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Submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the *Family Law Amendment (Shared Parental Responsibility) Bill*

INTRODUCTION

Women's Legal Services Australia

Women's Legal Services Australia (WLSA) (previously known as the National Network of Women's Legal Services) 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 for women, providing assistance to more than 25,000 women across Australia each year. We target disadvantaged women including women from non-English speaking backgrounds, rural women, women with disabilities and Indigenous women. As a consequence, WLSA has developed an expertise in family law, violence against women and children and the legal aid system, as these issues affect disadvantaged women.

WLSA 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.

WLSA's participation in the current family law review process

WLSA has participated at every stage of the current review process. We made a detailed submission to the parliamentary inquiry into child custody as did many individual member organisations of WLSA. WLSA also provided the Government with a response to the 'Every picture tells a story' report. We provided detailed comments on the Government's Discussion Paper *A New Approach to the Family Law System*. WLSA made written submissions to the House of Representatives Standing Committee on Legal and Constitutional Affairs ('the House of Representatives Committee') Inquiry into the Exposure Draft of the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 ('the Exposure Draft') and gave oral evidence to that

Committee. Finally, we provided the Government with a response to the House of Representatives Committee Report on the Exposure Draft.

This Submission

This submission contains some material from the above previous submissions and responses, updated to reflect the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005 ('the Bill') as it stood when introduced into parliament. 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 Bill should not be taken as an indication either of support or opposition to that provision.

Some of the recommendations made in this submission differ from previous recommendations we have made. We stand by our previous submissions and recommendations. However, we are mindful of the fact that the government is intending to pass this Bill into law in the March sittings of parliament and that it is therefore likely that only limited changes to the Bill will be considered. We have therefore provided some alternative recommendations to ameliorate some of our most significant concerns about the Bill.

Proposed Labor party amendments

We have not been able to discuss the amendments proposed by the Labor party (released on 14 February 2006) individually in this submission. However, we would like to record our support for all of the proposed amendments other than item 36. To the extent that the proposed Labor party amendments cover the same areas as our recommendations but differ from them, we support the Labor party amendments only to the extent that they *add* to our recommendations (and not in any way that derogates from our recommendations).

We would like to draw the Committee's attention to two particular items in the Labor party proposals that are not discussed in the body of our submission but which we strongly support. They are the additional exceptions to attending family dispute resolution ('FDR'):

- Item 31 – on the basis of fear about safety; and
- Item 32 – on the basis of an inability to get an appointment at such a service within 6 weeks.

Principle concerns

WLSA's principle concerns about this Bill are firstly that it tends to promote parents' rights rather than the best interests of children and secondly that it is likely to undermine the safety of children and their family members.

Promoting parents' rights

WLSA is particularly concerned about the provisions in the Bill which require consideration of or direct attention to specific types of parenting arrangements – namely equal time or substantially shared time arrangements. They derogate from a free and open assessment of what arrangement may be best for specific children in a specific case and encourage parents to focus on 'rights' to equality. We are also surprised and disappointed that the Bill as it currently stands will diminish the weight to be given to children's views in decision making.

Undermining safety of children and their family members

WLSA's 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 introduced the principle of the child's right to contact.[1] 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'[2] 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.[3] 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'.[4]

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.[5]

WLSA 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.[6] 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 Bill to address the issues surrounding violence and abuse. In particular, WLSA welcomes four positive changes to the Bill that have been introduced in relation to safety issues since the Exposure Draft:

- The need to protect children from harm is now recognized as an Object of Part VII of the *Family Law Act* (s60B(1)(b)).

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[1] 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.

[2] Rhoades, Graycar and Harrison (note 1) at page 6.

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

[4] Rhoades, Graycar and Harrison (note 1) at page 7.

[5] 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.

[6] 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.

- The Bill now requires a Court to take prompt action in relation to allegations of child abuse or family violence (s60K).
- The Bill also now requires a Court to apply the principle that proceedings are to be conducted in a way that will safeguard the children and parties from abuse and family violence (s69ZN(5)).
- A court could admit evidence and draw conclusions from other courts about family violence and abuse utilizing new s69ZX(3).

WLSA welcomes these measures and urges the Government to act on them promptly, including by ensuring that sufficient resources are available to the Family Court to make these changes meaningful.

Recommendation 1 - that the Government ensure that sufficient resources are available to the Family Court to give effect to the changes in s60K, s69ZN(5) and s69ZX(3)

However, we still believe that the Bill as it currently stands will further undermine the safety of children and their family members. This is because a number of the provisions in the Bill (particularly in the best interests provision (s60CC) and the objects and principles provision (s60B)) which seem to be intended to promote the benefit to the child of having a meaningful relationship with both of their parents 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 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.

WLSA 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 may further undermine the protection of children from family violence and abuse.

1. Best interests of children (s60CC)

1.1 Structure of s60CC

The Bill introduces a two tiered system for determining the best interests of children. The first tier two primary considerations are listed in s60CC(2). They are:

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

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to abuse, neglect or family violence ('the protection from harm consideration').

