19 October 2009

Professor Richard Chisholm
The Family Courts Violence Review
c/- Family Law Branch
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: familycourts.violencereview@ag.gov.au

Dear Professor Chisholm,

Family Courts Violence Review

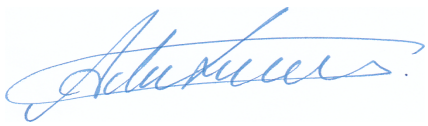
Thank you for inviting Women's Legal Services Australia (WLSA) to make a submission to your review of federal law court practice and procedure in the context of family violence.

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, Aboriginal and Torres Strait Islander women, women with disabilities and rural women are not further disadvantaged by the process.

In addition to comments on practice and procedure, we have also included comments on our broader concerns about the way in which family violence is dealt with in the family law system. While we understand this may be outside the scope of your inquiry, it provides important context in considering practice and procedure issues.

If you would like to discuss any aspect of this submission, please contact Edwina MacDonald on (02) 9749 7700 or Edwina_MacDonald@clc.net.au or Zita Ngor on (08) 8641 3366 or Zita_Ngor@clc.net.au.

Yours sincerely,



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Women's Legal Services Australia

Submission to Family Courts Violence Review

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1) Responses to domestic violence and child abuse should form part of the core business for the family law system and courts.

2) 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.

3) References to specific parenting arrangements, such as equal time, should not be included in the legislation, as this should be determined by what is in the best interests of the child.

4) Greater legislative direction should be provided on domestic violence and its effects on children.

5) The definition of 'family violence' should be broadened to reflect better the nature and dynamics of domestic violence, including by removing the reasonableness test.

6) The false allegations provision should be removed.

7) Consideration should be given to ensuring the 'friendly parent' provision does not have the effect of silencing victims or penalising mothers for acting protectively.

8) The limitations on considering non-contested interim AVOs in determining the best interests of the child should be removed.

9) Resource allocation to courts, legal aid and community legal services and support services should be increased.

10) A gendered analysis of legal aid policy and funding allocation should be undertaken to ensure that women are not disadvantaged in their access to justice.

11) An exemption to the merit test should be available for cases involving allegations of domestic violence and/or child abuse.

12) Adequately resource the courts to ensure that minimal delay precedes and follows an interim hearing.

13) Further investigation and analysis should be undertaken to track matters and explore the experience of mental health issues by women proceeding through the family law system.

14) Cases involving allegations of family violence, mental health issues and intractable disputes should be dealt with as complex matters.

15) Clear guidelines for judicial officers, court registry staff and legal practitioners should be implemented on where to commence matters and when to refer them to a higher division.

16) Systems should be implemented at the initial application stage to identify and assess issues of family violence and child abuse, including a whole of system risk assessment framework.

17) Guidelines for family report writers should be developed on issues to be considered, investigated and reported.

18) Court support schemes should be funded to assist victims of violence through the family court process.

19) The increasing poverty of women should be monitored, evaluated and addressed, particularly the effect of the interaction between shared care and child support and property matters.

20) Legislation should be amended to facilitate the admissibility and consideration of social science research.

21) Address community misunderstandings of the family law system through education and legislative reform.

Prevalence and nature of domestic violence in family law matters involving children

1. Over 50 per cent of parenting matters in the family law courts involving serious allegations of family violence and/or child abuse.[1] This corresponds with our advice and casework experience. In approximately 40 to 50 per cent of family law matters involving children, our clients indicate that they are experiencing domestic.

2. Anecdotally family relationship centres report the existence of domestic violence in 60 per cent of matters, although one Queensland family relationship centre has suggested its statistics are much higher – closer to 80 per cent. Research estimates that the overlap between woman abuse and child physical or sexual abuse is 30-60 per cent.[2] Domestic violence continues after separation and after separation children can move from the periphery to the centre of the conflict.[3] High number of cases where children are killed have a background of domestic violence.[4]

3. It is clear that 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.

4. The violence involved in our clients' matters is broad ranging and can include physical, emotional and financial violence. However, in our experience, the impact of emotional abuse on women and children is not given appropriate and sufficient weight in the family law system. Problems relating to disclosure and shame around family violence are not limited to the family court system; they exist more broadly in society. It is important the family court system counters these broader societal issues, rather than contribute to them.

Recommendations:

1) Responses to domestic violence and child abuse should form part of the core business for the family law system and courts.

Legislative barriers that silence victims of family violence

Conflicting objectives in the Family Law Act

5. The core objective of the Family Law Act – to encourage greater involvement by both parents in their children's lives after separation, and also protect children from

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[1] 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.

[2] Edelson (2001) quoted in Laing L, *Domestic Violence in the Context of Child Abuse and Neglect* (2003) Australian Domestic and Family Violence Clearing House Topic Paper no 9

[3] McMahon and pence (1995) and Peled (1997) cited in Laing L, *Children, Young People and Domestic Violence* (2000) Australian Domestic and Family Violence Clearing House Issues Paper no 2

[4] Edelson (1999b) cited in Laing L, *Children, Young People and Domestic Violence* (2000) Australian Domestic and Family Violence Clearing House Issues Paper no 2, p 16; NSW Child Death Review Team (2001) cited in Laing (2003) See No.7, p1

violence and abuse – brings 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 (for example, lawyers and primary dispute resolution practitioners) and the judiciary find these conflicting concepts difficult to reconcile and apply. In our experience, these sections, read together with other sections in the legislation,[5] have resulted in the division of time taking precedence over considerations relating to risk of harm.

