existence or risk of family violence or child abuse, parties must obtain information about the issue/s in dispute from a family counsellor or family dispute resolution practitioner before the application is considered by the court.

All applications made after July 1 2008 will need to be fully compliant with these provisions.

Comment

While the NSW WRM acknowledges that Family Dispute Resolution may be of benefit to couples separating with a low level of conflict, mediation is not appropriate for dealing with high level conflict or where there is a power imbalance between the couple. In cases involving domestic violence, it is highly likely that the safety of women and children will be placed at risk as a direct result of arrangements or compromises made during mediation sessions.

Evidence

The requirement to make dispute resolution compulsory provides exceptions to cases where there is or has been family violence or abuse. However, it is of great concern that there is no clear process as to how the Court will determine what are 'reasonable grounds' to believe that abuse or violence has occurred or may occur. What is currently accepted as evidence leaves many cases involving violence or abuse unidentified. To ensure the protection of women and children, Family Relationship Centres need to approach cases with a presumption that domestic violence or other abuse is highly likely to be present. The approach would remove the onus on the victim to disclose and would ensure a screening tool was inbuilt in all practices and procedures undertaken by Family Relationship Centres or the Family Law Court.

The evidence required to satisfy 'reasonable grounds' is not clear. Studies show that 80-95% of women who experience domestic violence do not seek assistance from any services; police, doctors, refuges etc.[3] Even when police apply for an AVO on the woman's behalf there is a high withdrawal rate by the women. In NSW 2002-03 the AVO withdrawal and dismissal rate was 44.8%.

Domestic Violence and sexual assault are crimes that predominately occur in the privacy of a home with no witnesses. Many of the women and children in our NSW refuges do not have AVO's in place, forensic evidence, doctors reports or ambulance records to present. Yet they may have been living in a violent relationship for significant number of years. The evidence available is often only the word of the victim the fact that it cannot be proven through supporting evidence is by no means proof that the violence or abuse did not occur.

The possible increased requirements to document or prove violence or abuse creates risks that women will be discouraged from disclosing violence and abuse and/or that matters will be inappropriately forced into FDR processes.

Screening

The Bill does not contain any approach to screening violence that reflects the prevalence of domestic violence and child abuse in families entering the family law court. The onus of identifying violence is solely reliant on the victim[4]. Given the evidence around low disclosure and the prevalence of cases involving domestic violence and other abuse going through the family law system, practices and procedures should reflect that domestic violence is a mainstream problem affecting a majority of Family Law Court cases.

Not all domestic violence is readily apparent and previous attempts to screen for domestic violence have not been successful. Research into mediation services in Australia have repeatedly shown that many people who should be excluded from mediation because of violence are not. Australia's most recent research shows that most women (70.9%) find it very difficult to disclose domestic violence and child abuse when the opportunity arises; to lawyers, counselors or other professionals. This is in direct contrast to the 70% of such professionals who, when asked, responded that they thought their clients would disclose domestic violence.[5]

The above research is consistent with reports from refuges that a high number of women and children escaping domestic violence and entering into Family Law Court processes do not disclose violence for reasons that include; shame, fear that they will not be believed and/or that the violence may escalate.

---

[3] ABS, Women's Safety Survey 1996: Victorian Family Violence Database, 2003. See also OSW Department of PM&C, Working Together Against Violence. The First Three Years of Partnerships Against Domestic Violence, Commonwealth of Australia, 2001, p.v.

[4] Refer to page 4 paragraph 5

[5] Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

Aboriginal and Torres Strait Islanders and newly arrived refugee communities who have lived through recent and generational trauma have a strong investment in building and keeping their communites together. Women escaping domestic violence or child abuse from these communities will be more reluctant to disclose for reasons that include; past systems trauma, protection of the abuser, community pressure and attitudes to preserve existing relationships and fear of isolation from the culture and community. Women from refugee or migrant background may not be aware of their rights or the legal remedies against domestic violence, may lack information on the support systems available, may face language barriers and may be fearful of deportation if they speak out against the violence.