The remaining considerations which have always been relevant to determining the best interests of children together with a new consideration (discussed at 1.2 below) are relegated to being 'additional considerations'.

Response

Diminishes the weight of children's views

- The effect of this structure is to diminish the weight given to children's views in family law decision making by making these an additional consideration (s60CC(3)(a)).
- This is despite the fact that one of the most important things children say about what they want is that they want to have a say in parenting arrangements.[7] Indeed this was a key finding of the Every Picture Tells a Story Report and many of that Report's recommendations were directed at addressing the concern that children did not have a sufficient say in family law matters.

Effect of Primary considerations

- The two primary considerations will be in direct conflict with each other wherever violence or abuse is alleged because it is almost impossible to maintain a meaningful relationship with an abusive parent and also protect the child from harm from that person.
- The tension created by the *Family Law Reform Act* between the 'child's right to contact' in the principles section and the safety considerations referred to in the best interests section has tended to be resolved in favour of the right to contact. As noted at p3, the 'child's right to contact' in the principles section has led to an effective ''presumption" (although not a legal one) operating in favour of contact with the non-resident parent'.
- The inclusion of s60CC(2)(a) as a primary consideration in *directly* determining best interests is therefore likely to create even greater pressure for contact to be maintained in the face of safety concerns because the tension between 'meaningful relationship' considerations and safety considerations are even more likely to be resolved in favour of maintaining contact with the meaningful relationship consideration being placed directly within the provision for determining the best interests of children. It is important to note that, unlike the meaningful relationship consideration, the protection from harm consideration has always been one of the best interests considerations.
- Placing s60CC(2)(b) (the protection from harm consideration) alongside s60CC(2)(a) (the meaningful relationship consideration) is likely to lead to the two primary considerations *effectively* canceling each other out in any case where there is an allegation of violence, leaving decision-makers to fall back on the additional considerations. This is apparently recognised and even anticipated by the government according to the evidence of the Attorney-General's Department ('AGD') to the House of Representatives Committee (see paragraph 2.190 of the Committee report):

  > *Where both considerations apply to a particular matter, the government anticipates that the court will then give consideration to the additional factors in subsection 68F(2) [now s60CC(3)] in order to determine what is in a child's best interest. For example, the willingness and ability of a parent to facilitate a close and continuing relationship between the child and the other parent or any views that may be expressed by the child.*

- For the reasons set out in 1.2 below this falling back on the additional considerations further increases the risk of safety being de-prioritised in decision making.
- The meaningful relationship consideration must be qualified to ensure that it does not directly conflict with the protection from harm consideration wherever violence or abuse is alleged. A 'meaningful relationship' must be recognised to be a positive relationship, free from violence.

> ***Recommendation 2 - that the current structure of s68F be retained and used in s60CC; ie that there be one list of criteria to assess children's best interests rather than 'primary' and 'secondary' criteria.***

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[7] See for example C Smart and B Neale, '"It's my Life Too": Children's perspectives on Post-Divorce Parenting' (2000) 30 Family Law 163; P Parkinson, J Cashmore, J & J Single, 'Adolescents' views on the fairness of parenting and financial arrangements after separation' (2005) 43(3) *Family Court Review* 429-444.

Recommendation 3 – that s60CC(2)(a) be qualified to ensure that it does not conflict with s60CC(2)(b) in any case where violence or abuse is alleged. For example by:

- ***amending paragraph (2)(a) to read: Subject to paragraph (b), the benefit to the child of having a meaningful relationship with both of the child's parents.***

OR

- ***adding a subsection (2A): For the avoidance of doubt, the reference in paragraph (2)(a) to 'meaningful relationship' means a relationship in which the child has not been and is not at risk of being exposed to abuse, neglect or family violence.***

1.2 New secondary consideration – willingness to facilitate a relationship with the other parent

The Bill introduces changes to the other considerations for determining the best interests of children (which are now to form the second tier of considerations the court must address in determining best interests) which include the addition of paragraph 60CC(3)(c):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 ('the facilitating relationship consideration').

Response

- Because the two primary considerations may cancel each other out, paragraph 60CC(3)(c) will have significant influence in determining residence and contact arrangements in cases where there is an allegation of violence or abuse (note the example given by AGD in the quote above). This is highly inappropriate given that parents who have genuine concerns about violence and abuse are, by definition, the parents who will *not* want to 'facilitate and encourage' the child's relationship with the other parent."
- It is impossible to anticipate which parent is more likely to facilitate and encourage a relationship between the child and the other parent.
- This provision will encourage aggressive and blame finding litigation.
- 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. Great care must be taken to ensure that protective behaviour is not automatically rendered as disqualifying whether or not it was reasonable or honestly believed.

- The reality is that most resident parents facilitate contact and they are the silent majority.

Recommendation 4 - that s60CC(3)(c) not be introduced.

