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NCSMC

National Council of Single Mothers and their Children Inc.

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The Secretariat
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House Canberra ACT 2006
e-mail: laca.reps@aph.gov.au

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BY: LAEA

Dear Secretariat

Please find attached the submission of the National Council of Single Mothers and their Children Inc to the inquiry into the provisions of the Family Law Amendment Bill 2005.

We note that an extension of one week from 8 July to 15 July 2005 was granted to submit comment.

Our submissions addressed the Terms of Reference of the Committee, as taken from 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

NCSMC would like the opportunity to support this submission with oral evidence. Please do not hesitate to contact our Executive Officer, Jac Taylor, for any further assistance.

Yours faithfully



Dr Elspeth McInnes,
NCSMC Convenor

About NCSMC

The National Council of Single Mothers and their Children Incorporated was formed in 1973 to advocate for the rights and interests of single mothers and their children to the benefit of all sole parent families, including single father families.

NCSMC formed to focus on single mothers' interests at a time when women who were pregnant outside marriage were expected to give up their children for adoption by couple families and there was no income support for parents raising children alone. Today most single mothers are women who have separated from a partner. Issues of income support, child support, paid work, housing, parenting, child-care, family law, violence and abuse continue as concerns to the present day.

NCSMC has member organisations in states and territories around Australia, many of which also provide services and support to families after parental separation.

NCSMC aims to:

- Ensure that all children have a fair start in life;
- Recognise single mother families as a viable and positive family unit;
- Promote understanding of single mothers and their children in the community that they may live free from prejudice;
- To work for improvements in the social economic and legal status of single mothers and their children.

Background of the Bill

On 24 June 2005 The Attorney General's Department released the Government's response to *Every Picture Tells A Story*, an exposure draft of proposed legislation and explanatory statement. In addition to the introduction of the FRC's and the more prominent use of Family dispute resolution in Family Law matters; the proposed changes to the Family Law Act could be the most significant changes to the family law system since 1975.

The exposure draft has been referred to the House of Representatives Legal and Constitutional Affairs Committee for consideration. Any comments are **due to be submitted to the Committee by 8 July 2005**. The Committee is due to report by 11 August 2005.

This submission makes recommendations on various sections of the Bill taking into account all four criteria of achievement listed below.

- 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.

NCSMC considers that two of the terms of reference are flawed:

The b) reference ignores the reality that, when parents are hostile, abusive or violent, 'meaningful involvement' of both parents is ordinarily harmful.

The c) reference should also recognise the need to protect the child's family members from family violence and abuse.

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

NCSMC notes that this provision supports the good intentions of separating parents who are able to co-operate and agree to provide safe care for their child/ren.

The provision also supports risks of increased and prolonged entrenched conflict and distress between parties to the detriment of children's well-being.

The primacy of safety has not been sufficiently emphasised.

Recommendations:

- 1. Give expression to the primacy of human rights to safety in the definition of the child's rights.**
- 2. Give expression to children's right to live free from continuing parental conflict.**

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 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

NCSMC notes that there is no detail about how the Court will determine what are 'reasonable grounds' to believe that abuse or violence has occurred or may occur.

Circumstances of violence or abuse often occur in private, are under-reported and often minimised or denied by parties.

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

Services that provide FDR will also play a role in screening for violence in families. There is evidence from research and past experience that screening is not successful/effective. Keys Young (1996) research into mediation services found that almost two-thirds of cases attending mediation involved family violence and less than one third were identified as such. Even with highly sensitive screening tools and skilled staff, not all cases of domestic violence will be identified.

A further problem is that the court's current processes routinely expose adults and children to continuing risks of violence and abuse. The Family Law Council has highlighted this in its reports on Family Law and Child Protection (2002) and Letter of Advice on Family Violence (2004). There is an annual corpse count of mothers and children killed by men who used the opportunity of child contact to kill their child/ren and sometimes mothers and other family members.

It is a grave and glaringly apparent abuse of power to ignore expert advice that mothers and children are being failed by existing safety provisions. The failure to act to make the Family Law system responsive to the safety needs of children and adults underpins the inadequate uselessness of referring matters involving abuse and violence to the court. The court's practices have a history of manifest and abject failure in sustaining the safety of targets of post-separation violence. People in the court system are being killed by ex-partners now. What is being done to make it safer? Nothing.

