24 August 2009

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By email: Julie.Deblaquiere@aifs.gov.au

Dear Ms Deblaquiere,

AIFS evaluation of family law reforms: extent to which reforms meet objectives

1. Thank you for inviting Women's Legal Services Australia (WLSA) to make a submission on the extent to which the changes effected by the *Family Law Amendment (Shared Responsibility) Act 2006* (Cth) are meeting the Act's objectives.

2. WLSA is a national network of community legal centres specialising in women's legal issues. Our member services regularly provide advice, information, casework and legal education to women on family law and family violence matters. We have a particular interest in ensuring that women experiencing domestic violence are adequately protected in the family law process, and that disadvantaged women, such as those from culturally and linguistically diverse backgrounds, Indigenous women, women with disabilities and rural women are not further disadvantaged by the process.

3. While our response is structured in accordance with the objectives, we note that many of our concerns are relevant to more than one objective. We also note our continuing concern about the appropriateness of the objectives. In particular, that they promote parents' rights rather than the best interests of children and that they undermine the safety of children and their family members. Further, the family law system fails to recognise that protection of children is often linked to the protection of their carer (usually the mother).[1]

(a) to help prevent separation and build strong, healthy family relationships

Preventing separation threatens strong, healthy family relationships

4. WLSA queries the appropriateness of legislation aiming to reduce separations, when the reality is that the people making the very difficult decision to separate do so to live safe and secure independent lives. People usually separate because they believe that is the appropriate choice for them and their families. A number of our clients separate due to family violence. Others may separate because the high level of conflict makes their differences irreconcilable.

5. The aim of preventing separation can threaten the strength and health of family relationships. In our experience, where clients separate and then return to their partners it is usually for practical reasons; such as economic hardship, cultural, linguistic and geographical isolation, or a risk management strategy (to prevent an escalation of

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violence). A number of our clients who have separated from violent partners have stressed the difficulty of going through Family Relationship Centres and then the courts for final orders. They have felt that negotiating children's issues post-separation in family violence relationships has been a more precarious situation than staying in the relationship with the family violence where they felt they could better protect the children.

6. While situations where families stay together may be perceived as having been satisfactorily resolved, problems often remain and there is no guarantee that the family members are safe or their relationships strong and healthy. A number of clients either return again to our services to separate, or remain in those relationships and remain in contact with our services for ongoing legal advice to manage the often treacherous and difficult cycle of family violence and separation. On average, women will leave and return to a violent relationship seven times before they leave finally. Aiming to prevent separation for women experiencing violence does not assist them in building strong, healthy family relationships.

7. The focus of the legislation should not be on preventing separations but on empowering people facing the difficulty of considering that option and ensuring that the outcome of separation is healthy for all involved. In some instances, it can be in the best interests of the children for the parents to separate and have an opportunity to build strong, healthy family relationships.

Impact of shared care and high conflict on the health and safety of children

8. Shared care arrangements in circumstances of high conflict have significant ramifications for the safety and welfare of children where such agreements are entered into by the parents, whether at mediation or settlement at court. Rhoades states in describing the research of McIntosh and Long[2] and article of McIntosh and Chisholm[3]:

> Its data suggest the reforms have been successful in producing an increase in 'substantially shared care arrangements' since the legislation came into force. At the same time, however, the research indicates that a significant number of these arrangements are characterised by intense parental conflict, and that shared care of children is a key variable affecting poor emotional outcomes for children.[4] [footnotes removed]

9. Recent court statistics show that the court has made orders for the children to spend 30%-70% of time with each parent in almost one in three (32%) of litigated cases.[5] This high rate is particularly concerning given that cases that are litigated in court are always those cases that involve high conflict.

Impact of community (mis)understandings of the legislation

10. There is an increasingly, widely acknowledged misunderstanding in the community about the effect of the changes introduced by the 2006 Act in relation to shared parenting. Misunderstandings about the law can lead to inappropriate care arrangements being negotiated and agreed to. As outlined above, inappropriate care arrangements in situations of high conflict or family violence can severely threaten the health and safety of children, as well as women.