Alternative Recommendation 4 – that s60CC(3)(c) be qualified to ensure that it does not encourage parents to facilitate an unsafe relationship or a relationship that is not in the best interests of the child. For example:

(c) 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, except where such a relationship would be otherwise contrary to the best interests of the child.
AND
(ca) paragraph (c) does not apply where the child has been, or is at risk of being, exposed to abuse, neglect or family violence in the relationship with the other parent.

1.3 Fulfilling parental responsibilities

The Bill introduces a requirement for a court to consider, when determining a child's best interests, the extent to which each parent has fulfilled or failed to fulfil their responsibilities as a parent (s60CC(4)).

Response

- There has been no consultation on the possible impact of this provision and it may well encourage parents to focus on 'earning' rights to their children.
- The requirement to consider whether a parent has facilitated or failed to facilitate the other parent in participating in decision-making or spending time or communicating with the child puts even greater emphasis on the facilitating relationship consideration in s60CC(3)(c), criticized above.
- The reference to fulfilling or failing to fulfil a parent's obligation to maintain the child is particularly concerning. Non-payment of child support clearly has a significant impact on children's interests in the broad sense. However, non-payment or indeed payment of child support has no relationship to whether the parent spending *time* with that child is or is not in the child's interests. The extent to which serial non-payers of child support continue to seek to exercise power and control over the lives of resident parents is a considerable source of frustration and distress. However, we believe that these problems can and should be addressed through changes to the child support system (to ensure that child support assessments are an accurate reflection of a payer's real income and that child support payments are actually made when required) rather than through linking child support and decisions about residence and contact.
- This provision is entirely focused on post-separation parenting and fails to reflect the importance to the child of maintaining stability in care arrangements for the child that existed in the intact family. The child is already destabilized and upset by their parents' separation, this consideration would recognise the significance to children of limiting disruption to their routines as much as possible.

Recommendation 5 – that s60CC(4) not be introduced

Alternative Recommendation 5 – that s60CC(4) be amended by removing paragraphs (b) and (c)

Recommendation 6 – that s60CC include as a relevant factor in determining 'best interests' the need to consider 'the history of care for the child'.

2. Changes to the Objects

The Bill amends the Objects of Part VII to read:

(1) The objects of this part are *to ensure that the best interests of children are met by*:

(a) ensuring 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; and
(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and…

[the remainder of the section is effectively unchanged].

Response

- The opening words of s60B(1) 'the objects of this part are to ensure that the best interests of children are met by' risks mis-directing courts to consider two sets of considerations about what is in a child's best interests – those things in s60B(1) and those in s60CC. We are concerned that this may lead to s60B being seen as an additional hierarchy of factors in determining best interests of children i.e. to s60B being seen as additional to the hierarchy in s60CC. The hierarchy in s60CC is already complicated by the two tiers – this might make it even more confusing and give even greater weight to the objects and principles sections in decision making than appropriate/intended and than they already seem to have.
- The influence to date of the 'right to contact' principle has been to promote contact over safety. Our analysis of the amended s60B (see fourth dot point onwards below) is that it will increase the focus on contact over safety so, if the effect of the preamble to s60B(1) is to encourage s60B to be seen as an additional hierarchy of factors in determining best interests this will have an even greater impact on decision making.
- Further, it is not necessary to qualify the whole of s60B(1) by reference to the best interests of the child. The only paragraph in s60B(1) that requires qualification is s60B(1)(a); it is not always beneficial to children for their parents to have a 'meaningful involvement' in their lives, for example where there is or has been violence, so this paragraph *should* be limited to when it is in the best interests of children. On the other hand the remaining paragraphs in s60B are clear and unqualified statements about things that are good for children. This is highlighted by the fact that even though the introduction to s60B(1) is proposed to read 'the objects of this part are to ensure that the best interests of children are met by', it is then necessary to immediately qualify the paragraph (1)(a) by saying 'to the maximum extent consistent with the best interests of the child'.
- The two new objects in (1)(a) and (b) will nullify each other in any case where there is an allegation of violence, leaving decision-makers to refer to the other objects and principles in s60B.
- The 'meaningful relationship' object is already reflected in the principles about children's *rights* in s60B(2) (see (2)(a) and (b)) whilst the 'safety' object is not reflected at all in the

principles. Repetition of the 'meaningful relationship' concept is likely to give it inappropriate weight over considerations of safety.

- In addition, for the sake of consistency and given the influence of the 'right to contact' principle to date, we believe that the 'safety' object should also be reflected in the principles as a child's *right* – we believe that the language of 'rights' is symbolically important and influential in decision making – to have the influence they are intended to have the provisions about 'safety' for children should be couched in this language in the same way that the provisions relating to 'rights to contact' are.
- The wording of the 'meaningful relationship' object is convoluted and inconsistent with the wording used in the best interests provision s60CC(2)(a).
    - The reference to '*parents* having a meaningful involvement' in their children's lives may 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 above) are likely to conflict with each other such that the presence of violence or abuse may not be sufficiently reflected in best interests assessments.
- If the 'meaningful relationship' object is to remain in the Bill it must be qualified to ensure that it does not always conflict with the need to protect children from harm.

