



WESNET Submission to the Attorney General
on the
New Approach to
the Family Law System Discussion Paper

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Introduction

The Women's Services Network (WESNET) is the national peak advocacy body which works on behalf of women and children who are or have experienced domestic and family violence. With almost 400 members across Australia WESNET represents a range of services and individuals including:

- Women's refuges/shelters
- Halfway houses
- Women's medium-term housing schemes
- Information and referral services, sexual assault services, and outreach services

Through its Canberra based national office and via its large network of members and associate members WESNET plays an important role in identifying unmet need, canvassing new and emerging issues, facilitating policy and sector debate and lobbying government to provide improved responses, in partnership with non-government stakeholders, to the problem of domestic and family violence within our community.

WESNET's Objectives

- To provide leadership as a national women's peak advocacy body in relation to domestic and family violence.
- To contribute to and monitor policies, legislation and programs which impact on women and children experiencing domestic and family violence.
- To promote equity of access to services for all women including Aboriginal women, Torres Strait Islander women, women from immigrant, refugee and/or non-English speaking background, women in rural and isolated areas, older women, young women and women with a disability, and give issues relating to equity of access highest priority.
- To promote community awareness of violence against women and its personal and social consequences at a national level and support and facilitate the community education role of services at a local level.
- To undertake research relating to the provision of support and accommodation services for women and children escaping violence and for women using SAAP funded services for other reasons.
- To build and promote collaborative relationships with key stakeholders.
- To ensure a viable, well governed and credible organisation representing WESNET members nationally.

The Safety of Women and Children

WESNET is extremely concerned that in the discussion paper ‘A New Approach to the Family Law System’ the fundamental issue of the safety of women and children during family separation has been ignored. Some of the proposed changes may actually *increase* the risk to safety for women and children.

While supporting the notion that children benefit from having supportive and safe relationships with both parents where possible, we are concerned that the paper does not clearly emphasise that contact is not in the best interest of the child if there is domestic violence or child abuse apparent, nor addresses the huge gaps of the current system in providing for safety for women and children after separation.

‘Sarah’ (mother) and ‘Terry’ (father) were married for twelve months. Sarah stated that she left the relationship in March 1997 as a result of Terry’s violence towards her and, on one occasion, his violence against an older stepchild. ‘Joe’, the child of the marriage, was three months old when his parents separated. Joe resided with his mother until the court ordered a change in residency. Following the separation, Sarah had concerns regarding the welfare of Joe while in his father’s care.

In 1998, Sarah detailed concerns that Joe returned from contact with Terry on a number of occasions complaining of having a sore bottom. ‘When Joe complained of a sore bottom he holds on to the front and back of his nappy.’ The child was reported to have said his father was ‘naughty’ and that ‘He hurt me’.

In 2000 Sarah reported to the police the following conversation she had with Joe:

Joe said, “He pinched me”. I asked Joe, “Where did Daddy pinch you?” Joe demonstrated by pinching with all fingers and thumb. He started pinching his belly around his navel and worked his way to his penis. Joe pinched his penis on the top and said ‘It hurts’. Sarah described Joe’s penis as ‘red from tip to the base’.

Terry was interviewed by the police with regard to two charges of ‘indecent dealing with a child’. He denied the charges and there was insufficient evidence to proceed.

During the trial, the reality of the child’s disclosures was not challenged. Joe, the child in question, was three when his early disclosures were reported

In reporting his conclusions in relation to parenting orders, the Judge stated, ‘A consideration of all the matters to which I have referred leads me to conclude that the interests of the child would be best served by an order that he reside with the husband’

(Jenkins, 2003)

If the basis for determining child residency is the *best interest of the child* surely we are obligated to assume that, where an allegation of abuse exists, a child is in danger until domestic violence or child abuse allegations are investigated. Can we justify dismissing such allegations on the premise that they might be untrue when the consequences for women and children are so dire, and the evidence base supports the truth of the majority of accusations? We cannot allow stories like Sarah and Joe’s to continue. It is imperative that the primary purpose of the Family Law Court is ensuring the safety of women and children escaping violent relationships. Any changes to the current system must prevent further abuse and empower those who are most powerless.

