

**Submission to the New South Wales Legislative Council  
Standing Committee on Law and Justice  
Inquiry into the impact of the  
*Family Law Amendment (Shared Parental Responsibility) Act 2006***

---

## **INTRODUCTION**

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

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

- Women's Legal Services located in capital cities in each State and Territory.
- Indigenous Women's Legal Services.
- Family Violence Prevention Legal Services located in 14 rural and remote communities.
- Domestic Violence Legal Services.
- Rural Women's Outreach workers located at 9 generalist Community Legal Centres.

These services offer free legal advice, information, representation and legal education for women, providing assistance to more than 25,000 women across Australia each year. We target disadvantaged women including women from non-English speaking backgrounds, rural women, women with disabilities and Indigenous women. As a consequence, WLSA has developed an expertise in family law, violence against women and children and the legal aid system, as these issues affect disadvantaged women.

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

### **Participation in the Federal family law review process**

WLSA participated at every stage of the Federal family law review process, raising two principle concerns about the proposals for change – namely that the proposals tended to promote parents' rights rather than the best interests of children and secondly that they were likely to undermine the safety of children and their family members.

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

## **Principle concerns**

WLSA's principle concerns about the proposals for change were not satisfactorily addressed in the Federal family law review process and we remain very concerned that the *Family Law Amendment (Shared Parental Responsibility) Act* ('the Act') will tend to promote parents' rights rather than the best interests of children and secondly that it is likely to undermine the safety of children and their family members.

## **IMPACT OF THE *FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) ACT***

We believe that it is too early to assess the impact of the Act on women and children in New South Wales, given that the Act has only been in force since 1 July 2006. However, we explained in some detail in our most recent submission to the Federal Senate Committee what we *predicted* would be the impact of the Act on women and children across Australia and we attach a copy of that submission as Appendix A. We stand by the comments in that submission and we also note that there *does* seem to have been an increase, since 1 July 2006, in the number of contacts we receive from women wrongly believing that equal time arrangements are now required by law. This *may* well be having an impact on how cases are being resolved and thereby an impact on women and children (particularly in cases where there are concerns about violence or child abuse) but as indicated above, we believe it is too early to assess this.

## **IMPACT OF THE ACT ON THE OPERATION OF COURT ORDERS THAT CAN PREVENT FAMILY VIOLENCE PERPETRATORS COMING INTO CONTACT WITH THEIR FAMILIES**

We believe that the amendments made by the Act to Division 11 of the *Family Law Act* will have a negative effect on the efficacy of Apprehended Violence Orders in New South Wales (and indeed on similar orders, generically known as 'family violence orders', in other states and territories).

Division 11 deals with the interaction between family law orders and state family violence orders. In particular, the Division enables a state magistrate making a family violence order to change a family law order. We believe that Division 11 as enacted, will make it harder to change family law orders to protect people from violence than was previously the case. This is because Division 11 has been made even more complicated to apply and because of the requirement in s68R(3)(b) to provide 'new material' to a state court before it can change a family law order. The effect of making it harder to change family law orders when making family violence orders will be to make family violence orders less effective.

### ***Division 11 – more complicated to apply***

It should be noted that Division 11 is intended to provide a short term solution to address safety issues arising from *Family Law Act* orders until the matter can be fully considered in a family court. There are long delays in accessing the family courts (which will not change significantly, even given the recent introduction of s60K which requires courts to deal with allegations of violence and abuse 'expeditiously'). It is therefore imperative that Division 11 is clear and accessible to magistrates to encourage its use where appropriate.

In enacting the new Division 11, the Federal Government purported to be giving effect to recommendations made by the Family Law Council, with 'slight modifications'. However, one of the key criticisms made by the Family Law Council of the previous Division 11 was that it did not tell state courts which considerations they had to give priority to in determining whether to change a family law order when making a family violence order. The Council recommended that the Division should give clear priority to 'the need to protect all family members from family violence and the threat of family violence'.

The new Division 11 as amended by the Act does not tell state courts what considerations to give priority to – and it certainly does not clearly prioritise protecting people from violence – given that the new objects and principles in s60B are so heavily balanced in favour of contact rights and promoting the child's relationship with both parents.