Services that provide FDR will also play a role in screening for violence in families. However, even with the most sensitive screening tool and highly skilled and experienced worker, not all cases of domestic violence will be identified.

Victims of domestic violence are not supported within the dispute resolution processes contained in this Bill.

Recommendations

A sworn statement by a party that violence or abuse has occurred should be sufficient to establish 'reasonable grounds' to believe that violence or abuse has occurred or may occur.

A further range of indicators of violence or abuse in families should be provided to the court to support 'reasonable grounds'. These should include but not be limited to:

- ***Allegations of abuse or violence by a party***
- ***Children's disclosures of abuse or violence***
- ***Any police records, reports, prosecutions, convictions pertaining to violent conduct of a party***
- ***Any mandated child protection notifications against a party***
- ***Any child protection records pertaining to a child of a party***
- ***Any audio or video recording of abusive or violent conduct by a party including threats to harm or kill***
- ***The existence of a previous or current Restraining Order against a party***
- ***Any witness statements attesting to violent or abusive conduct by a party***

An additional presumption of human rights to safety should be expressed, providing that the court specifically has responsibility to ensure that its orders do not expose parties or children to actual or threatened harm.

That a Domestic Violence Homicide Review Process be established and that further legislation should provide for a statutory compensation system for parties and children who are killed or suffer serious physical or psychological harm from parties who the court orders them to have contact with or reside with.

As a matter of urgency the family law system capacity to identify and respond effectively to violence and abuse to support adult and child safety should be addressed. The recommendations of the Family Law Council in its Family Law and Child Protection Report (2002) and letter of Advice on Family Violence under Division 11 of the Family Law Act (2004) should be implemented forthwith.

The FRC be an option for separating parents and not the single entry point to the Family Law Court.

Presumption of Joint Parental Responsibility

Content

Item 11 provides a new presumption for the court to consider in making an order, that parents have joint parental responsibility for the child except where there are reasonable grounds for the court to believe that a parent of a child or a person who lives with a parent of a child, has engaged in child abuse or family violence. The presumption will also be rebutted where the court considers that joint parental responsibility would not be in the best interests of children.

Comment

The NSW WRM is aware that the presumption of joint parental responsibility may be rebutted where there are reasonable grounds for the court to believe that a parent of a child or a person who lives with a parent of a child, has engaged in child abuse or family violence or where the court considers that joint parental responsibility would not be in the best interests of children.

However, it is not clear what requirements will need to be met for the Court to be satisfied that there is evidence of violence, abuse or entrenched conflict to reverse the presumption. In practice, this cannot be a protective provision for children if there are no effective procedures in place to screen for domestic violence.

The presumption of joint parental responsibility will give further precedence to contact over other provisions which are intended to protect adults and children from harm, placing the protection rights of children at risk of being over-ridden by the parent's right to contact.

Requiring victims of violence to counter a presumption of shared responsibility may further discourage women from leaving violent relationships, for fear of their safety and that of their children.

The onus here is on the victim of abuse proving that she has been abused. Consideration is not being given to the State and Federal governments' responsibilities to protect women and children from abuse and violence.

Even when victims can supply evidence of abuse, research suggests that it may not be considered relevant when determining issues relating to parental responsibility.

Joint parental responsibility is not necessarily the best outcome for all families in all circumstances. The principle of the best interests of the child must be the ultimate criteria on which to base decisions, prioritizing the safety of the child and of all parties.

Refuge workers report that contact visits and handover of residency is often used to maintain control over women and children after separation. It enables abusive ex-partners to insist on their preferences in key decisions relating to their child, and provides the opportunity for the abuser to intimidate, harass and abuse their ex-partner. This requirement endangers women and children and has a detrimental effect on their lives.