Recommendation 7 – that s 60B(1) be amended to ensure that it is not seen as an additional part of the decision making hierarchy by amending the introductory words to read: " (1) The objects of this part are to:"

Recommendation 8 – that s 60B(1)(a) be qualified to ensure that it does not conflict with s60B(1)(b) in any case where violence or abuse is alleged. For example:

(a) except when it would be contrary to the best interests of children, ensure that children have the opportunity to have a meaningful relationship with both of the child's parents.

Alternative Recommendation 8 – that s 60B(1)(a) be re-worded to be consistent with s60CC(2)(a) to say: "ensuring that children have the opportunity to have a meaningful relationship with both of the child's parents."

Recommendation 9 – that the principles in s60B(2) be amended to include an additional paragraph:
(a) children have the right to live free from abuse, neglect or family violence.

3. Costs orders for 'false allegations'

The Bill introduces a requirement on courts to make costs orders against parties 'knowingly' making a false allegation or statement (s117AB).

Response

- Although generically written, this provision has been introduced in response to the House of Representatives Committee's recommendation 10 which is clearly directed at false allegations of family violence or abuse.
- Empirical research undertaken through Monash University strongly suggests that false allegations of family violence or abuse are rarely made. That research also shows that false allegations are no more likely to be made in the context of family law proceedings than they are in the wider community.[8] We therefore reject the implicit assumption in much of the House of Representatives Committee's report that false allegations are made in family law proceedings for the purpose of obtaining some kind of advantage in those proceedings.
- The House of Representatives Committee itself acknowledged that it was 'unable to determine to what extent the allegations of family violence and abuse… are actually false'[9] and recommended that research occur into this issue. We understand that the government is currently negotiating for this research too occur. It is therefore premature and heavy-handed to introduce provisions directed at a 'problem' which may well be conclusively proven by the impending research not to be a 'problem' at all.
- The problems with under-reporting of family violence in the wider community are well known. In our experience, these problems are reflected and even exacerbated in the family law system which actively silences women, pressuring them not to raise their concerns about family violence and abuse and the impact this has on their children. Unlike the supposed 'problem of false allegations', for which there is no empirical basis whatsoever, there is ample empirical research to demonstrate that violence is currently given very little weight in family law decision making and that women are often actively encouraged not to mention it lest they be seen as alienating the children from the father.[10] Any provision that may further discourage women from raising concerns about violence or abuse should be avoided. Such concerns are directly relevant to assessing the best interests of the child.
- This provision is inconsistent with the government's 'Violence Against Women, Australia Says No Campaign', significant parts of which are directed towards encouraging women to speak up about violence.
- There are already ample and appropriate remedies for false allegations in the Family Court. A person can be prosecuted for perjury, contempt proceedings can be initiated and/or the general costs provision can be utilized. The mere fact that these may be under-utilised is not a good enough reason to introduce a specific provision, given the risks described above.
- The generic application of this provision (although clearly intended to focus on allegations of violence and abuse) is likely to lead to a significant increase in litigation over whether costs penalties should be imposed in relation to the range of allegations that may be made in family law matters – such as drug use, poor parenting skills etc.
- If in fact, as we believe, the extent of false allegations is very low (and we firmly believe that the proposed research will support the empirical data already available to this effect), the far bigger problem that should be addressed is false *denials* that violence or abuse has occurred. Denials of violence or abuse are highly detrimental to children's best interests and cause significant waste of government and court resources. We note that the Attorney has

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[8] T Brown, M Frederico, L Hewitt and R Sheehan, *Violence in Families – Report Number One: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, Monash University, Clayton, 1998, Chapter 5.

[9] Paragraph 2.102.

[10] H Rhoades, R Graycar & M Harrison, *The Family Law Reform Act 1995: the first three years*, 2001. See also R Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family*, Women's Legal Service Inc., November 2000.

stated publicly that he is also concerned about addressing the issues of false denials of violence. However, this provision does not clearly also target false denials – whilst these might be theoretically covered by the expression 'false statement', it is likely that this will be read down in the context of the expression 'false allegation'. Accordingly, if this provision is to remain in the Bill, it should at least be clearly amended to ensure that a Court is also directed to deal with false denials of violence.

***Recommendation 10 - that s117AB not be introduced*.**

Alternative Recommendation 10 - that s117AB be redrafted to ensure that it covers false denials of violence or abuse. For example by amending paragraph (1)(b) to:

- ***refer only to the making of a 'false statement'; or***
- ***refer to both 'false allegations or false denials of allegations made'.***

4 'Objective' definition of family violence

The Bill changes the *Family Law Act* definition of 'family violence' to be 'objective' (Schedule 1, item 3 of the Bill, amendment to ss4(1) definition).