6. If any primary considerations are to be retained in s 60CC (2), protecting children from 'physical or psychological harm' should be the only primary consideration. This should also be listed as the first objective is s 60B(1) to highlight the importance of protecting children from all forms of harm, including domestic violence, and give it the primacy it currently lacks. The stated principles in s 60B(2) would also need to be amended to reflect the objects. Amending the Act in such a manner would go some way to ensuring that the family law system operates cohesively with the state child protection systems to ensure the safety and protection of children.

Recommendations:

2) 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.

Imbalance in legislative emphasis on shared parenting and domestic violence

7. The legislative emphasis on shared parenting is too strong and contributes to the to the silencing victims of violence. The specific reference to equal time should be removed. No particular parenting arrangement should be specifically referred to in the legislation as it results in undue consideration of this arrangement over and above consideration of other arrangements that may better meet the best interests of the child.

8. In the alternative, if specific references to shared parenting are to be retained, we strongly recommend that shared parenting arrangements or substantial time (that is, greater than 30 per cent) be mentioned as a possible consideration in the absence of domestic violence and if the court is satisfied in the circumstances of the case that it is appropriate.

9. In the event of legislative change, further consideration should also be given to incorporating what is 'reasonably practicable' into the best interests of the child factors. Any consideration of a shared parenting arrangement should include a consideration of whether the parties have a demonstrated history of cooperation in relation to parenting issue.

10. The importance of the primary care relationship is not adequately provided for in the factors relating to the best interests of children. In cases where children have been exposed to domestic violence, the impact of this violence and their additional vulnerabilities makes it essential that the importance of the primary carer in the circumstances is taken into account. The factors listed in s 60CC should be amended to better incorporate this consideration.

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[5] 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)).

11. While the Act provides substantial legislative directions on shared parenting and equal time, the same legislative direction is not provided on domestic violence and its effects on children. Guidance could be given on evidence of domestic violence and its effect on children. Principles could also be drawn from the Best Practice Principles and included in legislation. Consideration should be given to including factors in the legislation such as:

a) the right of children and women to live free from violence; and

b) the responsibility of parents to ensure that children are not subjected to physical and psychological welfare, including witnessing violence being perpetrated against another parent or significant person;

Guidance on the types of evidence admissible could include:

a) the history of the relationship including the violence involved;

b) the cumulative effect, including psychological effect, on the children who are or have been in an abusive relationship;

c) the general nature and dynamics of abusive relationships, including the cumulative effect on children as well as the possible consequences of separation from the abuser; and

d) social, cultural and economic factors that impact on people who are or have been in an abusive relationship.

Consideration could also be given to including a preamble or purpose statement in the legislation on safety. WLSA would welcome further consultation on both these matters.

12. The emphasis in the legislation on shared parenting has also contributed to the greater restrictions on relocation arising out of the 2006 changes to the family law system. These restrictions have had serious 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.

13. 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.

14. In addition, we note that the future focus in the legislation is problematic particularly where there is domestic violence as the best predictor of the future may be the past and identifying patterns of abuse are critical in properly taking into account the nature and extent of domestic violence and making appropriate parenting arrangements. Providing greater legislative direction on domestic violence and factors that should be considered and limiting the consideration of shared parenting in cases involving domestic violence may go some way to addressing this.

Recommendations:

3) References to specific parenting arrangements, such as equal time, should not be included in the legislation, as this should be determined by what is in the best interests of the child.

4) Greater legislative direction should be provided on domestic violence and its effects on children.

Legislative definitions

15. One key factor in this is that the definition of 'family violence' in the Family Law Act is too narrow. Consideration could be given to the definition of family violence incorporated into the *Family Violence Act 2008* (Vic).

16. 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.

17. 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*[6] 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. 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.

Recommendations:

5) The definition of 'family violence' should be broadened to reflect better the nature and dynamics of domestic violence, including by removing the reasonableness test.

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

False allegations

18. 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.[7] 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.[8]

Recommendations:

6) The false allegations provision should be removed.

'Friendly parent' provision

19. Section 60CC(3)(c) 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' and section 60CC(4) requires the court to consider the extent to which parents have fulfilled their responsibilities.

20. In our experience, these provisions can add to the silencing of victims of family violence. 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.

Recommendations:

7) Consideration should be given to ensuring the 'friendly parent' provision does not have the effect of silencing victims or penalising mothers for acting protectively.

Consideration of non-contested interim apprehended violence orders

21. Section 66CC(3)(k) excludes consideration of non-contested interim apprehended violence orders (AVOs). In WLSA's view, there is no good reason to exclude consideration of non-contested interim AVOs. Such evidence could be set out, along with other evidence in a family law matter, so that the judge can appropriately give weight to each factor when determining the best interests of the child. Excluding consideration of non-contested interim AVOs may lead perpetrators to consent to an interim AVO as a tactic to exclude consideration of the AVO in a family law matter.

22. In some registries there seems to be a reluctance by the court to give any weight at all to the existence of AVOs as they have been seen as a tactical move in family law

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[7] 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.

[8] 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.

proceedings. In combination with the affidavit evidence of the nature and extent of the violence, judges should also be encouraged to consider AVOs as good evidence of the existence of domestic violence. It is unacceptable that orders granted by a jurisdiction to protect the lives of people who have experienced violence not be taken into account in a jurisdiction that, on the balance of probabilities, is charged with the responsibility to determine what parenting arrangements are in the best interests of children.

Recommendations:

8) The limitations on considering non-contested interim AVOs in determining the best interests of the child should be removed.

Effect of legislation on advice given to clients

23. Clients often come to us having already received legal advice from private lawyers. In our experience, lawyers may not discuss issues of violence or not raise them in court proceedings. The following case study illustrates this problem.

