



## **Comments on Family Court of Australia's Guidelines for use in parenting disputes when family violence or abuse is alleged**

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### **INTRODUCTION**

#### **Women's Legal Services Australia**

Women's Legal Services Australia (WLSA) is a national group of Community Legal Centres specialising in women's legal issues. It is comprised of the following agencies, some of which have been operating for over 20 years:

- Women's Legal Services located in capital cities in each State and Territory.
- Indigenous Women's Legal Services.
- Family Violence Prevention Services located in or servicing rural and remote communities.
- Domestic Violence Legal Services.
- Rural Women's Outreach workers located at 9 generalist Community Legal Centres.

These services offer free legal advice, information, representation and legal education to women across Australia. We target disadvantaged women including women from non-English speaking backgrounds, rural women, women with disabilities and Indigenous women. As a consequence, WLSA has developed an expertise in family law, violence against women and children and the legal aid system, as these issues affect disadvantaged women.

WLSA is regularly asked to respond to government and Court initiatives and reform proposals and has developed a reputation for providing considered responses which incorporate a broad cross-section of views.

#### **These comments**

Given the Court's request that the draft Guidelines remain confidential at these stage, these comments have been put together in consultation with the WLSA Coordinating Committee only. The Coordinating Committee consists of WLSA's law reform coordinator, representatives from each state and territory and three representatives of the National Network of Indigenous Women's Legal Services.

## **Guidelines welcomed**

WLSA welcomes the Court's initiative in preparing these draft Guidelines and acknowledges the other steps the Court has taken to ensure cases involving allegations of violence and abuse are appropriately dealt with – in particular the development of the Court's Family Violence Strategy. We believe that the Guidelines are a very positive further step along this path and that they will provide a useful resource to decision makers as well as a clear statement to stakeholders of the Court's continued intention to address the many issues raised by these difficult cases as quickly and as well as possible. Our comments below focus only on the areas of the Guidelines that we believe could be improved.

## **NON-PRESCRIPTIVENESS**

The main area in which we believe the Guidelines could be improved would be in making them more prescriptive both in relation to timelines and what decision makers are to consider.

### **What decision makers are to consider**

In our view, the language employed throughout the United Kingdom Good Practice Guidelines should generally be used in these Guidelines. The UK formulation is generally 'the Court should consider' – rather than the language employed in the draft Guidelines - 'the Court may wish to give consideration to/take account of the following matters', 'it would ordinarily be desirable for consideration to be given to' etc. We note that there may well be reservations about utilising more direct language from the point of view of fettering judicial discretion. However, we believe that pointing to matters that should be *considered* does not unduly fetter discretion. We note that the UK is also a discretionary jurisdiction but it has utilised this clearer and more direct language.

We also note in passing that the drafting currently used is quite strained in certain parts of the Guidelines - where the factor/s listed clearly *should* be considered and/or addressed – either because the legislation itself requires it or because there would not be a great deal of benefit in the action contemplated if the relevant factor/s was/were not considered. By way of example only:

- B. P6 'court may wish to satisfy itself' expert is qualified and experienced to assess impact of violence and/or abuse. There would not seem to be a great deal of benefit in seeking the opinion of someone who was not appropriately qualified.
- B. P6 in framing orders for report the court 'may wish to consider the following matters and, where appropriate, direct the reporter'. Again (subject to our comments at pp7-8 below) there would not seem to be a great deal of benefit in seeking a family report that did not address the issues listed on p6.
- C. P7 (ii) consideration of the likely risk of harm to the child. S60CC would seem to require this to be considered in every case, in any event.

## **Timelines**

We believe that the Guidelines should be more prescriptive in relation to the time standards to be achieved for court events (Part H) and in relation to the circumstances in which abridgements of time will be granted, preliminary hearing dates will be set and/or specific judgments about violence or abuse will be made at the final hearing stage. In our view, the real benefit of s60K and any Guidelines for family violence and abuse cases is to be gained from early protective action and prompt determination of allegations.