There is no capacity of individuals to protect themselves from death or injury arising from federal court orders requiring them to see or live with a person who was established on 'reasonable grounds' as violent or abusive. Therefore, there should be a statutory compensation scheme established for surviving dependents of murdered parents or children, and living adults and children who suffer serious physical or psychological harm from another party as a result of court orders.

Recommendation 3

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***

Recommendation 4

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.

Recommendation 5

The legislation should further 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.

Recommendation 6

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: Violence - Division 11 of the Family Law Act 1975 (2004) should be implemented forthwith.

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

There should be no presumption of joint parental responsibility, and consideration of parental responsibility should rest on each child's unique circumstances. NCSMC is pleased to note the provision recognising that joint parental responsibility will not always be in a child's best interests. NCSMC is concerned that some such circumstances should be indicated and include provisions which limit parent's capacity to intermittently exercise parental responsibility. For example, if the parent goes overseas for a number of years and has no contact with the child, it is not reasonable to support a capacity to re-appear and exercise significant control over the child's life.

A requirement to consult/communicate provides abusive ex-partners with ongoing opportunities to intimidate, harass and abuse their former partner. This requirement may endanger children.

Although there is the presumption against joint parental responsibility in cases involving violence/abuse, NCSMC is concerned about the burden of proof. There is no provision as to how to ensure that such evidence is presented to court, or where it fits into the process of the new family law system.

Further this is placing the burden of proof onto the victim. Despite research available that demonstrates how the system routinely fails to protect women and children, there is no consideration being given to the Government's responsibility to protect its citizens from violence/abuse.

Recommendation 7

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 include, in addition to circumstances of violence or abuse, circumstances of ; for example

- ***Substance abuse***
- ***Significant intellectual impairment arising from disability or illness***
- ***Continuing high conflict***
- ***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

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. There is no apparent consideration of the child's right to any continuity of living circumstances. NCSMC is concerned that the focus in these items is on parcelling the child out to parties and further does not include opportunities for the child to express her/his views on the way her/his time is spent and with whom in line with the provisions of the United National Convention on the Rights of the Child. Neither is there guidance as to 'practicability'.

In relation to situations of violence/abuse, research clearly demonstrates that perpetrators often seek greater access to their children, as a mechanism to maintain control (Kaye, et al., 2003; Judicial Council of California, 2002; Jaffe, et al., 2003; Rhoades, 2002). Research also documents that the "right to contact" principle has taken precedence over children's rights to safety (Rhoades, 2002; Kaye, et al., 2003).

Recommendation 8

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.

Recommendation 9

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.

Recommendation 10

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***
- ***Require children to attend prison to spend time with a parent***
- ***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, nieces and cousins

Comment

NCSMC endorses supporting parents to agree to processes for consultation and for changing plans where this is possible. It is again concerning that there is no systematic attempt to include children in the determination of their lives through either parenting plans or orders.

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.

There is also a need for children to be able to actively indicate if they experience significant distress arising from the plan/order. Where the terms of the plan/order provide for specific purposes of outcome for the child, there should be a review mechanism to check if the anticipated outcomes have actually been met and if there are any undesirable unintended consequences arising from the plan/order. For example if a child is ordered to spend time with a parent who has sexually assaulted her in order for her to lose her fear of her rapist, the practice outcomes of the order should be reviewed to examine its impact on the child. Currently, when orders are made that children spend time with parents who have been violent or abusive to them or other family members, there is no way to assess whether the order is helping or harming the child.

See Recommendation 9

Recommendation 11

There should be provision for Courts, 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.

Recommendation 12

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, 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.

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 – the benefit to the child of having a meaningful relationship with both of her/his parents and the need to protect the child from violence or psychological harm. The second tier lists factors already existing in subsection 68F(2) of the Act. There is a new factor to consider the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship with the other parent. There is also an amendment providing explicit direction that uncontested or interim family violence orders are not an independent factor in considering a child's best interests.

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. When a child is murdered by a parent there is no opportunity for a meaningful relationship with anyone. Safety should come first.

Further the 'friendly parent' provision has been a manifest boon, where it has been implemented, to parents who use violence or abuse. Parents who use violence and abuse welcome the opportunity to threaten and harm their targets whilst protective parents seeking to avoid threats and injury have every reason to avoid the violent parent.