Response

- May lead to real concerns about violence not being properly factored into decision making.
- We note that the Exposure Draft did not propose any changes to the definition of family violence. Neither was this issue addressed in the previous Family and Community Services Committee Report *Every Picture Tells a Story*, or the government's discussion paper *A New Approach to the Family Law System*. In our view it would be dangerous and highly inappropriate to amend the definition of family violence in the Act without full and proper consultation on the possible impact of such a change.
- The government says in its response to the House of Representatives Committee's report that this change is also directed towards addressing concerns about false allegations of family violence. As noted in 3 above, given the available research and the House of Representatives Committee's own *non*-findings about the levels of false allegations, we reject this rationale. In any event, we do not believe that making the definition of family violence 'objective' can make any difference whatsoever to the *possibility* of false allegations being made.
- Further, we consider that the introduction of an 'objective' element into the definition of family violence would be dangerous for the following reasons:
  - Tests of 'reasonableness' have been demonstrated to operate in gendered ways – i.e. although expressed in gender neutral language, they are often interpreted as what the 'reasonable man' might think – or in this case what might make him fear for or be apprehensive about his safety.
  - There is a tendency to see family violence as a series of incidents, when in fact it is a pattern of behaviour that involves the use of violence as a tool of power and control. Victims of family violence learn to 'read' the perpetrator of violence and know what is coming next. It may appear to an outsider that a specific incident should not 'reasonably' cause the victim to fear for their safety, but her experience tells her otherwise.
  - Including a 'reasonableness' test would send a very unfortunate message to the community about the use of violence and the experience of violence – that it is only a

problem if it causes someone 'reasonably' to be in fear. Being a victim of family violence is not a reasonable situation and it should not be the victim who is required to respond 'reasonably' to the violence.

- We note that the Attorney-General's Department indicated in its evidence to the House of Representatives Committee that 'the definition that is in the legislation at the moment has been there for a long time and is well understood by the courts' and that the Family Law Council did not believe that there was any need to amend the definition of family violence.[11]
- We note that this change would make the *Family Law Act* definition even more inconsistent with state family violence legislation. The overwhelming majority of state family violence legislation defines violence by the conduct of the perpetrator and not the reaction of the victim and only one state (New South Wales) *limits* its definition by use of an objective test. (See the attached pdf Information Document on state/territory Definitions of Family/Domestic Violence if more detail is required). If the government is to meaningfully proceed with its Family Law Violence Strategy and work with state governments to improve investigation and reporting of family violence, it will be necessary for the relevant definitions to be as consistent as possible. We therefore urge the Committee to follow the advice of the government's own Department and the Family Law Council and recommend that the definition of family violence not be amended at this stage.

Recommendation 11 - that the definition of 'family violence' not be amended at this stage and that the Standing Committee of Attorneys General explore the potential for introducing more consistent definitions of the term 'family violence' into all relevant Commonwealth and State legislation.

5. New Division 11 – Family Violence

Division 11 deals with the interaction between family law orders and state family violence orders. In particular, the Division enables a state magistrate making a family violence order to change a family law order. The House of Representatives Committee recommended that this Division be redrafted into clear and concise language as recommended by the Family Law Council in its letter of advice to the Attorney-General of November 2004. In its response to the House of Representatives Committee' report the Government says that Division 11 has been 'redrafted with *slight modifications* to the Family Law Council recommendations' (our emphasis).

Response

- The 'modifications' to the Family Law Council's recommendations are not 'slight'. Division 11 as it appears in the Bill, will make it harder to change family law orders to protect people from violence than is currently the case and certainly does not give effect to the Family Law Council's recommendations. (See the attached pdf document Comments on New Division 11 of the *Family Law Act* for a full analysis that compares the proposed new Division 11 with the Family Law Council's recommendations and the current Division 11).

Principles for exercising Division 11 powers

- It should be noted that this Division is intended to provide a short term solution to address safety issues arising from *Family Law* Act orders until the matter can be fully considered in a family court. There are long delays in accessing the family courts (which will not change significantly even given the introduction of s60K given that it currently specifies an 8 week

[11] Paragraphs 2.117 and 2.118.

timeframe for a family court to take action). It is therefore imperative that Division 11 is clear and accessible to magistrates to encourage its use where appropriate.