In relation to the time standards in Part H, we believe that at least the standards in (ii) and (iii) should be shorter and/or greater guidance should be provided in relation to these in the sense of linking the type of circumstances alleged to exist in the case with the length of time to the hearing. By way of example, there would be many cases in which abridgements would be granted to an *ex parte* hearing on the day of filing – the 6 week maximum therefore does not provide much guidance/constraint.

However, in relation to all of the issues we have raised in this section on timelines, we are only too aware of the resource constraints that currently inhibit the court in being able to hear matters earlier. We therefore intend to write to the Attorney-General directly in relation to this issue. In this regard, it would be very helpful to know what, if any, of the issues we have raised in this section the court would be able to address within its current resources.

## **OTHER ISSUES THAT APPLY TO GUIDELINES AS A WHOLE**

### **Training**

The Guidelines presume a high level of understanding of family violence and child abuse. In order for them to be meaningfully and safely applied, we believe that it is essential that judicial officers receive consistent training which covers the most recent research and information about these issues. Whilst we welcomed the Family Violence Strategy's commitments in relation to establishment and maintenance of a family violence research database and in relation to training, we believe that training on family violence and child abuse should be compulsory for all judicial officers. We are aware that this has traditionally been opposed on grounds relating to maintenance of judicial discretion. However, we note that this approach to judicial training is under scrutiny in various state jurisdictions and internationally and we invite the Family Court to reconsider its approach in this regard. The risk of non-existent or inconsistent training on these issues is that judgments can be made based on assumptions about a range of issues, *including*, in our experience, assumptions about the way people who have used violence or have experienced violence present, about risk indicators for future violence and about harm or lack of harm to children.

Another key area which training could address would be the *way* in which violence and/or abuse allegations are discussed in court. In our experience, the level of safety felt by many women who have experienced violence as they are progressing through court proceedings are often as closely related to the way in which they are treated and their experience of violence is treated, as it is to the actual court orders that are made/not made along the way. The court plays a key role in what is said to the parties in relation to the

orders sought and allegations of violence. The words said can send clear messages to both people who have used violence and people who have experienced violence. Sending a clear message about intolerance of violence and abuse may be critical in ensuring that people feel safe enough to raise concerns and may help ensure safety for women and their children in cases where interim orders are made for the children to spend time with a person who has allegedly used violence.

Finally, we wanted to draw particular attention to the need for training on diversity issues in the context of family violence and abuse. We note that the Guidelines currently make no mention of diversity issues and the particular considerations that might apply to family violence and/or abuse where family members involved are Indigenous or from culturally and linguistically diverse backgrounds. Obviously the legislation itself addresses these to some extent, but we believe that this is a further area that could and should be covered in training.

WLSA would be very pleased to be consulted in relation to appropriate training/trainers.

## **Complexity**

We found the draft Guidelines a little difficult to follow. There are a number of minor/technical drafting issues that we have noted at the end of our comments that may be contributing to this. We also believe the non-prescriptive language used contributes to the preambles to each section being hard to follow and/or the factors listed following the preambles to be hard to connect to/read with the preambles. The style and length of the UK Guidelines makes them rather more accessible. We do note, however, that one of the reasons for the increased length of the draft Guidelines is the inclusion of Parts A and G which (subject to our comments re both parts below) are very welcome.

In particular, we found the separation of Part A from Part C quite confusing. Part A *could* be read (and indeed we initially did read it this way) as implying that the Court Registrar or other judicial officer to whom the Form 4 is referred would consider all of the issues in Part A at that time. Whereas we understand that the intention is that the process the Court has already instituted is to continue – i.e. the Court Registrar or other judicial officer to whom the Form 4 is referred simply considers whether a directions, procedural or interim hearing is necessary and the rest of the matters in Part A are addressed at that hearing. It may well therefore be clearer if Parts A and C were grouped together.