As noted earlier, the family law system has been identified, most recently by the Government's own statutory advisory body, as failing miserably in its protections against violence. Apart from the advice of the government's own legal experts, there is also the evidence of an annual corpse count of mothers and children attesting to the fact that the safety protections are abysmally inadequate. It is not clear why the emphasis in the provisions is on downplaying the evidentiary significance of restraining orders in matters of violence and abuse when mothers and children with restraining orders are still being attacked and killed. The government would appear to be ignoring the recent Australian research findings of Access Economics, The World Health Organisation and VicHealth identifying that domestic violence is an \$8billion problem in the Australian economy, that most gendered violence occurs in intimate partnerships and that men's violence against women is the single biggest contributor to the public health burden for women aged 15-44. The government would appear to prefer the unsubstantiated anecdotes of men that women falsely claim violence to gain advantage to national quantitative research. The flaw in the men's argument is that reporting violence and abuse does not do anything to protect mothers and children in the family law system. In fact persistent attempts to protect themselves and

their children is likely to result in loss of residence to the abuser and supervised contact. The government's approach to this issue also seems to endorse the men's movement view that women routinely invent claims of violence and even the bodies of battered mothers and children do not seem to affect the apparent belief that women are liars.

Recommendation 13

The safety of the child and the child's family should be the first threshold condition of 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.

Recommendation 14

The 'friendly parent' provision should be scrapped or at least enable protective parents to seek to protect the child without such actions being used as an argument to remove the child from their care.

Recommendation 15

Interim and ex-parte family violence orders must be considered in determining a child's best interests.

Recommendation 16

The New Zealand Guardianship Act (1968) be considered for adoption, specifically s16B which requires a court to determine "as soon as practicable" whether an allegation of violence is proven. Where it is the court must not order residence or unsupervised contact to the violent parent unless satisfied that the child will be safe. An evaluation has demonstrated that this legislation has improved the safety of children (Chetwin, et al., 1999).

Recommendation 17

Where there is found to be 'reasonable grounds' of 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 and/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

Proposed changes 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.

Recommendation 18

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

The proposed changes ignore the research evidence that withholding of contact is linked to protective concerns for the child (Rhoades, 2002). Increased punitive measures further increase the risk of taking protective action on the child's behalf. If a contact parent drove to the contact handover intoxicated with alcohol, the resident parent would have to consider her/his capacity to successfully withstand contravention proceedings or knowingly let the child enter a car with a drunk driver. If the driver were to subsequently have a major crash the mother could be held to be criminally negligent in allowing her child to enter a car with a drunk driver. If she did not allow the child to go, the driver could pursue a contravention application against her. The mother would not have access to any legally recognisable capacity to obtain proof of the driver's intoxication. This example illustrates the difficulty protective parents face in supporting their child's safety, particularly when the Bill explicitly notes that a lower standard of proof is acceptable. Research into Family Court cases identifies that filing contravention applications is a method of legal harassment of an ex-partner. Persons filing such applications should have to establish that contact was not provided and face penalties for frivolous or non-meritorious applications. The capacity to withhold contact to protect the child needs to be available to parents.

Recommendation 19

In recognition of the popularity of contravention applications being used by ex-partners to legally harass resident 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.

Recommendation 20

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

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:-

- 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.

Recommendation 21

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

Additional Comments

There is significant research to show that domestic violence and child abuse are very real issues for many women and children, and that separation from an abusive partner can be the most dangerous time for women and children. The proposed reforms not only do not address how the family law system will be improved to protect women and children from ongoing violence and abuse following separation, but in fact create further barriers to women and children achieving safety. The proposed changes take a punitive approach towards women in their attempts to escape domestic violence and child abuse.

- The Australian Institute of Family Studies research (Walcott & Hughes, 1999) shows that communication breakdown, followed by violence and abuse issues are the main reasons for divorce.
- The Australian Bureau of Statistics (1996) Women's Safety Survey indicate that single, previously partnered women experienced the highest incidence of violence, with 42% reporting experiencing violence, mainly from former partners.
- The Family Law Pathways report identified that 2 out of 3 separations involving children feature issues of violence and abuse.
- One in four children experience violence and abuse through witnessing violence against their mother or step-mother by their father or step-father (Indemaur, 2001).

- Brown et al (2001) in their study of family court cases found that 50% of cases at the mid-point of proceedings in the family court contained multiple and serious forms of family violence.
- Women and children are at greatest risk of increased violence, including murder immediately following separation (Jaffe et al, 2003). At the time of separation children are at risk of violence, abduction, sexual assault and coercion (Kaye et al, 2003).

There is also ample evidence to show that the current family law system is failing to provide protection for women and children from abuse and violence.

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