

**Recommendations to Address Key Concerns
about the Impending Family Law Changes**
(including the *Family Law Amendment (Shared Parental Responsibility) Bill 2005*)

1. The changes do not promote the best interests of children

1.1 The Bill promotes parents' rights to share equally in their children:

- 1.1.1 Presumption of 'equal shared parental responsibility' (s61DA) and specific legislated duty to consult (s65DAC). Note, in particular, that a parenting order for equal shared parental responsibility then raises an obligation on courts to consider equal time arrangements or 'substantial and significant' time arrangements (s65DAA - see 1.1.2.B below).

Recommendation 1 - that s61DA not be introduced.

Recommendation 2 - that all references in the Bill to 'equal shared parental responsibility' be replaced with the term 'joint parental responsibility'.

Recommendation 3 - that s65DAC not be introduced.

- 1.1.2 Emphasis on equal time arrangements or 'substantial and significant' time arrangements gives inappropriate priority to those arrangements over any other type of arrangement:

- 1.1.2.A Advisers, including lawyers, family dispute resolution (FDR) practitioners and family counsellors, required to raise such arrangements for people to consider (s63DA(2)(a) and (b)). This also cuts across the neutrality of FDR practitioners.

Recommendation 4 - that s63DA(2)(a) and (b) not be introduced.

- 1.1.2.B Where a parenting order says that parents are to have equal shared parental responsibility, courts are required to consider equal time arrangements or alternatively 'substantial and significant time' arrangements' (s65DAA).

Recommendation 5 - that s65DAA not be introduced.

If s65DAA is to be introduced, Women's Legal Services Australia (WLSA) recognizes that the new sub-section (5) is an improvement to that section in providing an appropriate checklist of issues for a court to consider when determining whether equal time or substantial and significant time arrangements are 'reasonably practicable'. However, the notes following sub-section (5) may inappropriately influence its interpretation and compromise other provisions in the Bill aimed at ensuring safety – they should be removed.

1.1.3 The 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)) *may* encourage parents to focus on 'earning' rights to their children. There has been no consultation on the possible impact of this provision.

Recommendation 6 – that further time be allowed for consultation to occur on the possible impact of s60CC(4).

1.2 The Bill diminishes the weight given to children's views by making these a 'secondary' criterion (s60CC(3)(a)).

Recommendation 7 - that the current structure of s68F be retained and that there be one list of criteria to assess children's best interests rather than 'primary' and 'secondary' criteria.

1.3 Family Relationship Centres' (FRC's) performance measures focus on rates of agreement rather than on whether the arrangements are actually best for children (Family Relationship Centres – Information Paper, 22 December 2005 pp13-15).

Recommendation 8 – 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 this should be a key factor in evaluating the FRC's.

2. The changes undermine the safety of children and their family members

2.1 WLSA recognises that five positive changes have been introduced or are promised in relation to safety issues:

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

2.1.2 The Bill now requires a Court to take prompt action in relation to allegations of child abuse or family violence (s60K).

2.1.3 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)).

- 2.1.4 A court could admit evidence and draw conclusions from other courts about family violence and abuse utilizing new s69ZX(3).
- 2.1.5 The Government is developing a new Family Law Violence Strategy (Government's response to Recommendations on the Bill made by the Legal and Constitutional Affairs' Committee, p5) which includes measures such as:
- 2.1.5.A Working with State Governments to improve investigation and reporting of family violence.
 - 2.1.5.B Improving court processes for cases involving violence, similar to how child abuse is dealt with in Project Magellan; and
 - 2.1.5.C Asking the Family Law Council to review how to deal better with cases involving violence.

WLSA welcomes these measures and urges the Government to act on them promptly. However, we still believe that the Bill as it currently stands will further undermine the safety of children and their family members:

2.2 The Bill creates conflicting primary considerations and an additional secondary criterion for determining a child's best interests that are likely to lead to children being placed at greater risk of exposure to violence or abuse:

- 2.2.1 Primary considerations – children to have meaningful relationships with both parents, children to be protected from harm (s60CC(2)). These considerations will cancel each other out in any case where there is an allegation of violence, leaving decision-makers to fall-back on the additional considerations. Further, the 'meaningful relationship' consideration is already reflected in the additional considerations in s60CC(3) – its repetition would be likely to give it inappropriate weight over considerations of safety.

See Recommendation 7 above - that the current structure of s68F be retained and that there be one list of criteria to assess children's best interests rather than 'primary' and 'secondary' criteria.

Recommendation 9 - that s60CC(2)(a) be omitted from the list of criteria for assessing best interests.

- 2.2.2 New secondary criterion – willingness to facilitate a relationship with the other parent (s60CC(3)(c)) – will have significant influence over decision-making in cases of violence because the primary considerations will cancel each other out. By definition parents who fear violence will be acting to protect children from harm and not be willing to facilitate a relationship with the other parent.

Recommendation 10 - that s60CC(3)(c) not be introduced.