## **Limited to situations where a s60K Notice is filed**

We note that the Guidelines are directed to situations where a Form 4 is filed. In our experience, there are still many cases, particularly where parties are self-represented, in which violence or abuse is alleged in affidavit material and a Form 4 is not filed, despite the requirement in the *Family Law Rules*. In addition, one member of the WLSA committee reports that parties in one Court registry are strongly discouraged from filing a Form 4 in all but very serious cases of violence where substantial evidence exists. This may stem, in part, from the current Form 4 having superseded the old notice of risk of child abuse and court staff/judicial officers being accustomed to dealing with it in a particular way. Obviously, we believe this threshold for the filing of the Form 4 is far too high. Whether this is occurring more broadly or not this, together with the existence of fear in

domestically violent relationships and concerns about being seen to be unwilling to promote a relationship with the other parent, indicate to us that the Court can not rely on the filing of a Form 4 as a trigger for these guidelines.

We believe that, particularly in the context of Division 12A, which requires the court to be more interventionist in terms of defining the issues between the parties and the evidence to be led, that the Guidelines should also be applicable (some modifications would obviously be necessary) to situations where the *court* identifies that the allegation of violence or abuse is such that, if proven, it would affect the outcome of the matter. An alternative partial solution to this problem would be to ensure that, in any case where a judicial officer identified that an allegation of violence or abuse had been made, the party making the allegation were be directed to file a Form 4. However, we note that whichever of these approaches was employed there is still a real risk of violence or abuse issues not being picked up *early* in court processes, particularly in matters involving self-represented litigants. Every attempt should be made to ensure that these issues are identified as early as possible in the process. At the very least, we believe that whenever a registrar first becomes involved in a matter – whether by being called upon to consider an abridgement application (other than in response to a Form 4), or at the case conference, the registrar should sensitively explore whether violence or abuse allegations are involved. If this does not occur, any affidavit material that may refer to the violence or abuse will not be read until the interim hearing and such issues may only come to the judicial officer’s attention if specifically raised by a party. We do not believe it is safe or appropriate to rely on the party/ies identifying that the allegation is relevant to the court’s consideration of the case.

## **Use of language re spending time with/living with**

The language of ‘spends time with’ and ‘lives with’ does not always appear to be clearly/appropriately used throughout the document. Generally speaking the language of the document seems to be directed at the situation where a parent with whom the child ‘spends time’ is alleged to have been violent or abusive and not to the situation where a parent with whom the child ‘lives’ is alleged to have been violent or abusive. We believe that care should be taken to ensure that both of these situations, as well as ‘shared care’ type situations are clearly covered. This is a list of the places in the document which we have identified as possibly needing attention (but this may not be comprehensive):

- (v) on p6 – this could be being used in non-technical sense here – i.e. encompassing both living with and spending time with. However, this could still be misleading/confusing given the use of the distinct terms ‘spending time’ with and ‘living with’ in the Act so we believe it should be addressed.
- (iii) on p7, especially final bullet point.
- E preamble on p9.
- (i) on p9.
- (iii) on p9.
- G preamble – though again this could be used in non-technical sense here.
- G, 1<sup>st</sup> bullet point actually seems to only deal with allegations by parents with whom children spend time against parents with whom children live – i.e. the other way around.
- G, 3<sup>rd</sup> bullet point – again this could be used in non-technical sense here.

- G, 5<sup>th</sup> bullet point and 6<sup>th</sup> bullet point seem to clearly be re alleged violence by parent with whom children spend time (rather than also parents with whom they live).

## **ISSUES RELATING TO SPECIFIC PARTS OF GUIDELINES**

### **Part A – Issues to consider at directions, interim or procedural hearing**

#### *Directions to attend FDR to discuss violence or abuse*

A. (i) on page 2 requires decision makers to consider whether or not to order parties to attend family dispute resolution to *discuss the violence or abuse or risk of violence or abuse*. WLSA is strongly opposed to this being included in the Guidelines – whilst there can be situations where parties can negotiate about possible parenting arrangements despite the presence of violence and/or abuse, they should never be *directed* to negotiate *about* or even to discuss the violence or abuse. We note that this is not what s60I(10), which is the section referred to, requires. S60I(10) relates to parties being sent to FDR to discuss the ‘issue or issues that the order would deal with’ – i.e. the parenting arrangements.