11. In our experience, there is a general wrongly held belief in the community that the starting point for negotiations is that children should spend equal time with both parents,

regardless of the children's best interests in each family. Parents bring that belief to mediation and the courts. While parents are told that decisions should be made in the child's best interests, the 'equal time' idea is dominant in the minds of many parents as a starting point, even where there are contra-indicators about what is best for the children and the efforts mediators and others go to to dispel this notion.

12. We submit that the confusion has arisen for four reasons:

- the way the changes in the law were explained and promoted to the community at the time of their introduction, through the media and other sources;
- the legislative provisions in Part VII of the Family Law Act are unnecessarily complicated and virtually incomprehensible to a lay person: they require considerable skill in statutory interpretation in conjunction with analysis of case law to understand and apply, and considerable uncertainty and lack of clear guidance remains about when shared parenting is best for children;[6]
- the inherent conflict in the 'objects' and 'principles' in s 60CC and the two primary considerations in the 'best interests' provisions in s 60 that simultaneously emphasise children benefiting from meaningful involvement of both parents in their lives, but also protecting them from physical or psychological harm (see discussion below);
- the requirement in s 63DA on advisors (family dispute resolution practitioners, family counsellors and lawyers) to inform parents that they 'could consider' equal time, or substantial and significant time, if it is reasonably practicable and in the child's best interests.

Impact of relocation limitations on women's family relationships

13. Greater restrictions on relocation arising out of the 2006 changes to the family law system have had implications for women seeking to relocate away from violence. The lack of integration of responses and inadequate legal options leave women and children exposed to a greater risk of violence and abuse, particularly in rural, regional and remote communities.

14. There are many reasons why women desire to relocate. Many of our clients, particularly those who experience family violence, wish to move to be nearer to their mothers or other family members who support them and their children. However, in most cases we see, women are prevented from returning to their families and support structures. In doing so, women and their children are being denied strong and healthy family relationships. Instead, they must stay in places where they lack support and remain at risk of further violence and abuse.

(b) to encourage greater involvement by both parents in their children's lives after separation, and also protect children from violence and abuse

Conflicting objectives

15. This core objective of the reforms and the Family Law Act itself[7] bring the two concepts of the division of time (synonymous in the legislation with 'involvement') and risk of harm into direct conflict with each other. Professionals (eg, lawyers and primary dispute resolution practitioners) and the judiciary find these conflicting concepts difficult

to easily reconcile and apply, particularly in the context of the exemptions to the presumption and the consequences of applying the presumption of equal shared parental responsibility. These sections, read together with other sections in the legislation,[8] have resulted in the division of time taking precedence over considerations relating to risk of harm. This is particularly evident in Interim Parenting Orders.

16. These reforms have worsened the de-prioritisation of safety in favour of dividing the child's time between both parents, which was already occurring prior to the reforms. WLSA submission prior to the 2006 reforms spoke of a 'pro contact' culture and noted that '[c]lear and prescriptive legislative change is needed to address the extent to which the presumption of contact has permeated family law practice and led to the prioritising of contact over safety'.[9]

17. WLSA's position continues to be that if there is to be any primary consideration or principle in the Family Law Act and across the family law system, it must be protecting children from harm or a risk of harm.

Greater division of time does not necessarily equal greater involvement

18. Research from North America suggests that following the statutory push towards shared parenting there was, 'no sign of an associated increase in the amount of 'positive parenting' men undertook (eg spending time with the child engaged in helpful activities such as homework).[10] Further, it is 'active paternal involvement, not simply the number and length of meetings'[11] that is important for child development. The conclusion drawn in this research is that it is the quality not quantity of time that is necessary for the development of a meaningful relationship.[12]

19. The research is consistent with the experiences of many WLSA clients. Although the 2006 reforms have resulted in significant changes to how the time children spend with each of their parents is divided, these changes in time do not correspond with similar changes to the distribution of the cost of children. The intersection of the child support reforms and 2006 family law changes has resulted in a double impact on women still striving to meet the costs associated with the care of their children. The intersection of property settlements and shared care is also impacting women. Our clients report that their future needs are assessed in the property settlement on the basis of shared care but that shared care does not always continue after the settlement. In some cases, shared care is being used as a strategy in property settlement negotiations. It is essential that the increasing poverty of women be monitored and addressed.