Recommendations

Determination of parental responsibility should be determined on the unique circumstances of each child. Indicators of the circumstances in which joint parental responsibility would not be in a child's best interests should be developed with reference to research evidence and should take into account the effect of any current custody arrangements on the child. Other indicators may include, in addition to circumstances of violence or abuse, circumstances of ; for example

- ***Substance abuse***
- ***Significant intellectual impairment arising from disability or illness***
- ***Absence for a significant period from exercising parental responsibility***

Substantial Time with each Parent

Content

Item 14 provides that Advisers (as defined in the Bill and including legal practitioners, FDR practitioners, family counsellors) assisting in the making of a parenting plan are required to inform their client/s of the possibility of the child spending substantial time with each of the parties if it is practicable and in the best interests of the child.

Item 23 provides that the court must consider making an order that a child spend substantial time with each parent, if a parenting order provides parents with joint parental responsibility for the child. The court must consider whether both parents wish to spend substantial time with the child and whether it is reasonably practicable for the child to spend this time with each parent and whether it is in the child's best interests.

Comment

The proposal to start from a substantial sharing of parenting time undermines the capacity to hold the best interests of children as paramount. This preconceived notion of what is optimum for all children is particularly dangerous considering the lack of checks and balances to ensure that the agreements reached are actually in the child's best interests. In practice, substantial sharing of parenting time will also mean granting violent parents access and/or custody of their children.

In cases where family violence exists, there are serious concerns that a preference for substantial sharing of parenting time opens the possibility to perpetrators of utilizing formal avenues to continue to threaten, harass and abuse their ex-partners and children. Refuge workers report that violent fathers often threaten kidnap children or not return them on the agreed time, or harm the children during handover of residency or contact.

Research and reports from refuge workers raise the issue of contact with children being utilized by an abusive parent to continue to perpetrate violence and threats against the mother. Women should not be required to consult with the abusive partner on decisions regarding the children where domestic violence has been identified.

The safety of children must be paramount in determining post-separation parenting arrangements. It is not in the interests of children to spend substantial time with both parents if violence or the potential for violence is present and ongoing.

Recommendations

There should be no assumption that children should spend substantial time with each parent and the circumstances of each child should be taken into account in determining her/his best interests.

The aim of a child spending substantial time with each parent should not place a child at risk with a parent who is violent.

All children whose parents have a dispute about parenting matters have opportunity to express their views and have those views taken into account by Advisers or the Court in developing a parenting plan or making an order. Where children are pre-verbal, child development research evidence should be used to inform outcomes supporting children's healthy emotional and social development.

Children should have a right to reasonable continuity of living circumstances. That a range of indicators of 'practicability' need to be developed and considered in terms of the child's experience of the plan/order. Children should be protected from plans/orders which:

- ***Impose a regime of long travel times on the child***
- ***Disregard the need for secure 'attachment' for healthy infant development***
- ***Prevent/inhibit breastfeeding the child***
- ***Impose medical risks to the child (such as when the child has a serious illness or***

disability which requires attentive and continuing expert care)

- ***Impose unreasonably high financial burdens on either parent***
- ***Prevent/inhibit children from participating in regular sport/recreation activities such as weekend sport***
- ***Interrupt/change children's place of education***
- ***Prevent/inhibit children from spending time and participating in family events with other family members***
- ***Expose children to continuing emotional distress***

Parenting Plans

Content

Parenting plans/orders provide for the time a child spends with particular people, the allocation of parental responsibility, 'other communications' a child is to be made to have, child maintenance and the form of consultation about parental decisions and processes for changing plans by agreement.

A parenting plan will override a prior court order to the extent of any inconsistency.
Parenting plans will also be able to deal with other relatives of the child including step-parents, siblings, grandparents, uncles and aunts, nephews and nieces and cousins.

Comment

The NSW WRM has concerns over the focus on reaching early agreement regarding the future parenting arrangements of children. The Government commissioned *Family Law Pathways Report* identified that in two thirds of separations involving children, violence or other abuse was present.[6] . Recent studies have found that between 80-97% of women experienced violence post-separation, with 36% actually noting an increase in violence.[7] The early stages of separation are when women and children are most at risk, particularly when there has been a history of violence. Separation for any couple, particularly where there are children in the relationship, is a highly emotional time. The NSW WRM supports the provision of information, advice and support during this early period, but is opposed to the emphasis placed on reaching long term parenting agreements.