#### *Guidance re purpose for considering matters set out on pp3-5*

Part A is a useful resource, gathering together the relevant issues that might need to be considered at the directions, procedural or interim hearing. However, the list on pp3-5 – numbered (i)-(xxv) – gives no indication of the purpose for which the matters listed are being considered e.g. in relation to (v) one of the reasons for considering whether a state family violence order is in place is so that the court can (subject to the child’s best interests) ensure that any parenting order it makes is consistent with any family violence order. Judicial officers will obviously be aware of the reasons why they are considering the matters listed and we are not proposing that the sections referred to be included or summarised in the Guidelines. However, we note that this approach makes a number of the Guidelines quite hard to follow, most notably (iii). We believe that the list would be somewhat clearer, and in particular, the list would be clearer to external stakeholders if the preamble to the list included a sentence to the effect of the following: ‘the *purposes* for which judicial officers need to consider the issues listed are set out in the sections referred to’.

#### *Consideration of need for psychiatric assessment of parent*

In relation to the list of issues to be considered at the directions, procedural or interim hearing (Part A, pp3-5, numbered list (i)-(xxv)) it might be useful to add specific reference to the possibility of a parent or parents being directed to attend a psychiatric assessment.

#### *Consideration of directions re safe access to subpoenaed documents*

In relation to the list of issues to be considered at the directions, procedural or interim hearing (Part A, pp3-5, numbered list (i)-(xxv)) it might be useful to add reference to considering the need to make specific directions in relation to access to subpoenaed documents (and sensitive information contained therein).

### *Consideration of other sources of evidence*

We note that item (iv) in the list in Part A commencing on page 3, refers to whether to direct a party to file an affidavit and that item (xviii) refers to seeking expert reports. However, we believe it would be useful to direct attention to the court's other duties and powers in relation to evidence under s69ZX of the Act, in particular (a), (b) and (e) – with a view to making specific reference to considering possible witnesses and/or sources of corroboration to assist the court in making a finding in relation to allegations of violence or abuse.

### *Consideration of whether to direct a party to file a Form 4*

In line with the comments we have made above in relation to the Guidelines being able to be applied where a party has not filed a Form 4, it may be necessary/appropriate to include an additional consideration in the list commencing on page 3, being 'whether to direct a party, the Independent Children's Lawyer or other person seeking to intervene to file a Form 4' (s60K(1), Rule 2.04B(1))'.

## **Part B – Issues for Family Report writer to address**

### *Impact on child and parent*

The Guidelines should specifically refer in (ii) to the impact of physical and emotional abuse and/or family violence on *the child and on the parent* subject to the violence or abuse.

### *Presumption of equal shared parental responsibility*

In relation to item (iv), we consider that it is appropriate in the context of violence/abuse cases for family report writers to be asked to address the issue of whether it is safe and appropriate and/or parents have the capacity to consult with each other and make joint decisions in relation to parenting issues. Seeking comment on whether the parties have demonstrated a history of cooperation with respect to parenting would obviously assist the court in its determination. We also believe it is appropriate for family report writers to be asked to address the issue of violence/abuse and assess its impact etc, as per (i)-(iii). However, we do not believe that the question to the report writer should be framed in terms of 'whether it is appropriate for the presumption of equal shared parental responsibility to apply.' That is a decision for the court to make. In other words, the relevant questions to the report writer should be framed in terms of what the court needs to know in order to determine whether the presumption applies and/or is rebutted, rather than in terms of the report writer commenting on the application of the presumption.

### *Spending time with allegedly violent parent*

WLSA believes that report writers should be asked to comment on the benefit to the child of spending time with an allegedly violent or abusive parent, with specific reference to the impact of any family violence or abuse.