20. In addition, the unsustainable nature of many shared care arrangements also suggested that there are limitations in the extent to which legislation can achieve greater involvement by both parents. Shared care arrangements are not stable and, 'tend to break down over time with children moving to a primary residence with either parent'[13] Further, despite the obvious increases in the proportion of shared care arrangements, reached by agreement through mediation or by court order, 'it remains the case that over a quarter of children saw their fathers only once a year, or not at all, and paternal disengagement remains a strong factor in post-separation outcomes'[14]

21. WLSA submits that there should be no specific reference or consideration in the legislation of 50/50 or substantial and significant time as it unduly emphasises a limited

range of parenting arrangements over others that may need to be taken into account. In this way it weights the consideration of what is in the best interests of the child in favour of these arrangements and de-prioritises concerns in relation to safety (discussed in more detail below) and other 'best interests' factors.

Failures in the system to protect children from the impact of violence

22. Many of our clients report to us that their negotiated parenting arrangements or court orders expose them and their children to violence and abuse. This may be because of violence targeted at children directly or through harm to children in witnessing violence.

23. The overlap between woman abuse and child physical or sexual abuse is estimated to be between 30% and 60%[15]. It is these cases that represent the greatest risk to children's safety. High numbers of cases where children are killed have a background of domestic violence.[16] The impact of witnessing violence is also widely recognised within the domestic violence sector.[17] A 2006 survey found that 57% of women who experienced violence from a current partner reported that they had children in care at some time during the relationship, and 34% reported that children in their care had witnessed violence. 62% per cent of women who experienced violence from a former partner reported having children in their care and 40% reported that the children witnessed violence.[18] Children who are exposed to domestic violence are at increased risk of psychological, physical and social problems with a long-term impact on a child's future, and the effects of trauma begin when a child is in utero.[19]

24. With over 50% of parenting matters in the family law courts involving serious allegations of family violence and/or child abuse,[20] the core business of the family law system is responding to domestic violence and child abuse. Consequently, legislative and systems responses should be reformed to reflect this, and any agency that comes into contact with families after separation as part of the family law system should be heightened to the risks of violence and abuse.

Failure to address social science literature

25. In our experience, the family law system does not adequately address or refer to social science literature relating to the impact of domestic violence on children, the links between (and co-existence of) domestic violence and child abuse and research on the best interests of children generally. While various judicial officers are starting to consider relevant research in the area (eg, FM Neville in *Stuart and Stuart* [2008] FMCAfam 177)[21] various, judicial officers should have greater regard to social science research when considering matters. Similarly, legal professionals operating in the system should have sufficient training and skills to rely on the research in making submissions to the court.

26. The reliance on independent evidence of domestic violence and child abuse in determining the best interests of children also threatens the safety of children. Domestic violence and child abuse frequently occurs behind closed doors and commonly is not supported by independent evidence. The legislation should also be amended to facilitate the admissibility and consideration of social science research. Better use of experts on domestic violence to prepare expert domestic violence reports would also help address these concerns.