Case study 1

Rebecca and Clinton were in a relationship for 7 ½ years. For 8 years after separation, their children lived with Rebecca and spent time with Clinton. A year after separation, Clinton started family court proceedings, which were difficult and prolonged. The interim orders provided that their children would reside with Rebecca and spend time with Clinton. After three years, final orders were made by consent for the children to live with Rebecca and have contact with Clinton.

Three years later, Clinton applied to court to have shared care of the children. A family report was written by a social worker who recommended shared share. Both parties were privately represented and consent orders were entered into six months later ordering that the children live with Clinton and spend time with Rebecca.

From an early stage in the relationship, Clinton was abusive and intimidating towards Rebecca. She frequently felt degraded and denigrated by abuse, infidelities and she reports that he would often push her, poke his finger at her and scream at her through gritted teeth. Since the beginnings of the relationship, Rebecca's self esteem has been eroded through constant criticisms and Clinton's abusive nature. Rebecca has a history of depression and anxiety and has successfully managed her mental health over many years through medication and counselling. Throughout the relationship and since separation Clinton's abusive behaviour has had a detrimental affect on her mental health.

When Clinton brought his application to have shared care of the children, Rebecca received initial legal advice. She was advised that changes to the law in this area *did not* provide grounds for him to apply to change parenting orders made before the new laws began. Following a number of hard hitting letters from Clinton's solicitor denigrating the Rebecca's abilities as a parent and outlining Clinton's 'rights', Rebecca started to experience increasing levels of anxiety and distress.

By the time the family report writer conducted her interviews Rebecca's condition had deteriorated substantially. The family report written was most unfavourable to Rebecca. It appears that her psychological well being at that moment in time contributed greatly to the report writer's negative view of her. Of great concern was the lack of written data sources the report writer had at hand. The only documents she used in the writing of her report

were Clinton's affidavit material. No affidavit had been completed by Rebecca's solicitors (even though the relevant material for one to be completed had been provided by Rebecca) and the report writer did not have in her possession the two previous family reports or the psychiatric evaluation done of Rebecca and Clinton.

The matter was ready for hearing, and Rebecca and Clinton attended court for a court date. Rebecca was very distressed on this day and became panic stricken, highly anxious and emotional. Rebecca and Clinton ended up negotiating outside of the court room. Following consistent advice from her solicitors that she would not be successful against the Father's claim for 50/50, Rebecca agreed to the orders for the children to live with Clinton at a time when she felt that she was in no fit state financially, emotionally or psychologically to proceed to a contested hearing. The impact of the unfavourable family report and the ongoing barrage of criticisms and denigration by Clinton of what a terrible mother she was left her feeling beaten by the system and believing she was in fact a bad mother. However, she did not think that the arrangements would be in the best interests of the children and believed that Clinton was using the litigation as a way of getting at her. She knew Clinton would continue with his controlling behaviour and the threat of further litigation by him would always be hanging over her and the children. Her state of mind was such when the negotiations began that she believed the only way to protect the children from being exposed to ongoing conflict was to hand the children over to Clinton.

Rebecca realised shortly after agreeing to hand the children over the detrimental effect that living with Clinton was having on them. Apparent marked adverse behavioural changes became apparent in the children. Specifically her daughter's distress, depression, eating habits and her running away from Clinton's home and back to Rebecca were of particular concern. A report from the children's counsellor was received detailing the children's despair at being at Clinton's and Rebecca, with the assistance of a women's legal service, obtained a grant of legal aid to try to get to the children back.

A mediated outcome was achieved whereby the children were to live with Rebecca and spend time with Clinton as was the arrangement prior to Clinton's application for shared care. During the time that lapsed between the grant of aid and the conference reports from psychologists and psychiatrists who had seen both the children and the parents were obtained. The reports detailed the children's emotional decline since being in Clinton's care as well as Clinton's bad treatment of their daughter. With the evidence at hand, legal aid used both the skills of a barrister and a social worker in the mediation. Rebecca was not pressured this time around about how the court would order 50/50 and instead the mediators were child focused and explained to Clinton the effect his behaviour and litigious nature was having on his kids. We greatly believe this contributed in achieving a safe outcome that was in the best interests of the children.

24. We also have clients come to us after they have received advice from private lawyers cautioning them against raising issues of violence because of the impact that may have on their case. Where clients have been advised not to raise issues of abuse and they consult us when the family law dispute is years underway, it is harder for us to advise them about how or whether to raise their concerns. Where they have been advised not to raise these issues, women who are genuinely fearful of their children's safety find it impossible not to ignore and suppress their concerns despite the risk of adverse consequences or of not being believed. This is one of the factors that can contribute to abused women appearing in family court proceedings to be overprotective, inconsistent, lacking in credibility or too focussed on the past.

25. The following case study illustrates this problem.

Case study 2

Sarah and Billy separated after nearly 20 years of marriage. They had two children, Josephine (15) and Daniel (10). Billy applied for parenting orders in the Federal Magistrates Court in late 2008, seeking orders that the children live with Sarah and spend time with him on alternate weekends and school holidays. Both parties engaged private solicitors.

Throughout the marriage Sarah alleged that Billy was emotionally abusive, intimidating, controlling and threatening to both her and the children. Sarah also held a belief that the Billy had sexually abused Josephine as she had made very concerning disclosures to her. Josephine said things to Sarah such as, 'I don't trust Daddy, and I don't want to sleep with Daddy'. On another occasion Josephine had bruising on her hip and when Sarah asked her how that had occurred Josephine told her that her dad had been pulling on her pants and 'said Daddy wanted me to do something I didn't want to do'. When Sarah asked her what that was Josephine would not tell her.