### *Ascertaining children's views*

WLSA believes that item (vii) should acknowledge that, in some family violence cases it may be impossible to safely and appropriately ascertain the actual views of the child. This item should be clearly expressed as being 'provided it is safe and appropriate to do so'.

### *Appropriate treatment and/or behaviour change services*

WLSA believes that it would be useful to add a further matter for family report writers to consider that addresses the possible need for children or parents to have treatment and/or counselling and/or to access other services as a result of the violence/abuse. In particular, whether a parent who has used violence should attend a behaviour change program.

## **Parts C and D – Distinction between interim and final hearings**

WLSA notes that the Guidelines seem to be based on the old interim and then final hearing process and not the Division 12A process where, from the first intake date, the judge can start taking evidence. We believe that consideration should be given to restructuring the Guidelines in light of the Division 12A process – to ensure that the considerations about violence and safety listed in both these sections are addressed to the fullest extent possible at the first intake date and at each subsequent appearance in the less adversarial program process.

## **Part C – Matters to be considered at interim hearings**

### *Steps prior to making orders*

We note that the list in Part C is currently directed to the factors to be considered in determining what interim orders should be made. We believe that it would also be helpful to direct attention to steps that should possibly be taken prior to interim orders being made or, at least, prior to interim orders being made that are likely to be/are intended to be in place for some time. This could include consideration of:

- Whether advice from a Family Consultant should be obtained prior to any interim order being made or prior to an interim order being made that is likely to be in place for some time.
- Whether a short form family report should be obtained prior to any interim order being made or prior to an interim order being made that is likely to be in place for some time.
- Whether an Independent Children's Lawyer should be appointed prior to any interim order being made or prior to an interim order being made that is likely to be in place for some time.

We note that the latter two items are addressed in Part A but not in the context of their specifically being considered prior to interim orders being made or prior to interim orders being made that are likely to be in place for some time.

### *Consideration of risk of harm to child*

In our view, this is the central consideration to be applied at interim hearings and it should be listed first. We note that, in order for meaningful consideration to be given to the relative harms that might be caused to children by not seeing an allegedly violent/abusive

parent with the harm that might be caused by seeing that parent, judicial officers need to be up to date on the latest research in relation to both:

- the impact of violence and physical and emotional abuse on children; and
- the impact on children of not seeing one of their parents temporarily.

We have made a general recommendation above in relation to training that is particularly pertinent here.

#### *Consideration of whether person has complied with order to attend FDR*

WLSA believes that it would be unfortunate and inappropriate to have the first factor listed for consideration at interim hearing being one that includes reference to whether a person has complied with an order to attend FDR. In our view, where a party has chosen to attend FDR prior to applying to Court, despite the presence of violence/abuse, the Court is highly unlikely to direct that party back to FDR – and in our view the court should not do so. Where a party has not attended FDR, relying on the exception in s60I(9)(b), similarly we would hope that the court would not send that party to FDR unless/until it had determined that there were not reasonable grounds to believe there had been violence or abuse. In our view, the reference to complying with an order to attend FDR is therefore unnecessary and should be removed. At the very least, we believe that this factor should be given less prominence by being listed later in the list and should be qualified by words to the effect of the following: ‘and if a person has not complied with that order, the reasons for non-attendance and if the safety of the person was secured for the purpose of complying with that order’. We do recognise that the other matters referred to in s13C are appropriate and relevant – i.e. whether a person has complied with an order to attend family counselling or another program or service.

#### *Framing of the consideration about securing safety*

We have made the general comment above that we believe the more prescriptive language of the UK Guidelines should be adopted. In relation to (iii) on page 7, we note that this picks up the UK guidelines considerations in relation to where direct contact is ordered. However, we would emphasise that we believe the UK formulation is preferable in that it includes a general requirement to ‘ensure that any risk of harm to the child is minimised.’