2.3 The conflicting considerations about children having meaningful relationships with both parents and children being protected from harm are also included in the Objects provision of Part VII (s60B(1)(a)&(b)). These objects 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.

Recommendation 11 - that s60B(1)(a) not be introduced.

Recommendation 12 - alternatively that it be redrafted to be consistent with s60CC(2)(a) to say ‘ensuring that children have the benefit of a meaningful relationship with both of their parents’.

Recommendation 13 – that the principles in s60B(2) be amended to include an additional paragraph:

(a) children have the right to be protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

2.4 ‘False allegations’ provision in the Bill - courts required to order costs against parties ‘knowingly’ making a false allegation or statement (s117AB) - will put pressure on women to ‘keep quiet’ about violence or abuse and obscures the problem of false denials of violence.

Recommendation 14 - that s117AB not be introduced.

2.5 Changing the *Family Law Act* definition of ‘family violence’ to be ‘objective’ (Schedule 1, item 3 of the Bill, amendment to ss4(1) definition) – may lead to the victim’s experience of violence not being properly factored into decision making. Note that 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.

Recommendation 15 - 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 consistent definitions of the term ‘family violence’ into all relevant Commonwealth and State legislation.

2.6 Compulsory pre-filing mediation & issues with violence and abuse cases.

2.6.1 The legislative exception for violence and abuse cases is too narrow and the obstacles to get to court too great (s60I) – this will force inappropriate cases to mediation and lead to unsafe agreements. The provisions pressure FDR practitioners to continue with dispute resolution even if they consider it inappropriate.

Recommendation 16 - 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.

Recommendation 17 – alternatively 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.**

2.6.2 Legal representation can ameliorate some of the issues that arise where mediation occurs in violence cases but parents are to be prohibited from having legal representation at dispute resolution sessions in FRC's and it is not clear what, if any, alternative arrangements will be put in place to ensure access to legal advice (Family Relationship Centres – Information Paper, 22 December 2005, p8).

Recommendation 18 – where violence is disclosed or suspected at screening at an FRC the victim of violence be offered lawyer assisted mediation.

Recommendation 19 – people attending family dispute resolution at an FRC should have access to legal advice (for free where appropriate) prior to attending an FRC and prior to agreeing to a parenting plan.

2.6.3 Processes for screening and dispute resolution in FRC's are not yet determined.

Recommendation 20 – that the Attorney-General's Department (AGD) consult with us and with specialist domestic violence resource and training organisations, including the Domestic Violence & Incest Resource Centre in Victoria, the Education Centre against Violence in New South Wales and the Queensland Centre for Domestic and Family Violence Research, in relation to appropriate processes for screening for family violence and for conducting dispute resolution where cases involving family violence (identified or not) may be proceeding through those processes.

2.6.4 Qualifications and training requirements for FRC Staff particularly in screening and dispute resolution are not yet determined – the draft qualifications prepared by the Community Services & Health Industry Skills Council (CS&HISC) on behalf of AGD do not include adequate units re family violence/abuse.

Recommendation 21 – that CS&HISC consult with us and with specialist domestic violence resource and training organisations (see Recommendation 20), in relation to appropriate qualifications and training requirements for FRC staff, particularly in screening and dispute resolution. At a minimum family counsellors, family dispute resolution practitioners and anyone undertaking screening for FRC's must be competent to recognise and respond to clients affected by domestic and family violence (existing CHCDFV1B competency). However, we anticipate that more specific competencies will need to be developed for family dispute resolution practitioners.

2.7 Changes to Division 11, which deals with the interaction between family law orders and state family violence orders, may make it harder to change family law orders to protect people from violence and do not give effect to the Family Law Council's recommendations:

2.7.1 They do not *prioritise* the need to protect people from family violence in decision making (s68R(5) and referring to s68N);

2.7.2 They focus only on protecting children from family violence and lose the current broader focus on protecting *people* from family violence (s68R(5) and referring to s68N);

Recommendation 22 – 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.

2.7.3 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.

Recommendation 23 – that s68R(3)(b) not be introduced

3. The changes must be fair, accessible and appropriate for Indigenous and culturally and linguistically diverse ('CALD') communities and for rural and remote families

3.1 The service system is not yet clearly defined as the FRC model is still being developed. Very little detail has been released about how these communities and families will be serviced, particularly under the compulsory family dispute resolution model but there is some suggestion that dispute resolution services could be delivered by telecommunications. This would be ineffective and highly inappropriate.

Recommendation 24 – that the Government release, as a matter of urgency, details of how the needs of Indigenous and CALD communities and rural and remote families will be met (other than by telecommunications) in the new family law system.

WOMEN'S LEGAL SERVICES AUSTRALIA

Contact: Joanna Fletcher
Law Reform Coordinator
Women's Legal Services Australia &
Law Reform & Policy Lawyer
Women's Legal Service Victoria
justice@vicnet.net.au