- One of the key criticisms made by the Family Law Council was that the current Division 11 does not tell state courts which considerations they have to give priority to in determining whether to change a family law order when making a family violence order. The Council recommended that the Division should give clear priority to 'the need to protect all family members from family violence and the threat of family violence'.
- The Bill does not tell state courts what considerations to give priority to – and it certainly does not clearly prioritise protecting people from violence – given that the new objects and principles in s60B are so heavily balanced in favour of contact rights and promoting the child's relationship with both parents.
- The Bill may even be worse than what we currently have because the reference in current s68Q(b) to one of the purposes being to '*ensure* contact orders do not expose people to family violence' is only very weakly reflected in the reference in the objects and principles to one of the objects being to protect children from harm.
- The Bill also focuses only on protecting children from family violence and loses the current broader focus on protecting *people* from family violence.
- Furthermore, the requirement on magistrates to weigh up a huge number of considerations (the need to resolve inconsistencies between state family violence orders and federal family law orders, the four objects and five principles underlying Part VII and the two primary considerations and 14 additional considerations for determining the best interests of the child) is likely to make it even less likely that they will agree to hear an application to vary a Family Court Order, let alone make a change – they will see it as too complicated and are likely to refer people to the Family Court.
- The Bill should give clear direction to state courts to prioritise the need to protect *people* (not just children) from violence over the other considerations. Without this clear direction, Division 11 will continue to be confusing. More importantly it will continue to be ineffective in actually protecting people from violence because 'the need to protect children from harm' will just be one of a range of unprioritised considerations state courts will be called upon to apply when determining whether to change family law orders. The Division should be amended to give effect to the FLC recommendations, especially recommendation 3.

Requirement for new material

- The requirement to provide new material to a state court (s68R(3)(b)) before it can change a family law order may operate to obscure a history of violence and hence the context of any new incidents.
- In our experience, even under the current law, state courts do not change family law orders if they think *all* the evidence before them had already been put to the Family Court when those orders were made. The provision is therefore unnecessary.
- However, we believe that s68R(3)(b) could operate to obscure a long history of violence when a state court is determining whether to exercise its Division 11 powers. In theory, under s68R(3)(b) a person *should* just need to show that further violence had occurred after the family law orders were made in order to get over the requirement in that paragraph – once they had got over the requirement the state court *should* then still be able to consider *all* of the history of violence even if some of that evidence had been given to the Family Court and then, in the context of the whole history make a proper determination about whether to change the family law order. However, we are concerned that s68R(3)(b) might lead to state courts not giving proper regard to a long history of violence if an applicant came before them with only one or two 'minor' incidents of violence after the family law orders were made – those further incidents might well be the 'straw that broke the camel's back' for the applicant and have led to them feeling unsafe. BUT, if the state court took the view that

the Family Court considered that the preceding history did not warrant restrictive contact arrangements, the state court might be unwilling to restrict contact because they only gave consideration to the one or two further 'minor' incidents without considering these in the context of earlier incidents and the complete nature of the violent relationship.

Recommendation 12 – that Division 11 be amended to give effect to the Family Law Council's recommendations in its letter to the Attorney-General dated 16 November 2004, particularly recommendation 3. We believe that this could be achieved by the following amendments, however we recommend that the Committee seek the Family Law Council's opinion on this:

- ***Substituting s68N(b) with the following: "to ensure that orders, injunctions and arrangements referred to in sub-paragraph (a)(ii) do not expose people to family violence."***

AND

- ***By adding a new paragraph s68R(5)(ba): "have regard to the need to protect all family members from family violence and the threat of family violence and, subject to that, to the child's right to spend time and communicate with both parents and other people significant to the child's care, welfare and development, provided it is not contrary to the best interests of the child."***

Recommendation 13 – that s68R(3)(b) not be introduced.

6. References to 'equal shared parental responsibility'

The Bill introduces the term 'equal shared parental responsibility' rather than 'joint parental responsibility'.

Response

- This language is likely to lead to parents focusing on time rather than sharing of parental responsibilities. There is a high level of misunderstanding in the community as a result of the public discussion of a 'presumption of equal time', closely followed by the announcement of a 'presumption of equal responsibility'. We have many clients who think that equal time is now a legal requirement, or whose partners assert that it is, simply because it has been discussed in the media.
- Even if it does not lead to a focus on time, it is likely to lead to parents seeking to exercise strictly 'equal' responsibility for their children rather than focusing on sharing responsibility in a manner which is in the children's best interests.
- The phrase 'joint parental responsibility' is preferable.

Recommendation 14 - that all references in the Bill to 'equal shared parental responsibility be replaced with the term 'joint parental responsibility'.

7. Courts to consider equal time or substantial and significant time arrangements

The Bill introduces a requirement, where a parenting order says that parents are to have equal shared parental responsibility, for courts to consider equal time arrangements or alternatively 'substantial and significant time' arrangements' (s65DAA).