## **Part D – Matters to be considered at final hearings**

#### *Directions in relation to conduct of proceedings*

In the same vein as item (i) – i.e. addressing how proceedings are to be conducted, rather than the matters to be considered in reaching conclusions in proceedings – we believe it would be useful to direct consideration to safe practices that could be used to prevent intimidation etc – particularly in relation to personal cross-examination by self-represented litigants.

#### *Findings of fact re violence/abuse*

WLSA believes that it is imperative that, wherever practicable, judicial officers make findings of fact in relation to allegations of violence and/or abuse or findings of whether or

not there is an unacceptable risk of violence and/or child abuse – so that consideration can then be given to whether face to face contact is appropriate (Part E) and, if so what protective measures might be necessary (Part F). We are aware of a number of cases in which allegations have been clearly and directly made and, not only have no findings been made in relation to these allegations, judgments have not even referred to the allegations in considering the best interests criteria. We believe that (ii) on page 8, when read with the preamble to this part, currently leaves it too open to judges not to endeavour to make findings. We note that in relation to actual findings of violence/abuse, that this may well not have been intended by the drafting – but that when the phrase ‘wherever practicable’ is read with the non—prescriptive preamble to this section, that could be the unintended effect. We also believe that reference should be made directly in this section to findings in relation to ‘unacceptable risk’ so that these are more clearly linked to sections E and F – i.e. it is both findings of violence/abuse *and* findings of unacceptable risk that spark the consideration of the matters listed in Parts E and F – so this Part D needs to refer to findings of ‘unacceptable risk’ as well as findings of violence/abuse.

### *Distinguishing types of violence*

WLSA understands that the features referred to in (iii) on p8 are taken from the work of Michael Johnson. This list captures *some* important features of family violence – essentially the tactics that may be used by abusers to get their own way - but these may well be just one part of the characteristics of the violence in a particular case. The inclusion of this list is clearly well-intentioned. However, we have serious concerns about the use of an apparently limited/exhaustive list, particularly one extracted out of the context of the research background from which it apparently comes. We believe that different histories of violence, warrant different responses from the courts, but we do not believe the list in (iii) is a satisfactory mechanism for distinguishing those histories. It is vital that non-physical forms of violence, such as those listed in (iii) are recognized as serious forms of violence but, again, we do not believe that utilizing an apparently limited list that refers *only* to these non-physical forms of violence is the way to achieve this. Sterotyping abusers is risky and WLSA believes that issues relating to the nature and extent of domestic violence considered at a final hearing must be much more comprehensive than factor (iii) and the behaviours listed in it.

Whilst we note that the Guidelines do not utilise Johnson’s language of ‘intimate terrorism’ as distinct, in his analysis, from ‘situational couple violence’, we have reservations about the Guidelines’ drawing on this work – and, especially drawing on it in a way that may not have been intended and out of context - in that they may encourage attempts to make these sort of distinctions (as opposed to any of a range of others supported by the work of other researchers) as an indicator of ‘seriousness’ or a predictor of future occurrences. In our view, matters about which there are still ongoing debates should not be incorporated into the Guidelines as *the* way to approach an issue – rather judicial officers should be up to date on the latest research and weigh up its application for themselves.

Johnson’s work raises some interesting issues which we would like to consider further. However, although we have not been able to undertake a detailed analysis of his work, we do note in passing a number of issues that arise from the discussion in AIFS’ recent report on allegations of violence (at pp5-10) which are of concern to us – in particular:

- we agree with Horwood and Ridder that Johnson’s model bears the risk of ‘situational couple violence’ being dismissed as trivial when all violence should be seen as unacceptable and is known to be highly detrimental to children exposed to it.
- based on the distinctions between ‘intimate terrorism’ and ‘situational couple violence’ described in the AIFS report, it might well be very difficult at a particular point in time for a court to determine with any certainty whether it is seeing the earlier stages of ‘intimate terrorism’ or whether it is seeing ‘situational couple violence’.
- a danger of thinking in terms of situational violence is that the actions of a parent with whom children live refusing to allow the other parent to spend time with the children may be seen to be the ‘reason’ for the violence. Responding with violence is a choice made by the person who uses violence, often because violence has worked for him in the past. It is notable that many perpetrators of domestic violence do not ‘lose control’ in other circumstances such as when they are involved in disagreements at work or with their friends. Retaliation with violence can never be excused and it will always be important to look at why contact was refused in the first place. Refusal of contact on the grounds of safety itself can be a good indicator of future violence.