False allegations provision

27. The false allegations provision (s 117AB) presents a major challenge to the objective of protecting children from violence and abuse as it can be a major deterrent to women raising issues of violence and abuse. This section places emphasis of false allegations over false denials and is unnecessary given other provisions allowing for costs orders to be made. AIFS research indicates that false allegations occur in a very small number of cases.[22] WLSA supports the Chief Justice's suggestion that this provision should be repealed so that women are not deterred from raising issues of domestic violence.[23]

Connection between women's mental health issues and domestic violence

28. The way women's mental health issues are addressed within the family law system also results in a failure to protect children. In our experience, the mental health of women is considered by the courts without reference to a broader consideration of the issue and impact of domestic and family violence. Mental health is cited as the reason in 31% of court cases where the mother receives less than 30% of time and where the mother receives no time. This is compared to 2% of cases where the father receives no time.[24] Given the high incidence of domestic violence and the impact this has on women's health,[25] it seems likely that cases involving women's mental health issues may also involve serious issues of violence and abuse. Further investigation and analysis is required to explore the experience of mental health issues by women proceeding through the family law system.

29. WLSA believes there is also a strong connection between these cases and the ones described by commentators as 'intractable disputes' or 'high conflict'. Many of our clients spend years seeking to have violence and abuse taken into account by the family law system. Often these matters end up focussing on the 'difficult mother' often described as experiencing a mental illness. Issues of violence and abuse raised early in the life of these court matters are often ignored over the passage of time and mothers feel punished for their attempt to protect their children. Unsustainable orders for the father to have unsupervised time are a common outcome in these matters and, as the dispute continues, sometimes 'residence' is reversed with some women receiving orders for no 'time with'.

Interaction between family law, domestic violence and child protection systems

30. The Australian and NSW governments' recent reference to the Australian and New South Wales Law Reform Commissions to address this issue is a welcome and much-needed step. The poor integration between state and commonwealth agencies and jurisdictions has a significant and sometimes devastating impact on the experiences and outcomes of our clients, and can result in drastic failures to protect children from violence and abuse.[26]

31. If the mother acts as a 'protective parent' and leaves a violent relationship, child protection authorities withdraw and the matter is directed into the family law system for resolution. Without better integration, the courts have been left exposed to a role that requires them to act as tertiary responses to child abuse. The 2006 reforms have widened the gap between state and commonwealth jurisdictions. Greater consistency between these systems and the cultures and philosophies that underpin them is essential.

32. A failure of the family law system to take into account family violence and the impact on children can be seen in the strong emphasis on informal resolution of children's matters which has led to parenting agreements and consent orders that are unworkable and have exposed many WLSA clients and their children to family violence. Currently, matters where 'agreement' is reached are counted as a success of the family law system even if those agreements may have been reached under forms of duress due to family violence and an emphasis on informal resolution.

33. There must also be consistent consequences for perpetrators of child abuse and domestic violence across jurisdictions (particularly with regard to their contact with their children). The use of perpetrator programs is an important part of shifting responsibility for the violence from the victim to the perpetrator. Research supports the view that perpetrator programs are most effective when supported by an integrated response.[27] Consideration should be given to increasing the use of referral to and orders to attend men's programs as part of parenting arrangements and orders.

34. There is currently an absence of an underpinning (written) risk assessment framework to assist state and commonwealth agencies to identify domestic violence, and identify and hold accountable the perpetrator of violence. A framework would also assist agencies to ensure that appropriate referrals can be made and safety planning undertaken for women and their children when necessary.

Concerns about definitions of violence and abuse

35. The impact of emotional abuse on women and children is not given appropriate and sufficient weight in the family law system. One key factor in this is that the definition of 'family violence' in the Family Law Act is too narrow. Better recognition is needed about the dynamics of domestic violence and a relationship characterised by domestic violence. 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. In cases where there is violence or abuse there is an element of fear or fear of harm and a power imbalance that is not present in other cases. WLSA submits that the 'objective' test introduced in the 2006 reforms should be removed.

36. Another concern is the extent to which domestic and family violence is referred to as 'conflict' or 'entrenched conflict' in the family law system, including in the case law. It is important that domestic and family violence be clearly identified and named rather than deferring to the term 'conflict'. By way of just one example, in the case *Eddy & Weaver*[28] the father had been charged (although acquitted) with a rape and pleaded guilty to an assault from the same incident. It is of some concern that both the Judge and the family report writer refer to the 'conflict' in the relationship.