A Domestic Violence Order was obtained against Billy.

Billy brought his parenting application on the basis that Sarah was denying him contact with the children. Sarah had previously put forward a proposal that the children spend every second weekend with Billy, however no matter how much she tried to encourage a relationship between the children and their father, the children expressed such vehement views that they no longer wished to spend time with him. Daniel began suffering from a stress disorder which led to him collapsing on multiple occasions. He was admitted to hospital and began seeing a psychiatrist through the Child and Youth Mental Health Services. Josephine also began exhibiting signs of severe distress and began counselling. Daniel disclosed that Billy was involving him and his sister in the issues concerning the breakdown of the marriage, continually interrogating them about whom Sarah was spending her time with and applying immense pressure to them both to spend more time with him. Both children were also suffering greatly as a result of witnessing the years of terrible treatment that they and their mother had suffered at the hands of the Father.

Sarah's concerns about Billy's abuse of Josephine were silenced by her then acting solicitors and were not put forward in her affidavit. Her solicitors provided her with the letter attached to this submission cautioning her about the risks of raising allegations of domestic violence and abuse, and the likely outcomes.

A family report was completed which was particularly unfavourable to Sarah. She recalled the concerning comments from Josephine and incidences she had viewed. However, she was unable to definitively allege child abuse as she was fearful of the warning from her solicitor about raising the child's disclosures of sexual abuse. The report writer observed, 'in these interviews, the mother could not make up her mind as to whether she should make a point of accusation or avoid the question entirely. This is illustrated by her affidavit, where the claims are not mentioned at all, and in these interviews' where she presented her concerns with a mixed mind'.

In the interview Sarah detailed the history of domestic violence by Billy and both she and the children were consistent in explaining that Billy seemed to have two personas: the nice

one when other people were around and the dark/nasty one when they were alone with him. Sarah told the report writer, 'he seemed to get an enjoyment over making me feel scared', alleging that he would threaten to shoot her and 'spoke of killing me and burying me in the forest, I was quite petrified he was going to do that'. She also referred to an incident where Billy picked up a large knife from the block in the kitchen and started walking towards her with the knife level at her chest, only stopping half a step away. Both children viewed this incident and Sarah states she believed he was actually going to stab her. Billy denied committing any act of domestic violence during the marriage. Despite all the concerns raised the report writer concluded that Sarah was an over anxious woman and that the parents had a fairly conventional relationship, noting although 'there were divisions in the marriage – and a degree of conflict – these were not noticeably overt'.

At a return date for Billy's application negotiations took place outside the court. After many hours of negotiation it was agreed the children were to see Billy for five alternate Sundays supervised by the maternal grandparents and Billy's partner, thereafter alternate Sundays with only Billy's partner to be present. Daniel had the option as to whether to attend. Unsupervised time with Billy's partner has not occurred as the children have expressed such strong wishes to Sarah they do not want to be alone with him. They have said on many occasions that they are ok with seeing their father with other people present but his behaviour turns so quickly when they are alone. This is the biggest stress factor to the children, being threatened by their father that they will have to see him on their own overnights every second weekend. Whilst Daniel is at liberty to attend he will always attend contact if his sister is forced to go.

26. We note that in lengthy, complex, 'intractable' matters with little or no current objective evidence, we will caution our clients about how/when/where to raise issues of violence because of the risks posed by the system to our clients.

Lack of resources

27. The lack of resources – for court processes, support services and legal assistance – is a major contributor to the failure of the court system to adequately protect victims of violence. As set out below, the delay in court processes can risk women and children's safety.

28. Women who raise concerns about domestic violence also run the risk of not being able to access legal aid due not being able to meet the legal aid merit criteria. This is a reflection of the perception of legal practitioners that claims about violence that seek to minimise or restrict the nature of visitation with the other party, are not likely to succeed within the family court arena because of the friendly parent and shared parenting provisions. In this way Legal Aid offices can act as a gatekeeper to a decision being made by the courts on the issue. Conversely father's seeking time with or shared care of their children will find it easier to satisfy the merit test, and have access to legal representation, for the same reason.

29. The application and effect of merit tests on access to justice should be reviewed. In our view, in determining eligibility for legal aid, better consideration needs to be given to the capacity of the party to self represent. This is because of the impact of violence on women's self esteem as well as the other impediments to self-representing against a violent partner in an adversarial system.

30. Another example of the increasing difficulty in accessing legal aid is that legal aid policies require that applications for variations be 'imperative'. This creates problems for our clients who may have children who do not want to spend time with the other parent. Often the children have very good reasons for not wanting to spend time with the other parent but because of the legal hurdles required to justify no-contact orders when making applications to the courts, they are forced to spend time with the other parent. We hear of many examples where children, despite attempts by their mothers to encourage positive relationships, are dragged kicking and screaming by the mother to see the father. In these circumstances, because of the likely consequences it they do not, women feel that they have no choice but to take their children to handovers. These kinds of experiences re-victimise women and children and cause further psychological trauma to both the children and women. In many cases there is little prospect of a successful application for variation without access to legal representation and legislative change, In these circumstances, women's legal services also feel that they have no choice but to advise women to take their children to handovers in circumstances that do not appear to be in the best interests of the child, that place the woman and the child at risk.