We would welcome the opportunity to comment further on Johnson’s work before the Guidelines are finalised if, notwithstanding our comments above, the court is still intending to refer to and rely upon his work in these Guidelines.

## **Part E – Matters to be considered where finding of violence made**

### *Motivation of parent seeking particular parenting order*

The motivation discussed at (ii) is also a good indicator of future violence and abuse, however listing it without reference to other motivations may run the risk of stereotyping abusers. In making reference to this particular motivation in the Guidelines it is critical to acknowledge that it may be hard to identify and may be one of a range of motivations. For example ‘winning’ and financial motivations are also motivations ‘characteristic’ of abusers.

### *Potential detriment or harm to child of spending time with abusive parent*

Whilst we recognise that much of the list in Part E is directed towards ascertaining whether further violence or abuse is likely, we believe a specific point referring to the potential detriment or harm to the child of being required to spend time with an abusive parent should be added i.e. this would pick up the general ‘risk of harm’ point in C(ii).

## **Part F – Matters to be considered where finding of violence *made* and spending time with order made**

### *Order enabling relisting on notice*

WLSA believes that an additional consideration should be added to the list provided, being whether it would be appropriate to make an order allowing the parties to relist the matter on 7 days notice if orders intended to protect are not working. We note that this approach is often used in cases where there has been drug taking and a person has to have ongoing testing. Supervision can be very difficult for a non-agency supervisor and these arrangements can often fall away. In our view, where findings of violence or abuse have

been made and the child is still ordered to spend time with the violent/abusive parent, it should not be left to the party to have to go through contravention proceedings or a formal application to change orders process to have the issues dealt with – eg if conditions have not been complied with or problems arise with supervision.

### *Treatment/counseling for children*

WLSA believes that it would be useful to make clear in the list provided in F, that consideration should be given to orders to ensure children receive appropriate treatment or counseling to deal with the effects of the abuse or violence. We believe that consideration should actually be given to such orders wherever findings of abuse or violence are made – whether or not the child is ordered to spend time with the abusive parent. For this reason, this consideration might more appropriately fit in Part E – but we note that this part is currently directed only to matters to be considered in deciding whether to make orders that children spend time with parents found to be violent or abusive.

## **Part G – Matters to be considered where consent orders are sought**

Given, the significant percentage of matters that resolve by consent, WLSA believes that this part of the Guidelines will be important and that the bullet point list provided needs further consideration in light of the following comments:

- Many of the concerns we raised above in relation to the use of the terminology ‘spends time with’ and ‘lives with’ arise in this part.
- It is not clear what is meant by the phrase ‘serious’ violence in the 1<sup>st</sup> bullet point and, whilst we believe (as indicated above) that different histories of violence warrant different responses from the court, we do not believe it is appropriate for the Guidelines to imply that some violence is not ‘serious’ and regard does not need to be had to it. The word ‘serious’ should be removed.
- It appears to us that the 3<sup>rd</sup> bullet point in this list (and possibly others) may be derived from Michael Johnson’s work. For the reasons set out in the section above, we believe that the inclusion of such references should be reconsidered. Whilst we note that the bullet point list provided in G is not expressed to be an exhaustive list, there could still be risks that factors extracted out of context of the research background might be misapplied.
- A number of the matters to which attention is directed by Parts C-F should be included here. Obviously not all of these will be relevant/appropriate for inclusion in Part G and we have not been able to consider each item in these other parts individually - but, by way of example only, it would appear useful and appropriate for the Guidelines to include reference to judicial officers being satisfied that the orders proposed will ensure the child’s safety – i.e. directing attention to issues re supervision etc.

