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**A RESPONSE TO
THE FAMILY LAW DISCUSSION PAPER:
A NEW APPROACH TO THE FAMILY LAW SYSTEM**

**From: NSW Women's Refuge Resource Centre on behalf of the NSW
Women's Refuge Movement Working Party Inc.**

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INTRODUCTION

The NSW Women's Refuge Movement (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.

Due to the lack of available Legal Aid, refuge support workers witness first hand the complex navigation involved in seeking safe living arrangements for women and children as they support them through the Family Law Court processes.

Refuge workers constantly report that the Family Law Court is "soft" on violence and continues to make orders in favour of contact with fathers against whom allegations of violence and abuse have been made. These reports note an increase in the court giving contact to a violent parent since the 1995 Family Law Act reforms legislated a child's right to have contact with both parents.

This is a significant problem given 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 serious¹ 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

It is therefore of deep concern that the discussion paper 'A New Approach to the Family Law System' ignores the serious safety issues of women and children during separation. Contrary to the reputable body of research undertaken over recent years of which a large proportion was commissioned by the government, it is apparent that this model dismisses this serious threat to safety and makes biased provisions for claims of domestic violence and child abuse being false.

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

RECOMMENDATIONS

The NSW Women's Refuge Movement recommends;

1. The FRC adopts safety first principles, policies and practices that recognise domestic violence as a mainstream problem affecting a majority of FLC cases.
2. FRC develops a thorough continuum of check points that screen for the presence of domestic violence and ensures that domestic violence is not minimised as conflict.
3. That breaches of parenting orders be assessed on a case by case bases to identify whether non-compliance is a response to protect children from abuse or neglect.
4. That priority funding be made available to legal aid and community legal centres to ensure that women with domestic violence and other abuse issues are legally represented.
5. In support of the recommendation of the National Network of Women's Legal Services that the Family Relationship Centres allow for the provision of early information and assistance, but only require dispute resolution sessions to prepare parenting plans to occur anytime within the first 12 months after separation.
6. That adequate on-site security be made available to protect participants and staff at all the Family Relationship Centres.
7. That the Family Law Act not be amended to require advisers who are assisting in parenting plans to commence negotiations at the starting point of equal contact.
8. That additional funding for Contact Order Programs and contact services not be used to ensure that violent parents can continue contact when research shows that is it not in the best interests of the child.
9. That the Family Relationship Centres and the Family Law Court treat and address domestic violence as a child protection issue.
10. That the safety and best interests of the child remain paramount in determining the future residency arrangements for children.
11. That child residency and contact be determined on individual, case by case bases and not by a one size fits all model.
12. The FRC be an option for separating parents and not the single entry point to the Family Law Court.

13. That changes to the Family Law Act do not require parents to consult on decisions regarding the children when domestic violence has been identified.
14. The access to free interpreting services be made available to families from non-english speaking backgrounds and Aboriginal and Torres Strait Islanders.
15. The proposed additional legal aid funding for grandparents be extended to women and children whose matters are referred to the Family Law Court because of violence or child abuse.
16. The proposal to enable the courts to award costs against the people making false allegations of violence or child abuse be removed in acknowledgement of the low disclosure and false claims data.
17. The Family Law Act be amended to introduce Section 16B of New Zealand's Guardianship Act.
18. That the FRC and the FLC develop practices to screening violence and child abuse to remove the sole onus and responsibility from the victim.

A NEW APPROACH TO THE FAMILY LAW SYSTEM.

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 Women's Refuge Movement is concerned that the proposed reforms do not adequately acknowledge or make provisions for the levels of domestic violence and other abuse often involved in separation.

While the NSW Women's Refuge Movement acknowledges the proposed Family Relationships Centres to 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. The discussion paper acknowledges this in proposing that cases involving abuse, domestic violence and entrenched conflict be referred to court.

However the proposal contains notable conflict between the protection of children from violence and abuse and the aim to facilitate parent contact. This conflict is consistent throughout the paper and compromises mindful consideration of 'what is in the best interests of the child'. The recommendation of 50/50 shared parenting time as a starting point for child contact negotiations will give further precedence to contact over other provisions which are intended to protect adults and children from harm.

SAFE CONTACT AND RESIDENCY ARRANGEMENTS

A recent research study undertaken with women who were negotiating and facilitating child residence and contact arrangements with an ex-partner who had abused them found; "The high level of unsupervised contact arrangements in our study is disturbing given that the fathers of the children had a past record of violent behaviour in all instances towards the mother of the children (more often than not witnessed by the children), and in a significant number of instances towards the children themselves."³ The same study found that "an overwhelming majority (71, 4%) of the women who were resident parents expressed concerns about the treatment of the children during contact visits.

The expansion of Children Contact Services to assist the handover of children to a violent or abusive parent is an example of the pro-contact approach over the best interests of the child. Whilst the Family Law Act has provisions and a responsibility to protect children from violence and abuse, the paper's approach is to increase the facilitation of the unsafe parents contact through the expanded establishment of Contact Services.

The discussion paper also proposes that if there is an intentional breach of orders the parenting orders may be changed and the child sent to live with the non-obstructive parent. NSW women's refuges report that the most common reason for women's non-

³ Negotiating Child residence and Contact Arrangements Against a Backdrop of Domestic Violence, 2003; Miranda Kaye, Julie Stubbs and Julie Tolme; Socio-Legal Research Centre School of Law.

compliance with parenting orders is to protect children from abuse or neglect. Breaches need to be assessed on case by case bases to distinguish conflict from protective behaviour. It is inappropriate and potentially dangerous to propose a change of residence as a solution or punishment for breaches. Such a response would have very negative safety consequences and implications for the protection of children.