31. Further, the allocation of legal aid funds disadvantage women in their access to justice. Women receive significantly less legal aid than men. In the 2007-2008 financial year, women received between 27 and 41 per cent of legal aid grants across Australia. [9] The lower levels of legal aid granted to women can be attributed to the higher level of legal aid funding provided to criminal law matters where men make up the vast majority of recipients and current limitation which mean that State funding (for criminal law) cannot be used to provide assistance in Commonwealth matters (family law). Over the same period, between 50 and 77 per cent of legal aid was granted for criminal matters compared to 18 to 34 per cent for family law matters.[10] Too often women who satisfy the merits test may be refused a grant of aid because the Commonwealth budget has been expended for that month. There is some discussion at a Commonwealth level about removing the

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[9] NSW: 27.8% of legal aid case and inhouse duty clients were women: Legal Aid NSW (2008) *Annual Report 2007-2008*, p 26. Vic: women received 36% of legal aid grants: Legal Aid NSW (2008) *Annual Report 2007-2008*, p 26. SA: women received 27% of legal aid grants: calculated from figures provided in Legal Services Commission of South Australia (2008) *Annual Report 2007-2008*, p 21. WA: women received 31% of legal aid grants: calculated from figures provided in Legal Aid WA (2008) *Annual Report 2007/2008*, p 16. ACT: women received 41% of legal aid grants (based on approved applications): Legal Aid ACT (2008) *Annual Report 2007-2008*, p 27. The annual reports for Queensland, Northern Territory and Tasmania legal aids do not provide a gender breakdown of legal aid grants made, applications approved or legal aid services provided across all matter types. Queensland provides statistics on the gender breakdown for civil and family law matters only: Legal Aid Queensland, *Annual Report 2007-2008*.

[10] NSW: 50.3% of Legal Aid NSW's overall budget was spent on criminal law services and 31.6% was spend on family law services: Legal Aid NSW (2008) *Annual Report 2007-2008*, pp 18 and 20. Vic: over 60% of all grants of legal assistance were for criminal law matters: Victoria Legal Aid (2008) *Annual Report 2007-2008*, p 17. Qld: 62% of applications approved were for criminal matters and 26% for family matters: Legal Aid Queensland (2008) *Annual Report 2007-2009*, table 11. SA: 77% of legal aid granted was for crime matters and 18% for family matters: Calculated from figures provided in Legal Services Commission of South Australia (2008) *Annual Report 2007-2008*, p 21. WA: 63% of applications granted were for crime matters and 34% for family matters: Calculated from figures provided in Legal Aid WA (2008) *Annual Report 2007/2008*, p 2. Tas: 74% of applications approved inhouse or assigned were for crime matters and 25% for family matters in 2006-2007: Legal Aid Tasmania, *Annual Report 2006-2007*. ACT: 54.14% of applications approved were for criminal matters and 31.45% for family matters: Legal Aid ACT (2008) *Annual Report 2007-2008*, p 26. NT: 70% of applications approved were for criminal matters and 23% for family matters: Calculated from figures provided in Northern Territory Legal Aid Commission, *Annual Report 2007-2008*, p 26.

Commonwealth and State restrictions on allocation of funding. WLSA would support a removal of these restrictions so that any available grants funding could be used in an appropriate family law matter.

32. Women's legal services and community legal centres are often the last resort for women who have experienced violence and are unable to meet the criteria for legal aid or afford private solicitors. Unfortunately due to the limited funding that we receive, we are unable to effectively meet the demands that are placed on our time and resources. Many women who access our services must self-represent. This is particularly unsatisfactory in cases involving violence because of the impact of violence on women's capacity to self-represent. Without legal assistance, some women also agree to orders that do not protect them or their children because there is nowhere else for them to obtain assistance. More assistance is needed for women who have experienced violence and increased funding is required for community legal centres to provide services to the nation's most disadvantaged communities.

Recommendations:

9) Resource allocation to courts, legal aid and community legal services and support services should be increased.

10) A gendered analysis of legal aid policy and funding allocation should be undertaken to ensure that women are not disadvantaged in their access to justice.

11) An exemption to the merit test should be available for cases involving allegations of domestic violence and/or child abuse.

Interim hearings

33. In our experience, decisions made at interim hearings tend prioritise contact with both parents over the safety of the child and mother. The lack of court time and resources allocated to interim hearings means that family violence issues cannot be assessed comprehensively.

34. Our greatest concern with interim hearing decision relates to delay – both before and after hearings. There can be considerable delays before an interim hearing is heard, and interim orders are often in place for considerable lengths of time due to court workloads. As such, these orders are 'interim' in name only. As the interim orders are in place for extended periods of time, the failure to consider fully family violence issues at interim hearings can leave women and children in considerable danger.

35. The delays may also contribute to the orders made, as a decision-maker may be reluctant to make no-contact orders because the lengthy delays will mean that the interim orders have a significant impact on the final orders. If delays were reduced, a no-contact or limited contact order would prejudice the final orders less, and interim decision-makers might be more willing to err on the side of safety.

Recommendations:

12) Adequately resource the courts to ensure that minimal delay precedes and follows an interim hearing.

The connection between 'mental health' issues and domestic violence

36. 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 per cent of court cases where the mother receives less than 30 per cent of time and where the mother receives no time. This is compared to 2 per cent of cases where the father receives no time.[11] Given the high incidence of domestic violence and the impact this has on women's health,[12] it seems likely that cases involving women's mental health issues may also involve serious issues of violence and abuse. The mental health of women in these circumstances is clearly exacerbated by lengthy court and legal processes and by a system in which it is difficult for them to be believed. Further investigation and analysis is required to track matters and explore the experience of mental health issues by women proceeding through the family law system.

37. 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'. The following case study highlights some of the difficulties faced by women who have mental health issues, including the re-victimisation suffered by women who have lived with domestic violence and have mental health issues.