## **Part I – Information about local facilities**

WLSA welcomes the Court’s commitment to identifying local facilities to assist people who have used violence to address their behaviour. We strongly recommend that the Court seeks the advice of the Victorian No to Violence/Men’s Referral Service in developing Guidelines for which services are appropriate to refer to. Danny Blay, who is the Manager of NTV/MRS can be contacted on 03 9428 3536. NTV has developed Standards of

Practice for men's behaviour change programs which its members (providers of such programs) subscribe to as well as best practice goals for its members to work towards implementing. WLSA would also be pleased to be consulted in relation to appropriate services available in each state and territory.

In establishing a relationship with locally available facilities and, in particular, in considering imposing a requirement on parents who have used violence to attend relevant programs it will be important for the court to be aware that –

- These services can be affected by resource and consistency limitations.
- Ongoing risk assessment is critical to ensure safety of women and children –programs need to work with the women partners, or in conjunction with services that work with women partners, as well.
- Referral to a program should not be taken to provide an adequate safeguard for women/children.
- As yet there is relatively limited evidence in relation to the effectiveness of such programs in changing behaviour, particularly the effectiveness of *mandated* attendance at programs – as many programs rely on agreement by the abuser to participate as a way of best securing the possibility of change.
- If the court intends to rely on the abuser's participation in the program – then attendance and resulting attitudinal changes will need to be monitored.

## MINOR DRAFTING ISSUES

We noted the following minor/technical drafting issues whilst preparing these comments. Most of them do not affect the meaning of the Guidelines but we have included them in case they are of assistance to the court in finalising the detail of the Guidelines:

- A(iv) on p3 needs some kind of preamble to link with the heading 'in every application the decision maker must...' eg '*consider* whether it is satisfied'.
- Point (iii) on p3 should refer to 60J(1)(b) as a whole (not just (1)(b)(ii)).
- Point (iv) on p3 should refer to s60K(2) and Rule 20.4B(2). It would probably also be clearer if it was expressed as 'whether to direct the parties (or person filing a Form 4) to file affidavits.'
- Point (xix) on p5 - children can only be ordered to be made available for psychiatric examination upon application by an ICL.
- Point (iii) on p6 – should refer to whether orders sought are made *or not made*.
- P6 point (iv) should refer to 'equal shared' parental responsibility.
- P6 point (vii) – preferable to refer to 'views' of child as opposed to wishes.
- In relation to (viii) on p6 - current wording/framing of this linked with the preamble to the list seems to weaken the vital directive about not revealing the whereabouts of parties whose addresses have been suppressed.

- Document slips into language of ‘contact’ in places e.g. p7 point (ii), p8 E preamble, p9 final bullet point, p10 point (i).
- Use of language that refers to the ‘other parent’ in various places can be misleading and seem to refer to parent alleging violence – e.g. 1<sup>st</sup> bullet point in point (iii) on p7.
- Point (iii) on p7, bullet point 5 should refer to the ‘visit’ or something similar as opposed to ‘appointment’.
- Section E is not clearly written because the preamble suggests that the list on p9 will be factors that have to be present in order for the benefit of contact to outweigh the disadvantages but they are not written in this way. (i) and the final two bullet points of (iii) are particularly unclear in the context of the preamble but all of them need to be cleared up/linked semantically with the preamble.
- Although the heading and context indicates that the phrase ‘used or exposed the child to violence’ in the second sentence in Section E is *intended* to refer only to the user of violence, it is slightly ambiguous on a first reading. We believe that this sentence would be clearer if it read ‘...parent who has used violence towards the child or towards another family member and by so doing has exposed the child to violence’.
- The final bullet point in E (iii) should refer to children’s ‘views’ not ‘wishes’.

Please do not hesitate to contact us if you require any further information or clarification or if you would like to discuss our comments.

**WOMEN’S LEGAL SERVICES AUSTRALIA**  
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