37. In our view, 'conflict' is a general term and 'domestic and 'family violence' are specific terms that refer to a particular pattern of behaviour and the dynamics of power and control. To better meet the safety needs of women and children in the family law system, the existence of Family Violence and the risk of Family Violence must be

identified, named and taken into account in determining parenting arrangements for children.

Identification of family violence and child abuse in the court system

38. There is an inconsistent approach by the courts to identifying when family violence and/or child abuse are an issue, and this can threaten the objective of protecting children from violence and abuse. In WLSA's experience, the fast, efficient, inexpensive philosophy currently influential in the FMC has, at least in part, contributed to a lack of identification of abuse and violence and the impact of abuse and violence on a party and the capacity to effectively engage in the court process.

39. With regards to the planned amalgamation of the family courts, WLSA submits that it is critical the court have very clear guidelines and operate consistently in determining how and when matters are allocated between the divisions as complex (or not complex) matters. The new family court will need to implement systems at the initial stages of application to identify, thoroughly assess and comprehensively explore issues of family violence and child abuse. The role (and number) of family consultants should also be expanded to allow for assessment of all children matters where there have been allegations of family violence and child abuse to inform case management.

40. This approach will require the development of clear guidelines about how to comprehensively assess for risk where family violence and child abuse is a factor. The guidelines will need to fit within a 'whole of system' approach and include competency standards and risk assessment processes for all family consultants, family report writers and independent children's lawyers with regards to family violence. Other changes should include continuing training for judicial officers in current issues in family violence and child abuse and potentially accreditation for family consultants and family report writers.

41. There is a lack of consistency in the approach of family report writers and how they are briefed to prepared the report. Consistency is needed in identifying what they should consider, investigate and report on and the documentation they are furnished with for this purpose. This could be achieved through clear guidelines.

(c) in the case of separation, to provide information, advice and dispute resolution services to help parents agree on what is best for their children rather than contesting parenting proposals in the courtroom (WLSN)

Availability of appropriate mediation, support and referral services

42. The introduction of Family Relationship Centres and funding of other family dispute resolution providers by the Federal Government, following the enactment of the 2006 Act, has enabled many families to access more easily family mediation, support and referral services.

43. However, there are still significant gaps in geographical coverage and the Family Relationship Centres and other providers are not practically accessible to many parents in rural and remote areas. Family Relationship Centres need to undertake further work and direct resources to engage effectively and in a culturally appropriate way with Indigenous communities and culturally and linguistically diverse communities. There are also

discrepancies in how clients with intellectual disabilities are engaged in the mediation process. Some clients with intellectual disabilities are required to mediate without support, with no assessment being undertaken about their capacity to mediate. Specialist services and staff need to be resourced by government to develop appropriate dispute resolution services for Indigenous communities, culturally and linguistically diverse communities and clients with intellectual disabilities.

Inconsistencies across family dispute resolution services

44. Our clients' experiences across Australia indicate that there are considerable variations and inconsistencies in the approaches taken by individual Family Relationship Centres and other family dispute resolution providers in their policies and procedures, desired outcomes of the dispute resolution providers and how they are to be achieved. There appear to be significant discrepancies in approaches to family violence during the intake and assessment, the conduct of mediations where there is family violence and the outcomes for victims of family violence and their children as a result.

45. Recent research by University of Melbourne academics has found there were many different models of dispute resolution being used in the sector, including many variations in approaches to 'impartiality' by dispute resolution practitioners.[29] In presenting this research, Professor Helen Rhoades stated:

> practitioners at some services saw this obligation as preventing them from exerting any influence on the outcome of the negotiations – espousing the notion of self-determination – while others regarded themselves as having an obligation to veto arrangements in certain circumstances., for example, if they believed the arrangements were not safe.[30]

46. We acknowledge that some Family Relationship Centres do appear to have good screening tools and are issuing these certificates in cases of family violence. However, while Family Relationship Centres must develop and implement screening and risk assessment standards for family violence and the risk of such violence to the parties and children, compulsory standards have not been developed or mandated.