It is of great concern that parenting plans made during this early separation period and possibly under pressure to agree to substantial sharing of parenting time will be taken into consideration by the Family Court in the future. Particularly in cases were the agreements have broken down due to violence or child protection issues and the women's non-compliance may be viewed as obstructional.

---

[6] Family Law Pathways Report, 2001

[7] Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

The lack of independent advice regarding legal rights and the options available will heighten the risk of unsustainable and dangerous coerced agreements, especially if parenting plans don't need to be registered or checked. Where are the checks and balances to ensure that the agreements reached are actually in the child's best interests, rather than merely being the arrangement that the parents could most easily agree to? This is particularly of concern in cases where there is a power imbalance between the parties that will skew the result in the favour of the best negotiator on the day. There must be systems in place where parents have the opportunity to obtain independent legal advice, either before the session, or before signing the agreement.

There is also a heightened risk of instability in children's lives if they are subjected to a constantly changing sequence of plans/orders about their lives. The approach of continual change of plans may in practice inhibit children's capacity to pursue educational and vocational opportunities which rely on continuous participation.

Recommendations

That the safety and best interests of the child remain paramount in determining the future residency arrangements for children.

That child residency and contact be determined on individual, case by case bases and not by a one size fits all model.

There should be provision for courts and Advisers and parents to consider whether the child's life will be subject to significant fragmentation and disruption by either the terms of the plan/order or changes which are being sought to the plan/order. Children should have a right to reasonable continuity of living circumstances.

There should be provision for the review of a plan/order with respect to how it is working for the child. Where children experience significant emotional or behavioural or physical distress arising from the terms of the plan/order, there should be opportunity for systematic review and changes which assist the child's well-being.

Contact given to extended kin by Courts or Family Relationship Centres should specify that the contact will not be used to facilitate contact with a parent who has been denied contact or residency due to violent or abusive behaviour.

Best Interests of the Child

Content

Items 26 to 36 provide for determining the best interests of the child and include a first tier of two factors –

1. the benefit to the child of having a meaningful relationship with both of her/his parents and

2. the need to protect the child from violence or psychological harm.

Comment

Despite the statement about the need to protect the child, the amendments collectively undermine the existing inadequate protections for children and adults from violence and harm in the family law system. The need to protect the child from violence is represented as subordinate to the child's 'benefit' from a meaningful relationship with both parents. These should be reversed to put safety first.

The Access Economics Report prepared in July, 2004 for John Howard estimated that in 2002-2003, 263,000 children lived with family violence. Of this number, about 181,200 of these children witnessed the domestic violence. This estimate is considered to be very conservative given the lack of disclosure regarding domestic violence, even after the families have separated. According to this report, more than a quarter of a million Australian children live in homes afflicted by domestic violence in an "expensive epidemic" costing $8.1 billion a year. The largest component of this cost was the $3.5 billion cost of physical and mental suffering as well as premature mortality.

Despite this readily available data and other supporting evidence and research, the Bill inadvertently continues to support the myth that women routinely invent claims of violence.

Recommendations

The safety of the child and the child's family should be the first consideration in meeting a child's best interests. All considerations of a child's best interests by Advisers and the courts should work systematically through the indicators in this section of the Act.

Parents who seek to protect their children by not adhering to court orders that may place their children at risk should not have the child removed from their care.

Where there is found to be 'reasonable grounds' of the past or current context of violence and abuse the decision-making process should focus on preventing, reducing and managing risks of harm. Courts should be required to make risk assessment the central feature of parenting disputes where domestic violence or child abuse has been present. They include the nature and seriousness of the violence; how recently and frequently such violence has occurred; the likelihood of further violence; the physical or emotional harm caused to the child by the violence; the opinions of the other party and the child as to safety; and any steps the violent party has taken to prevent further violence occurring. The occurrence of such violence should be the central issue of the court's initial inquiry and the assessment of the risk of further violence occurring should determine the shape of the parenting order.