Response

- The term 'equal' should be avoided. This language is likely to lead to a focus on parents' 'rights' to strictly equal time with their children rather than arrangements that are best for the children in all the circumstances.
- As noted above the reference to equal time in the joint custody inquiry has already created significant confusion in the community. In our experience, the perception that equal time is now a legal requirement is already leading to unworkable and unsafe arrangements in relation to the ongoing care of children. Greater emphasis on equal time is likely to worsen this situation.
- Although the notes to s65DAA(1) and (2) makes it clear that a decision about whether to 'go on to make' a parenting order for equal time or substantial and significant time with both parents would still be determined according to the child's best interests, this still prioritises consideration of two particular models over any other – even though they are no more likely to be appropriate.
- Absence of evidence to suggest that equal time or 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. The Revised Code of Washington (RCW 26.09.187) provides a useful and appropriate model for considering when equal or 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 there is a history of violence or abuse.
- Cases being considered by the court (on which the legislation will have the greatest effect) are the matters least likely to be suitable to an equal time or substantially shared time arrangement because there is generally a high level of conflict and very often violence between parents who are unable to reach agreements between themselves about appropriate arrangements for their children.
- Furthermore, even though s65DAA requires consideration of the best interests of the child, because that assessment itself is made utilizing the two conflicting primary considerations and s60CC(3)(c) (the facilitating relationship consideration), the whole assessment is dramatically weighed in favour of the parent who wants equal time – which will have a significant impact where there are safety concerns.
- If s65DAA is to be introduced, WLSA recognizes that the new sub-section (5) is an improvement to that section in providing a checklist of issues for a court to consider when determining whether equal time or substantial and significant time arrangements are 'reasonably practicable'. However, that sub-section directs attention completely away from the *history* of cooperation and sharing parenting as good evidence of its practicality in the future. In addition, the notes to s65DAA(5) may inappropriately influence its interpretation and compromise other provisions in the Bill aimed at ensuring safety. A result of s65DAA and notes 1 and 2 could well be that a mother who is victim of violence will be sent off to counseling about how she can put the violence in the past and communicate effectively to 'resolve difficulties that might arise in implementing an arrangement' for equal time or substantial and significant time. The notes should be removed.

Recommendation 15 - that s65DAA not be introduced.

Alternative Recommendation 15 - s65DAA(5)(b) and (c) be amended to refer simply to 'parents' capacity' rather than 'parents' current and future capacity' AND the notes to s65DAA(5) should be removed.

8. Advisers to raise equal time arrangements

The Bill introduces a requirement on advisers, including lawyers, FDR practitioners and family counsellors, to raise equal time arrangements and substantial and significant time arrangements for people to consider (s63DA(2)(a) and (b)).

Response

- Gives inappropriate priority to those arrangements over any other type of arrangement.
- This also cuts across the neutrality of FDR practitioners.
- Directing advisers to specifically raise two models for caring for children after separation gives inappropriate priority to those arrangements which are no more likely to be appropriate than any other arrangement. This might project a level of authority that means that equal time or 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. See our comments above in relation to evidence about the appropriateness of equal or substantially shared time arrangements.
- 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 or substantially shared time arrangements.
- We believe that for parents utilizing FDR services advisers will carry a degree of authority and that there are therefore significant dangers in parents being advised during FDR processes about the appropriateness of a particular parenting arrangement as is contemplated in the note to s63DA(2). In particular where there is a power imbalance between the parties we believe that such advice may inadvertently give more power to the dominant parent. Further, we believe that it will be difficult for many parents to understand the distinction between this advice and legal advice.

Recommendation 16 - that s63DA(2)(a) and (b) not be introduced.

Alternative Recommendation 16 - that s63DA(2) be amended to ensure that advisers must inform parents of the factors for determining the best interests of the child in s60CC and the factors for determining whether an equal time or substantial and significant time arrangement is 'reasonably practicable' in s65DAA(5).

9. Emphasis on and Priority to Parenting Plans

The Bill places significant emphasis on parenting plans and gives them priority over court orders.

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

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'.

S64D means that court orders will be subject to subsequent parenting plans and that a court may only specify that its order will *not* be subject to a subsequent parenting plan in 'exceptional circumstances'. The effect of this will be that an unenforceable parenting plan will override an enforceable court order, presumably to the extent of the inconsistency between the two.

Response

- We remain very concerned about the emphasis in the Bill on unenforceable parenting plans which are not scrutinized or supervised by anyone and create a significant level of confusion about the obligations parents are under. We believe that this focus may have stemmed from an incorrect belief that parents cannot have flexible arrangements under Court Orders (see for example paragraph 3.235 of the House of Representatives Committee Report) and that Court Orders cannot be changed without further 'court proceedings' (see for example paragraphs 3.213 and 3.216 of the House of Representatives Committee Report).
- In fact, most Court Orders contain a catch-all provision which allows for contact to occur 'otherwise as agreed between the parties'. Court Orders can be changed by filing Consent Orders with the Court. There is no filing fee for Consent Order applications and there is usually no need for a court attendance. It is therefore already perfectly possible for parents to operate in flexible and cooperative ways. Court Orders are no more set in stone than parenting plans and, like parenting plans, can be changed by agreement (either informally utilizing a catch-all 'as otherwise agreed between the parties' provision or formally through the Consent Orders process). However, Consent Orders offer the protection of court scrutiny to ensure changes are actually best for children. The lack of court scrutiny of parenting plans may well lead to plans being entered into under coercion that are not best for children.
- 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.
- It is significant to note that the performance measures for Family Relationship Centres ('FRC's') currently focus on rates of agreement rather than on whether the arrangements

made are actually best for children (Family Relationships Centres – Information Paper, 22 December 2005, pp13-15). The overall effectiveness of FRC's and the proposed changes generally must be measured by reference to the quality of the outcomes for children not by the quantity of outcomes.