47. Professor Rhoades also refers to the significant disparities in the level of trust placed on the type of screening and risk assessment tools used at Family Relationship Centres and family dispute resolution providers, including the experience and skill of staff at Family Relationship Centres in developing and implementing such tools. She refers to:

> concern among practitioners from both [dispute resolution professionals and legal] professions about … the 'juniorisation' problem associated with dispute resolution staff at the new Family Relationship Centres. As one experienced dispute resolution practitioner described … some of the new recruits have little experience and understanding of the dynamics and needs of women and children affected by family violence[31]

It is noted that Rhoades' research also indicates that some lawyers too do not identify family violence adequately or understand the dynamics of family violence.

48. To address these concerns, compulsory standards should be developed and implemented for Family Relationship Centres and all family dispute resolution providers that include minimum standards on:

- a set of questions to be used in screening and risk assessment;

- a requirement to notify parties that there is no obligation to reach an agreement, including that parenting plans are not enforceable;
- how family dispute resolution practitioners assess for genuine effort by the parties.

Resources should also be allocated to support Family Relationship Centres and family dispute resolution providers to implement compulsory standards.

49. The government should also undertake an audit and review of evaluation and data collection tools used by Family Relationship Centres and other family dispute resolution providers to assess the impact of mediation processes and agreements on women who victims of family violence and their children, Indigenous clients and clients from culturally and linguistically diverse backgrounds.

Effect of 'compulsory mediation' on women's safety

50. Many of our clients also come to us thinking that mediation is compulsory in all circumstances, including where family violence is present. Family Relationship Centres have also indicated to us that they are receiving referrals for mediation from private lawyers in cases where family violence is present. This misunderstanding about the law can affect women's decisions on whether to separate, the steps they take after separation and the ways in which they negotiate with their former partners in ways that can greatly risk their safety.

51. In cases where women do choose to mediate, it is essential that they are able to make an informed choice to do so and that an appropriate model of mediation is available to them. The commitment of the government to fund pilots for community legal centres to partner with Family Relationship Centres to provide legal assistance in mediation is a welcome initiative, as is the funding of a development of a mediation model in cases involved family violence. Ongoing, adequate resourcing of such intiatives is necessary to ensure that appropriate models of mediation are available.

(d) to have a new entry point that provides a doorway to other services that families need and facilitates access to these services

52. WLSA believe that the reforms have created a useful entry point into the family law system. Family Relationship Centres provide a good start for families who are reluctant to go through litigation and where mediation is appropriate. Where matters are not particularly complex, they provide a visible alternative that has helped a lot of families.

53. If you would like to discuss any aspect of this submission, please contact me on (02) 9749 7700 or Edwina_MacDonald@clc.net.au.

Yours sincerely,

Edwina MacDonald
Law Reform Coordinator

[1] Humphreys, C (2007), *Domestic Violence and Child Protection: Challenging Directions for Practice*, Issues Paper 13, Australian Domestic and Family Violence Clearinghouse, 7.

[2] McIntosh, J and Long, C (2007), *The Child Responsive Program Operating with the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes,* Report to the Family Court of Australia.

[3] McIntosh, J and Chisholm, R (2007), 'Shared Care and Children's Best Interests in Conflicted Separation: A Cautionary Tale form Current Research' (2007) *Australian Family Lawyer*, vol 20(1), 1.

[4] Rhoades, H (2009), *The case for more family law reform-shared care, parental conflict and violence* presented at the Women's Safety and the Law Forum, convened by WLSA and Women's Legal Service Victoria, 18 and 19 March 2009, Melbourne; see also Rhoades, H, Astor, A, Sanson, A and O'Connor, M (2008), *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report*, University of Melbourne, 1-2, accessed 20 August 2009 at <http://www/law.unimelb.edu.au/files/Inter-ProfessionalRelationshipsStudyFinalreport.pdf>.