Furthermore, the requirement on magistrates to weigh up a huge number of considerations (the need to resolve inconsistencies between state family violence orders and federal family law orders, the need to ensure family law orders do not expose people to family violence, the four objects and five principles underlying Part VII and the two primary considerations and 14 additional considerations for determining the best interests of the child) is likely to make it even less likely that they will agree to hear an application to vary a Family Court Order, let alone make a change – they will see it as too complicated and are likely to refer people to the Family Court.

In our view Division 11 of the *Family Law Act* should give clear direction to state courts to prioritise the need to protect people from violence over the other considerations, as recommended by the Family Law Council. Without this clear direction, Division 11 will be even more complicated and confusing to apply than it was previously. More importantly it will continue to be ineffective in actually protecting people from violence because the need to ensure family law orders do not expose people to violence will just be one of a range of unprioritised considerations state courts will be called upon to apply when determining whether to change family law orders.

### ***The requirement to provide new material***

In addition to the above, the requirement to provide new material to a state court (s68R(3)(b)) before it can change a family law order may operate to obscure a history of violence and hence the context of any new incidents. This may make it even less likely that a state court will change a family law order when making a family violence order.

In our experience, even under the previous law, state courts would not change family law orders if they thought *all* the evidence before them had already been put to the Family Court when those orders were made. The provision is therefore unnecessary. However, we believe that s68R(3)(b) could operate to obscure a long history of violence when a state court is determining whether to exercise its Division 11 powers. In theory, under s68R(3)(b) a person *should* just need to show that further violence had occurred after the family law orders were made in order to get over the requirement in that paragraph – once they had got over the requirement the state court *should* then still be able to consider *all* of the history of violence even if some of that evidence had been given to the Family Court and then, in the context of the whole history make a proper determination about whether to change the family law order. However, we are concerned that s68R(3)(b) might lead to state courts not giving proper regard to a long history of violence if an applicant came before them with only one or two ‘minor’ incidents of violence after the family law orders were made – those further incidents might well be the ‘straw that broke the camel’s back’ for the applicant and have led to them feeling unsafe. BUT, if the state court took the view that the Family Court considered that the preceding history did not warrant restrictive contact arrangements, the state court might be unwilling to restrict contact because they only gave consideration to the one or two further ‘minor’ incidents without considering these in the context of earlier incidents and the complete nature of the violent relationship.

### ***Recommendations***

We made two recommendations for improvements to the amended Division 11 in our submission to the Senate Committee at Appendix A. Part of the first recommendation was addressed in last minute changes to the Bill made by the Federal Government prior to its introduction into the House of Representatives. Our modified recommendations for resolving the above problems with Division 11 would be:

1. That s68N(b) be deleted.
2. That a new paragraph be added: s68R(5)(ba): “have regard to the need to protect all family members from family violence and the threat of family violence and, subject to that, to the child’s right to spend time and communicate with both parents and other people significant to the child’s care, welfare and development, provided it is not contrary to the best interests of the child.”
3. That s68R(3)(b) be deleted.

### ***Impact of other aspects of the Act on Family Law Act Injunctions***

We note in passing that other aspects of the Act may impact on the making of injunctions under the *Family Law Act* itself to protect children or their parents. S68B gives courts exercising family law jurisdiction the power to make injunctions in whatever terms it considers 'appropriate for the welfare of the child' – these can *include* orders for the personal protection of a child or their parent and orders restricting a perpetrator of violence's access to the victim's residence, place of employment or school. The best interests of children are not the paramount consideration when making orders under s68B of the *Family Law Act* but they must be 'given careful consideration'.<sup>1</sup> The changes to the best interests section of the *Family Law Act* (discussed in Part 1 of our Submission to the Senate Committee at Appendix A) may well shift the balance towards maintaining contact with an alleged perpetrator of violence where consideration is being given to making an injunction.

#### **WOMEN'S LEGAL SERVICES AUSTRALIA 19 October 2006**

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

---

<sup>1</sup> Flanagan and Handcock (2001) FLC 93-074.