Research and reports from refuges workers raise the issue of contact with children being utilized by an abusive parent to continue to perpetrate violence and threats against the mother. The Women's Refuge Movement is apposed to changes to the Family Law Act that would require women to consult with the abusive partner on decisions regarding the children where domestic violence has been identified.

NEW ZEALAND'S GUARDIANSHIP ACT.

Since the introduction of Section 16B into New Zealand's Guardianship's Act evaluations of children's safety has improved. The Act does not allow for residency or unsupervised contact by a parent who has been violent or abusive. The adoption of such a presumption of no contact in case involving violence would be in the best interest of the child.

GRANDPARENTS

The Family Law Act currently has adequate provisions for grandparents to have on-going realationships with their grandchildren after separation. The NSW Women's Refuge Movement disagrees with the blanket assumption that assisting all grandparents to have increased contact with their grandchildren post separation is in the best interest of the child.

Whilst the NSW Women's Refuge Movement acknowledges the positive contribution that many grandparents make to their grandchildren's lives refuges report cases where grand parents use their contact to provide access to an abusive parent who the court has granted limited or supervised contact because of violence or child abuse. Where violence or child abuse is identified the courts needs to take precautions that orders articulate clearly that conta ct with the grandchild/ren cannot be used to facilitate contact with the abusive parent.

The NSW WRM also rejects the proposal to increase legal aid funding to grand parents when many of the women and children that we support are forced to go through the Family Law Court unaided. Legal aid to women and children escaping domestic violence and child abuse should be prioritised.

SCREENING

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.⁴

The above research is consistent with reports from refugees 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.

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 communities 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.

It is of deep concern to the NSW Women's Refuge Movement that given the overwhelming body of research highlighting the under reporting and lack of disclosure of domestic violence that the proposed approach focuses on concerns and penalties for false allegations of domestic violence and child abuse. Reputable studies all show a low incidence of false claims. For example, Project Magellan identified that child abuse issues in the Family Court were rarely without foundation, were often serious and complex and that many cases had not been investigated by the state child protection services. The possibility of having to pay costs will further silence victims and compromise the screening of violence and child abuse.

In 2004 the NSW WRM partnered with the Family Law Court in Sydney to improve the safety of women and children using the court. The NSW Women's Refuge Resource Centre and NSW women's refugees will continue to work with the FLC in Sydney to develop an approach to screening violence and other abuse that acknowledges the onus of identifying violence cannot be solely reliant on the victim. A more effective approach that reflects the prevalence of domestic violence and child abuse in families entering the family law court is needed.

⁴ Miranda Kaye, Julie Stubbs and Julia Tolmie, Research Report 1, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, June 2003.

EVIDENCE

The NSW Women's Refuge Movement notes that the paper does not clarify how it will measure domestic violence or child abuse claims or what will be deemed as permissible evidence. Studies show that 80-95% of women who experience domestic violence do not seek assistance from any services; police, doctors, refuges etc.⁵ 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.

PARENTING AGREEMENTS

The NSW Women's Refuge Movement has concerns over the discussions paper's 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 Women's Refuge Movement supports the provision of information, advice and support during this early period, but are apposed 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 equal parenting time will be taken into consideration by the Family Court in the future. Particularly in cases where the agreements have broken down due to violence or child protection issues and the women's non-compliance may be viewed as obstructive.

The lack of independent advice regarding legal rights and the options available will heighten the risk of unsustainable and dangerous coerced agreements, especially if

⁵ 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.

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.

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.

TRAINING

All Staff at the Family Relationship Centres will need to comply with standards currently in practice in the domestic violence and child protection and support sector. Domestic Violence Competency Standards were developed under the government's Partnerships Against Domestic Violence Initiative. The standards outline best practices for all levels of staff in services.

Family Relationship Centres will need to have extensive knowledge and understanding of Australian families including; the extended family structures of Aboriginal and Torres Strait Islanders, families from non-english speaking backgrounds and same sex couples.

It will be imperative that counselors, mediators and advisors are competent in working with couples and have expertise in the dynamics of gender related violence and abuse.

CHILDREN

Parenting Advisers need the skills to ascertain whether *any* contact is in the best interest of the child. Provisions are made to protect adults from contact with a known perpetrator of violence or abuse, yet under the proposed model the protection rights of children are at risk of being over-ridden by the parent's right to contact. Parenting Advisers will need extensive knowledge of the traumatic impact of violence and abuse in relation to a child's development, including the long term impacts on their social, health and wellbeing

LEGAL REPRESENTATION

The NSW WRM is concerned that if a woman who has experienced domestic violence cannot get Legal Aid and cannot afford legal representation while her ex-partner can, she may keep silent about domestic violence or other abuse to keep the case in the Family Relationships Centres. There are further concerns that if a woman does not raise domestic violence from the outset, their claims may lack credibility and be viewed as relationship conflict.

It is also highly unlikely that a women who has suffered the effects of domestic violence will be able to negotiate safe outcomes for themselves and their children in the presence of the ex-partner they are afraid of and intimidated by.

Women who have escaped a relationship because of violence or other abuse require the legal representation and advice of a lawyer. It is the right of the women to chose to have a lawyer present and this should not be dependent on whether the parenting adviser thinks it is *appropriate*. Further more, if parenting plans are to be deemed legally binding documents, then it is imperative that legal representation is available throughout the process.