[5] Family Court of Australia (2009), *Shared Parenting Responsibility*, 2 March, accessed 20 August 2009 at <http://www.familycourt.gov.au/wps/wcm/resources/file/eb6b6e03325f52f/SPR_org_02_03_09.pdf>.

6 See for example: Overington C (2009), '"Flaws" in John Howard's parenting law', *The Australian*, 3 June, accessed 20 August at <http://www.theaustralian.news.com.au/story/0,25197,25579454-601,00.html> and See for Rathus, Z (2009) 'How Judicial Officers are Applying New Part VII of the Family Law Act: A Guide to Application and Interpretation', *Australia Family Lawyer*, vol 20(2), 1, and Howard, G (2009), 'Shared parenting at work – the reality', *Australian Family Lawyer*, 20(3), 37.

7 In particular, *Family Law Act 1975* (Cth) s 60B(1) Objects of Part VII, s 60CC(2) Primary Considerations for determining what is in the Best Interests of the Child and s 60CC(3)(c) 'the friendly parent provision'. This last provision requires a court to consider in determining the best interests of the child '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'. Parents who are concerned about violence or abuse and seek to protect their children will, by definition, be the very parents who are likely to be reluctant to facilitate a relationship with the other parent. 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 rather than an unwillingness to facilitate close relationships with the other parent.

[8] In particular, s 60B(2), s 61DA, s65DAA and the sections that discourage the disclosure of violence and abuse (see particularly s117AB and s60CC(3)(c)).

[9] See the WLSA (then NNWLS) submission to the Standing Committee on Legal & Constitutional Affairs Inquiry Into Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, 2-3. This extract has been attached for your information at **Attachment 1**.

[10] Rhoades, H (2000), 'Posing as Reform: The Case of the Family Law Reform Act'*, Australian Journal of Family Law* vol 14, 142 at 147 cited in Osbaldeston T (2008), *In The Best Interests Of The Child? Judicial Officers Apply the Family Law Amendment (Shared Parental Responsibility) Act 2006* (Research paper), 18.

[11] Smyth B (2008), 'When what we know is based on 201 families: A five year retrospective of post separation shared care research in Australia'*,* paper presented at the *Essentials of Family Law*, 16-18 October, 9.

[12] See Osbaldeston T, above n 10, 8.

[13]Ibid, 7 citing Smyth, B & Moloney, M (2008), *'*Changes in patterns of post-separation parenting over time' *Journal of Family Studies*, vol 14, 4, 10, 18

[14]Ibid, 3-4 citing Smyth & Moloney, ibid, 5.

[15] Edleson, JL (2001), 'Studying the co-occurrence of child maltreatment and domestic violence in families', in *Domestic Violence in the Lives of Children: The Future of Research, Intervention, and Social Policy*, eds SA Graham-Bermann & JL Edleson, American Psychological Association, Washington, DC cited in Laing, L (2003), *Domestic Violence in the Context of Child Abuse and Neglect* Australian Domestic and Family Violence Clearing House Topic Paper no 9, 1.

[16] Edelson JL (1996), 'The overlap between child maltreatment and woman battering', *Violence Against Women*, vol 5(2), 134 cited in Laing (2000) *Children, Young People and Domestic Violence*, Australian Domestic and Family Violence Clearing House Issues Paper no 2, 16; New South Wales Child Death Review Team (2002), *2001-2002 Annual Report*, NSW Commission for Children and Young People, Sydney quoted in Humphreys, C (2006), *Domestic Violence and Child Protection: Challenging Directions for Practice*, Issues Paper 13, Australian Domestic and Family Violence Clearinghouse, 7.

[17] *Magistrates' Court (Family Violence) Act 2004* (Cth) provides that hearing or witnessing domestic violence (and a likelihood to hear or witness it again) is a ground for the making of an order to protect a child. See also police policy in some Australian states to mandatorily notify to child protection agencies.