Case Study 3

Michelle had been in a six-year relationship with Phillip. They have one child, Clare, from the relationship. The relationship between Michelle and Phillip had been characterised by violence. Michelle was subjected to physical, emotional and mental abuse by Phillip. The violence and abuse was aggravated by Phillip's binge drinking. Sometimes Phillip would be violent or denigrate Michelle whilst Clare was in the room.

In the fourth year of their relationship Michelle was diagnosed with schizophrenia and placed on medication. Her treating physician believed that the abuse she suffered had been a major contributor to Michelle developing a mental illness.

During the court proceedings, Michelle's mental health issue became the main issue of contention, due to the fact that Michelle had been hospitalised once during the course of the

[11] 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>.

[12] 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*.

relationship. Her mental health issue is used by Phillip to argue successfully that she was not able to adequately care for the child. The argument was successful despite the fact that Michelle had been the primary carer throughout the relationship and even after being diagnosed with a mental health issue. Phillip's history of alcohol use and violence towards Michelle was minimised.

During interim proceedings Clare was placed in the care of Phillip. Michelle was ordered to undertake a psychiatric assessment and provide a detailed a treatment plan from her treating GP.

Michelle made a number of complaints about the unsuitability of Clare's living arrangement with Phillip. Phillip had a one bedroom flat and Clare had to share the bedroom with him when he had his older children from a previous relationship sleeping over. The children from a previous relationship would sleep in the lounge room. Also Phillip would make it difficult for Michelle to spend time with Clare. He would cancel the visit if Michelle was running even five minutes late. This happened several times. On one occasion when Michelle had notified Phillip that she was running late returning Clare because they were at a birthday party waiting for the cake to be blown out before leaving, he had the police turn up. This incident made both Clare and Michelle really upset. Clare's concern's were largely ignored by the judicial officers and even by her own lawyer who felt that because of her mental health she should be satisfied with just being able to spend time with her daughter and should not voice her concerns too loudly in case she is viewed more negatively.

Final orders were made for Clare to continue to live with Phillip. The fact that Clare had been living with Phillip during the course of the proceedings was a major factor in making the final orders. No acknowledgement was made by the Court of Phillips' violence contributing to Michelle's mental health issue and Michelle was re-victimised by the Court's treatment and categorisation of her, as a 'bad' mother due to her mental health.

Recommendations:

13) Further investigation and analysis should be undertaken to track matters and explore the experience of mental health issues by women proceeding through the family law system.

Inconsistencies across court registries

1.

38. In our experience, there are a number of inconsistencies in the family court process across court registries. For example, there are inconsistent approach to identifying when family violence and child abuse are issues, inconsistent approaches in FMC registries to managing court lists, inconsistent use of family consultants, family reports and the appointments of independent children lawyers, and inappropriate referral and re-referral of cases involving allegations of serious family violence to family dispute resolution. 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, it is critical the court has very clear guidelines and operate consistently in determining how and when matters are allocated between the divisions as complex (or not complex) matters. Guidelines are needed for judicial officers on what should be referred to different divisions, but also for court registry staff and legal practitioners on where matters should be commenced. Matters should be considered as complex where they include allegations of family violence or child abuse, mental health issues, appointment of independent children's lawyers and family consultants, and intractable disputes.

40. The new family court will need to implement systems at the initial stages of application to identify 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. Early identification and thorough risk assessment of family violence and child abuse will contribute to ensuring that the matter proceeds through the most appropriate court division and ensuring less adversarial and earlier resolution of issues. A focus on speed along militates against the outcome.

41. Clear guidelines about how to comprehensively assess for risk where family violence and child abuse is a factor will need to be developed. The guidelines will need to include competency standards and processes with regards to family violence for all family consultants, family report writers, independent children's lawyers, other solicitors, Legal Aid and all other players in the family law system that parties and their children may come into contact with. The guidelines would need to fit within a whole of system approach. In addition to the legislative and procedural changes in the courts required to improve responses to domestic violence and a risk of harm, there is a need for an underpinning (and written) risk assessment framework to assist all State and Commonwealth agencies that play a role in the family law system to identify domestic violence. Risk identification would assist agencies to ensure that appropriate referrals can be made and safety planning undertaken for women and their children when necessary. The overarching risk assessment framework and the importance of preserving safety must be imbedded in all Government policy underpinning the family law system. See further discussion under 'Risk assessment' below.

42. Other changes should include continuing training for judicial officers in current issues in family violence and child abuse and potentially accreditation and requirements around compulsory professional development for family consultants and family report writers. The training should not be a one off training package but a continuing professional development training that is held on a regular and consistent basis.

Recommendations:

14) Cases involving allegations of family violence, mental health issues and intractable disputes should be dealt with as complex matters.

15) Clear guidelines for judicial officers, court registry staff and legal practitioners should be implemented on where to commence matters and when to refer them to a higher division.

Risk assessment

43. Risk identification undertaken by all players in the family law system (as part of the overarching framework and policy) would need to be supported by a more comprehensive

risk assessment.

Risk assessment in an integrated system

44. In a more integrated system, the role of risk assessment should be undertaken by the agencies holding the expertise in relation to issues of violence. These services have workers whose role is to work directly with women who are victims of violence. Assessment of safety is their core business and this role is not blurred, as it may be in other agencies, by a focus on legal proceeding/determining disputes (courts), dispute resolution and 'compromise' (family relationship centres and dispute resolution practitioners), advising their client (lawyers). In the case where a man (and/or father) is the victim of violence there would need to be an appropriate men's service to undertake this role.