Domestic violence is not an issue only for an insignificant proportion of separating couples:

- Currently, 5% of separating couples reach a full hearing before a judicial officer (Laing 2003). Of those families that do reach the Family Court, a significant proportion has experienced domestic and family violence or child abuse.
- Research indicates that over 40% of family separation is the result of serious partnership violence or child abuse (Brown et al, 1998).

Domestic violence is a form of child abuse. It is difficult to see how an abusive and violent spouse can be a healthy and positive parent, and more difficult to understand how this violent spouse could be a good role model for children. The existence of domestic violence can also be an indicator of child abuse: in a recent Queensland study, 68% of cases of domestic violence involved child abuse (QDVTF 1988), while other studies suggest that child abuse and domestic violence frequently co-exist (Laing 2003b).

There is a long list of women and children who have died at the hands of violent spouses. Research indicates that the most dangerous period for women and children who have experienced domestic violence is immediately after separation (Mouzos and Makkai, 2004).

60% of family homicides are perpetrated by a current or ex-partner and in 3 out of every 4 cases women have been killed (Mouzos and Rushforth 2003).

In a study in child homicides between 1989 and 1993, it was found that 35% of the children died as a consequence of a family dispute, usually relating to the termination of their parent's relationships. Men were the offenders in all cases. (Strang 1996)

Allegations of child abuse are unlikely to be false. In recent national (Hume 1997 and Brown et al 1998) and international (Thoennes and Pearson 1988) research, only 9-14% of allegations investigated by child protection authorities were proven to be false.

WESNET emphasises that any changes made to the Family Court of Australia and the Family Law Act must prioritise the safety of all parties, particularly of women and children. The safety of children involved in family separation must be paramount in all decisions under the Family Law Act. Any changes made cannot be based on notions of parents' rights or any presumption that one form of parental supervision and contact is more desirable than any other. Children experience family breakdown in a myriad of ways, so individual cases cannot be confined to straightjacket measures. When there are allegations of domestic violence or child assault, these allegations must be immediately investigated for the good of the child.

In New Zealand, the safety of children is seen as paramount in determining what level of access parents and grandparents will have to their children:

a parent who had used violence against a child or the against other parent would not have custody of, or unsupervised access to the child unless the Court could be satisfied that the child would be safe during visitation arrangements (Busch & Robertson, 2000, p 269)

Children's voices are shockingly absent from the Attorney General's discussion paper. It appears that little or no importance is given to the child's view of their situation and concerns in this proposal.

Children, particularly older children, should be supported and heard in proceeding regarding them, as clearly articulated in research carried out by Jenkins in Western Australia (Jenkins, 2003).

The discussion paper released by the Attorney General's Office does not make mention of the impact of domestic violence and child abuse on women and children pre- and post-separation. The obvious bias of the paper toward fathers and grandparents is a consequence of the disproportionate influence men's lobby groups such as the Lone Fathers Association had over the process. WESNET is concerned that this bias will result in a new Family Law System that escalated the trauma experienced by women and children escaping domestic violence and child abuse.

Recommendations

1. That the Family Law Act be amended to include a "safety first" principle as a determinant factor when establishing the child's best interest
2. That the child's best interest remains the paramount criterium to determine child custody arrangements according to each family situation, and that no particular model of child custody arrangement is inscribed in Family Law
3. That children are given meaningful opportunities to be heard and for their wishes and concerns to be taken into account

Parenting Plans and Advisory Sessions

Each family is unique. Imposing a 'template' of a parenting plan onto those 95% of Australian families whose separation does not become a subject of Family Court intervention seems unduly bureaucratic and may cause greater conflict than allowing these families to develop their own approach to separation. WESNET believes that the focus on parenting plans in the discussion paper undermines the fact that in the majority of separations in Australia, child residence arrangements are decided with some pain, but amicably. It is those families where violence and abuse may be a factor that needs the greatest assistance when determining the best outcome for the children. A 'parenting plan' for these families, however, cannot start with a presumption of 'joint parental responsibility' **and** 'the best interest of the child' as in these cases these two presumptions will be diametrically opposed.