[18] Australian Bureau of Statistics (2006), *Personal Safety Survey*, ABS Catalogue No 4906.0, 6. Similarly, a 2001 Australian Institute of Criminology paper reported that up to one quarter of young people aged between 12 and 20 had witnessed violence against their mother or stepmother: Indermaur, D (2001) *Young Australians and Domestic Violence*, Australian Institute of Criminology, Trends and Issues No 195,

[19] For a good summary of the literature see Queensland Government (2006), *Practice paper: Domestic and family violence and its relationship to child protection*, 27-30, accessed 20 August 2009 at <www.childsafety.qld.gov.au/practice-manual/documents/prac-paper-domestic-violence.pdf>. See also ibid: 41% women reporting domestic violence reported violence during pregnancy.

[20]Moloney, L et al (2007), *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A pre reform explanatory study*, Research Report No 5, AIFS, Canberra.

[21] See Howard, above n 6.

[22] Moloney et al, above n 20.

[23] Bryant, D (2009), 'Family violence, mental health and risk assessment in the family law system', Public Lecture Series, Queen University of Technology, 21 April, 20.

[24] Family Court of Australia, above n 5.

[25] Intimate partner violence contributes to 9% of the total disease burden of Victorian women aged 15-44 with 60% of this burden attributable to mental ill health: VicHealth (2004), *The health costs of violence: Measuring the burden of disease caused by intimate partner violence: A summary of findings*. Women previously or currently abused are 4-5 times more likely to report depression than women free of violence: Lee, C (ed) (2001), *Women's Health Australia: What do we know? What do we need to know? Progress on the Australian Longitudinal Study of Women's Health 1995-2000*.

[26] See Humphreys, above n 1, especially p 7.

[27] Gondolf, EW (2002), *Batterer Intervention Systems: Issues, Outcomes, and Recommendations*, Sage, Thousand Oaks.

[28] *Eddy & Weaver* [2009] FMCAfam 188 (19 March 2009). See particularly paragraphs 4, 122, 123.

[29] Rhoades, above n 4; see also Rhoades, Astor, Sanson and O'Connor, above n 4.

[30] Ibid.

[31] Ibid.

Attachment 1

Extract – NNWLS Submission To The Standing Committee on Legal & Constitutional Affairs Inquiry Into Exposure Draft of the F*amily Law Amendment (Shared Parental Responsibility) Bill* 2005

Family violence and child abuse cases

The NNWLS' 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]

The NNWLS 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 Exposure Draft to address the issues surrounding violence and abuse. However, as noted in relation to the amendments made in 1996 by the *Family Law Reform Act* 1995, changes to the legislation can have unforeseen consequences if not carefully drafted. Changes that can appear to be relatively minor can be interpreted by the courts in a way that has a significant and unintended impact on the operation of family law. The NNWLS is concerned that a number of the provisions of the Exposure Draft which seem to be intended to implement paragraphs b) and c) of the Government's measures listed on page 2 above will conflict with each other, at the expense of paragraph c) – that is that the provisions intended to promote the benefit

to the child of both parents having a meaningful role in their lives 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 and prescriptive 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. We advocated in our Comments on the Government's Discussion Paper, *A New Approach To the Family Law System* for the introduction of the New Zealand *Guardianship Act* model (see Appendix).

The NNWLS 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 (paragraph a) of the Government's measures on page 2 above) may further undermine the protection of children from family violence and abuse. We therefore question whether the Exposure Draft encourages and assists parents to reach agreement on parenting arrangements outside court where *appropriate*. Finally, whilst the provisions directed towards a less adversarial court system *may* make the court process easier to navigate and less traumatic we believe that other provisions in the Exposure Draft actively undermine these aims in the case of family violence and child abuse cases.

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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 2) at page 6.

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

[4] Rhoades, Graycar and Harrison (note 2) 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.