- S64D will increase the risks associated with such flexible agreements given that they will effectively terminate prior parenting orders. 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. If this priority is going to be given to parenting plans it will be necessary to ensure that people are properly advised of the impact they will have on their legal rights and responsibilities.
- We support the House of Representatives Committee's intention as set out in paragraph 3.245 of their Report that 'section 64D should be redrafted to make clearer the power of the court to include an explicit provision in a parenting order where it would be inappropriate for a subsequent parenting plan to make a court order unenforceable', for example in a case where there was significant power imbalance, family violence or abuse (see paragraph 3.243). We believe it is essential in these sorts of cases that parties' rights and obligations are clear and that court orders cannot be overridden in circumstances where one party may coerce the other to enter into a conflicting parenting plan. However, we do not believe that the court's power should be limited by the need for the case to be 'exceptional'. Rather the court should be able to make orders that cannot be affected by a subsequent parenting plan where it considers this to be 'appropriate'.

Recommendation 17 - that s64D(1) be amended to provide that a parenting order is only subject to a subsequent parenting plan provided the child's parents and other persons to whom the parenting order applies have obtained legal advice prior to signing the parenting plan, preferably demonstrated by a certificate of independent legal advice.

Recommendation 18 – that s64D(2) be amended by deleting the words 'in exceptional circumstances' such that a court will have an unfettered discretion to ensure that its order cannot be overridden by a subsequent parenting plan.

Recommendation 19 – that the performance measures for FRC's include the need to demonstrate that arrangements for children agreed to at FRC's are actually in the best interests of children and that the best interests of children should be a key factor in evaluating the FRC's and the family law changes generally.

10. Compulsory Dispute Resolution

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(9)(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 (9)(c)
- Where the application is urgent (9)(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)' (9)(e).

Response

- WLSA 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.
- WLSA 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. A sworn statement could be given if necessary. 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'. We note the House of Representatives Committee's comment at paragraph 3.30 of their report that

  > 'it is unclear at which point in the proceeding the availability of the exception would be determined, the amount of evidence required to satisfy the court on reasonable grounds and even whether a judge or registrar would make such a decision'.

  We believe this is highly unsatisfactory.
- 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(9)(b) appears to create significant obstacles for a potential applicant to negotiate to issue a court application where they allege there is violence or abuse. It appears 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 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 of the current inaccessibility of the court system. As noted in previous submissions the way in which the relevant FDR services will operate in practice will determine the extent to which this new system creates even greater risks that unrealistic, unfair and even unsafe agreements will be negotiated. We do not propose to repeat our comments about those systems issues as they are not directly guided by the legislation. However, we would emphasise that great care needs to be taken in developing the systems that will apply in these services and the qualifications that will be necessary to work in them.
- S60I(9)(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.
- Swearing and filing an affidavit asserting the existence of family violence or child abuse should be specifically recognized as one way in which a party can be exempted from the requirement to attend family dispute resolution. It should not be the only basis for being exempted from FDR in violence or abuse cases
- In particular, we believe that 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.
- We are concerned by the reference in s60I(8) to FDR practitioners needing to certify that parties made a 'genuine effort' to resolve the issues. This seems to place a very high responsibility on the practitioner who, at least in an FRC, will be under pressure by the proposed FRC performance measures to ensure agreements are reached, even where they have reservations about their fairness or appropriateness. Victims of family violence may be unable to proceed effectively in an FDR process due to the very nature of the impact of the violence on them. There is a risk that such people (particularly where violence is not disclosed) might be seen as not having made a 'genuine effort' to resolve their issues and this might expose the victim or her children to greater risks of violence as she could be further delayed in commencing necessary court proceedings.

Recommendation 20 - that s60I not be introduced. Parties should be able to elect to use the court system if they disclose violence or abuse. A sworn statement could be given if necessary.

Alternative Recommendation 20 – that, at a minimum:

- ***FDR practitioners should be able to certify that a dispute is not suitable for FDR due to family violence or other issues (per current Regulation 62 of the Family Law Regulations).***
- ***The requirement for FDR practitioners to certify that parties have made a 'genuine effort' to resolve the issues be removed.***

11 Presumption of Equal Shared Parental Responsibility & Effect of Order for Equal Shared 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 equal shared 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 equal shared 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 changes to the child's living arrangements that make it significantly more difficult for the child to spend time with a parent.

Response

- 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.[12] 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(2)(f)(i)).
- 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'.
- The introduction of a presumption of equal shared parental responsibility is likely to lead to increased litigation.[13]
- 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.
- 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.

Recommendation 21- that s61DA not be introduced.

Recommendation 22 - that s65DAC not be introduced.

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28 February 2006

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[12] Rhoades, Graycar & Harrison (note 1) at page 2.
[13] 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 1).