Changes to the Family Law Act

Content

Proposed change to S60B: Objects of Part and principles underlying it

" (1) The objects of this Part are:

(a) to ensure that children receive adequate and proper parenting to help them achieve their full potential; and

(b) to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children; and

(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.

Comment

The Objects and Principles should include ensuring the right to safety of the child and her/his family.

Recommendations

The Objects and Principles should include ensuring the right to safety of the child and her/his family.

Schedule 2 – Compliance Regime

Content

The Bill proposes amendments reflecting the changes to the object in s60B - that children have a meaningful relationship with both of their parents to the greatest extent possible. Make up contact can be ordered and the Bill provides directions about when the court must consider making a costs order and/or ordering compensation for costs incurred in relation to contact that did not take place because of the breach. The court is also given broader powers to impose bonds. The Bill clarifies that there is a low standard of proof for compliance matters at the 1st and 2nd stages on the basis that the sanctions are not criminal. If the matter is a stage 3 contravention matter - there is a presumption that the court will order costs against the party in breach unless it is not in the child's best interests.

Comment

NSW women's refuges report that the most common reason for women's non-compliance with parenting orders is to protect children from abuse or neglect, or to protect themselves from abuse

happening during change over. Breaches need to be assessed on case by case basis to distinguish conflict from protective behaviour.

Any compliance regime should hold the best interests and safety of the child as paramount in considering the actions of a 'contravening parent'. In situations of domestic violence, it is inappropriate and potentially dangerous to propose sanctions or punishment for breaches. Such orders would often have very negative safety consequences and implications for the protection of children. The proposed changes will result in discouraging women from withholding the children from spending time with the other parent where they think violence or abuse is occurring.

A high proportion of contravention applications occurred in cases where parents had agreed to consent orders. In many of these cases, the residential parent had contravened the order due to violence issues and it has been suggested that such contact orders should probably not have been made in the first place. It is likely that resident parent may have well been under pressure to consent to order that did not protect themselves and their children from violence, and could therefore not continue with these arrangements[8].

Recommendations

In recognition of the popularity of contravention applications being used by ex-partners to legally harass residence parents, all applications for contravention proceedings should place the burden of proof on the party bringing the application. Further penalties should be available to the court when applications are found to be without substance and the party bringing the application is exploiting the family law system as a form of harassment and control.

The capacity of parents to withhold contact to protect their children from exposure to violence or abuse needs to be supported.

That if a non-residential parent does not exercise contact without any reason, over a period of time, the Court will consider varying the order to reflect the level of contact actually happening.

Schedule 3 – The Conduct of Child Related Matters

Content

The Bill provides for changes in the way child related matters are conducted. These changes are based on the Children Cases program that has been piloted by the Family Court in NSW. They allow for the Court to act in a more inquisitorial manner. Principles are set out in the Bill to guide the Court in a less adversarial approach. These Principles include:-

[8] Rhoades, Graycar, Harrison, ~~The Family Reform Act 1995: the first 3 years,~~ 2000, University of Sydney and Family Court of Australia

- Ensure the proceedings are focused on the child
- The Judicial Officer must control the conduct of the hearing
- Ensure that the proceedings are conducted in such a way to encourage the parents to focus on the children and on their ongoing relationship as parents
- The proceedings should be conducted as expeditiously and with as little formality as possible

The proposed new s60KE provides a number of general duties that the Court must carry out to give effect to the principles. This includes considering whether the likely benefits in taking a step in the proceedings justify the costs of taking it.

Significant changes are proposed in relation to the rules of evidence. Even where the rules of evidence in relation to hearsay evidence are applied a representation made by a child about a matter that is relevant to the welfare of that or another child is admissible.

Comment

The focus on the child is a welcome change in direction however the capacity for the court to inform itself of the child's circumstances and risks to the child's safety has still to be improved. The recommendations of the Family Law Council's report on Child Protection and Letter of Advice on Family Violence are critical to the court's capacity to know what has happened to the child.

Recommendations

Implement as a matter of urgency the Family Law Council recommendations on child protection and family law and elevate the right to safety as the first condition of meeting a child's best interests.