45. The risk assessment undertaken by a specialist service would need to be made available at least to the family dispute resolution practitioner and court (where the matter preceded this) for the purpose of informing appropriate processes. Risk assessment is a continuous process and risk may change over time. The system must allow for this. Consideration should also be given to how information from a risk assessment could become part of the legal process (without the need for it to be subpoenaed). Changes to the legislation would need to be considered. Information contained in a risk assessment in the hands of a perpetrator may place a victim of violence in serious danger. Any legislative or systems changes must ensure the victim would not be placed at risk in this way.

Risk assessment in the current family law system

46. Until the family law system is more integrated across the country, consideration should be given to improving collaboration between lawyers, domestic violence service providers, the courts and family dispute resolution practitioners to ensure that better use can be made of the skills of domestic violence workers in relation to the assessment of risk, and that these skills inform the role and systems of risk identification and responses to violence amongst all players in the family law system. Skilled domestic violence workers are also well placed to provide expert domestic violence reports to the court.

47. Research undertaken on the collaboration between lawyers and family dispute resolution practitioners speaks to the benefits of improved collaboration.[13] Incidentally the research indicates that, amongst those practitioners surveyed, lawyers identified the existence of violence at much lower rates than family dispute resolution practitioners. Given the role that lawyers play in assisting their client to 'identify the issues', it is critical that lawyers take a full history of the relationship, including the violence and abuse, to identify patterns and risk. Lawyers would benefit from collaborating with domestic violence workers to assist them in this work.

Recommendations:

16) Systems should be implemented at the initial application stage to identify and assess issues of family violence and child abuse, including a whole of system risk assessment framework.

[13] H Rhoades, H Astor et al, Enhancing Interprofessional Relationships in a Changing Family Law System. Final Report May 2008, Melbourne University.

Family report writers

48. There is also a lack of consistency in the approach of family report writers, including the nature and scope of recommendations they make, and how they are briefed to prepare 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. Consideration of current and reputable social science research should form part of their report analysis and be appropriately referenced.

49. Some report writers will undertake their assessment with regard to available court and other documentation, as well as by spending adequate time with the parties involved. For example, behavioural scientist George Klein has discussed preparing specialist reports on substance mis-use in family court matters in which he relies on the stability of presentation of a person over time, that is over a number of interviews over 4-6 weeks.[14] However, some report writers will undertake assessments based on one interview, and often an inadequate interview, only. While we respect the professional capacity of report writers to determine what level of assessment is required, we are concerned that inadequate assessment may occur and that this can have a serious effect on the outcomes, particularly for the safety of the parties and the children.

50. Consistency could be improved through the use of best practice guidelines. Better family reporting processes, combined with resourcing for this, and use of expert domestic violence reports are also essential in cases where the possibility of serious violence has been identified.

51. The following case study demonstrates the importance of having clear guidelines for family court writers to ensure that crucial issues regarding the children are raised and examined during a family court assessment. The guidelines could refer to race and sex discrimination legislation and international obligations to ensure that stereotypes or assumptions do not influence the outcome of the family assessment reports.

Case Study 4

Tamara is an young Aboriginal woman with three children. Her ex-husband Fred is non-Indigenous. Fred sought to have their oldest child, Kevin (10 years old), live with him, and Katherine (6 years old) and Jack (3 years old) live with Tamara.

When Tamara, attended Court for the family assessment report, she was only interviewed for about 10 minutes. During the course of the interview she was questioned about whether she consumes alcohol and how much alcohol she consumes. Tamara was also questioned at length about her sexual relationships with other men. Tamara did not understand why she was being asked these questions and these issues were not raised in any materials filed before the court. Tamara was only asked two questions concerning the children before the family report writer terminated her interview.

The family assessment report reflected the nature of questioning, with comments made about Tamara's physical appearance, her manner of dressing and that she seemed well

[14] George Klein, paper presented at Queensland Family Law Residential Conference, 4-5 September 2009.

spoken. No mention of these physical attributes was made in relation to Fred. Tamara felt that the family court consultant may have been racially prejudiced against her due to her Aboriginality. Also no mention was made of Tamara's concerns about Kevin living with Fred or the impact of separating the children as Tamara lives six hours away from Fred. The report made a recommendation for the children to be spilt. Tamara was devastated as she wanted the children to remain together until they were older.

Despite an inherently biased and inflammatory report, legal aid would not consider funding Tamara to obtain a second family assessment report. Orders were eventually made for Kevin to live with Fred and the other two children to remain with Tamara.

Recommendations:

17) Guidelines for family report writers should be developed on issues to be considered, investigated and reported.

Support provided by courts

52. In most family law courts there is little support provided to victims of violence. In some courts (including some courts in South Australia, Brisbane and Sydney) there are limited court assistance programs with varying resources, skills and practices. However, these are not located in most courts and, where present, court support programs are usually mainly staffed by volunteers who do not have a legal background.

53. Courts also generally have safety plans for victims of violence. However, in practice these often do not work. Problems that we have encountered include clients not being listed on safety plan list, security guards not being aware of safety plans, and insufficient security guards on duty to carry out safety plans.

Recommendations:

18) Court support schemes should be funded to assist victims of violence through the family court process.

Impact of shared parenting on child support and property matters

54. In our experience, the 2006 reforms have resulted in significant changes to how the time children spend with each of their parents is divided, but these changes in time do not correspond with similar changes to the distribution of the cost of children. Many of our clients report feeding their children every night and buying all their clothes, despite shared care arrangements. The intersection of the child support reforms and the 2006 family law changes has resulted in a double impact on women still trying to meet the costs associated with the care of their children. Further, the child support formula assumes that there is no difference in the notional cost of the child is no difference for a child living mainly in one home (with one room, one wardrobe, one set of clothes, etc) and a child splitting time between two homes (with two rooms, wardrobes, etc).

55. In our experience, the increased interconnectedness of child support and children matters has also increased the perception of children as commodities or possessions in family law disputes and tools that can be readily employed to lessen financial obligations. In our experience proceedings are sometimes initiated and orders for substantial time or

shared care sought so as to lessen child support payments.

56. As can be seen in the following case study, the threat of initiating court proceedings to apply for substantial time or 50/50 care if a woman files for child support is an issue of significant concern. A significant portion of our clients, who tend to be on low income, are not receiving the correct amount of child support but feel disempowered to challenge the status quo at the risk of either going back to court or aggravating the other party, particularly in cases where there is violence.

Case study 4

Margaret has one child with her ex-partner Paul. After separation Margaret tried to maintain a relationship between Paul and their child, Matt. Paul was reluctant to do so. Paul would cancel arrangements to spend time with Matt at the last minute. He only spent time approximately ten days with Matt throughout the 2 ½ years since separation.

Margaret finally filed for child support after being reluctant to do so in case she made Paul angry. Within 4 weeks of getting child support, Margaret was served with family court documents requesting 50/50 shared care of Matt. Margaret was willing for this to occur and agreed to a 50/50 shared care during interim proceedings.

Within six weeks of the final order being in place, for shared care, Paul left town without informing his solicitors or Margaret. Matt was upset and left bewildered by the sudden departure of Paul. Margaret had to go back to court to amend the order, as the final orders for 50/50 shared care made it difficult for Margaret to amend the child support payments to reflect the living arrangements. A 50/50 shared care arrangement had essentially cancelled child support payments for Margaret despite the fact that Paul's salary was triple her salary.

57. The intersection of property settlements and shared care is also impacting women. Our clients report that their future needs are assessed in property settlements on the basis of shared care but that shared care does not always continue after the settlements. Research has shown that shared care arrangements are not stable and, 'tend to break down over time with children moving to a primary residence with either parent'.[15] In some cases, shared care is being used as a strategy in property settlement negotiations. It is ironic that the recent reforms were introduced to make the Act more child focused but in reality by connecting children's issues with child support and property they have become sidelined, as parties compete to minimise their financial outlay.

58. As a direct result of this an increasing number of women and children are forced to live in poverty. A significant number of our clients have to make a choice between foregoing child support payments and/or property claims to have their children live with them. Therefore it is essential that the increasing poverty of women be monitored and addressed.

[15] Osbaldeston T (2008), *In The Best Interests Of The Child? Judicial Officers Apply the Family Law Amendment (Shared Parental Responsibility) Act 2006* (Research paper), 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.

Recommendations:

19) The increasing poverty of women should be monitored, evaluated and addressed, particularly the effect of the interaction between shared care and child support and property matters.

Use of social science literature

59. 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 some judicial officers are starting to consider relevant research in the area (for example, FM Neville in *Stuart and Stuart* [2008] FMCAfam 177)[16], all judicial officers should have greater regard to social science research when considering matters. Legislative amendments could be considered to assist this happening. Similarly, legal professionals operating in the system should have sufficient training and skills to seek leave from the court to have research taken into account, and to rely on the research in making submissions to the court.

60. 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 and ensure that the research influences what is an 'unacceptable risk'. Currently, in our view, the threshold of what amounts to an 'unacceptable risk' is too high.

Recommendations:

20) Legislation should be amended to facilitate the admissibility and consideration of social science research.

Impact of community (mis)understandings of the legislation

61. 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. Inappropriate care arrangements in situations of high conflict or family violence can severely threaten the health and safety of children, as well as women.[17]

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[16] See Howard, above n 18.

[17] 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; 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; 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; 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>.

62. 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 dispel this notion.

63. 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;[18]
- 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;
- 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.

Recommendations:

21) Address community misunderstandings of the family law system through education and legislative reform.

Forms and affidavits

64. The quality of affidavits and the filing of notices of child abuse or family violence (form 4) are affected by the barriers outlined elsewhere in this submission.

65. An additional factor that may limit the number of notices of child abuse or family violence that are filed is lawyers' perception that there may not be any benefit in doing so. In our experience, there is a perception that filing such a form may negatively impact on the court's perception of the client, or that a client could be characterised as being an 'unfriendly parent'. The risk of placing a client on the back foot from the commencement of proceedings is one thing that legal practitioners go to great lengths to avoid. Even in cases where judicial orders are made for the parties to file a notice, it may not appear to have any significant bearings on the interim court proceedings. The following case study demonstrates this.

[18] 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.

Case Study 5

Steve was incarcerated for 4 months after he was arrested by the police for threatening and hitting his partner Patricia with a gun in front of their children, Genie, Greg, Dahlia and Brandon. Steve was refused bail for 4 months before he was released on home detention.

After his release from remand a visit was arranged between the paternal grandparents and Patricia for the children to spend some time with Steve. The paternal grandparents had stated that they would supervise and return the children to Patricia. The oldest child, Brandon, refused to spend time with his father, Steve.

Steve and the paternal grandparents did not hand over the children. Patricia initiated proceedings and in her affidavit the violence committed against her and Brandon was mentioned in the fourth paragraph of her affidavit on the first page. The affidavit also provided information about previous criminal convictions and restraining orders, as well as details of incidents that were not reported to the police. Copies of the restraining orders were attached to the affidavit.

As a result of the clear identification of violence within the relationship both parties were invited to file a form 4 by the judicial officer. When the parties filed their form 4 applications, it was decided by a judicial officer at the next court date, that the violence was borderline and that the matter did not need to be referred to a superior court.