In addition, it is unclear which evidence is being used as a basis on which to assume that using a parenting plan provides positive outcomes for separating parents, and specifically that Parenting Plans should be based on shared responsibility and equal time in all cases. Any changes to the Family Law Act, particularly where those changes could be of detriment to children and women escaping violence, must originate from a sound evidence base, not myths and conjecture.

WESNET has grave concerns regarding the undue pressure that will be put upon women to develop parenting plans and agree to shared responsibility and equal time regardless of their circumstances. Professionals such as advisers, lawyers and counsellors should be able to have discretion in suggesting parenting plans and particular models of "post-separation access", so as not to advise inappropriately. As a large proportion of violence against women and children goes unreported, it is essential that any professional's advice to separating parents be based in the women and children's situation in the relationship. Professionals should not be mandated to suggest equal parenting time. As a result of the proposed changes, women may be pressured into agreeing to parenting plans that are not in the best interest of the children and put the mother or children's safety at risk. Imposing a "one size fits all" plan to individuals where domestic violence or child abuse may be present (but unrecognised by 'professionals') will result and has resulted in further trauma.

"I don't know really – it just kind of crept up on me, All I know is, one day I did know, so it probably happened bit by bit from me not knowing to me knowing. Then I could remember back to when things happened when I was younger, but I didn't think anything of it – like when my mum had bandages and she said she banged herself. But now I realise my dad must have done it, but they hid it from me and just accepted that at the time. We even made jokes about it – like how clumsy she had been to bash herself.... Mum, Dad and me, we made all those jokes". (15 year old girl) Mullender, Hague, Imam, Kelly, Malos & Kelly, Children's Perspectives on DV 2002, Sage Publications

It is greatly worrying that parenting plans would be taken into consideration by the Family Court if parents end up in Court over a parenting issues, when it is likely that there will be no record of how the agreement to the parenting plan was achieved in the first instance, i.e. if it was freely agreed and understood or if women were pressured into accepting an unsafe agreement.

Legal Representation

WESNET is concerned that in this discussion paper the role of lawyers in Family Law is only seen as negative and adversarial. The lack of legal representation in Parenting Sessions where these plans may be developed will greatly disadvantage women in a situation of domestic violence.

We believe that lawyers can and do also play very constructive roles; including ensuring the safety of the parties to the proceedings and ensuring that clients understand the full implications of any agreements they sign.

At the same time, they are required to build in primary dispute resolution processes throughout the proceedings.

According to the Best Practice Guidelines for Lawyers Doing Family Law Work, "best practice in Family Law is characterised by:

- a constructive and conciliatory approach to the resolution of family disputes
- the minimisation of any risks to separating couple and/or children (...)
- having regard to the interests and protection of children and encouraging long-term family relationships" (page 1)

The Guidelines promote Primary Dispute Resolution and clearly state that it is the lawyer's role to "make a determined effort to explore options for settlement" (page 7) before initiating Court proceeding as well as once they have started.

However lawyers have also 2 other essential roles:

- 1) ensuring clients do not enter into agreement under duress, particularly if the agreement present's risks for anybody's safety
- 2) ensuring that client understand the contents and meanings of any document and agreement they sign.

These last 2 roles are essential for women escaping family violence and who may be under great pressure, both from the perpetrator and from a system that privilege contact over safety, to sign agreements that may jeopardise theirs and their children's safety.

It is not clear who will have these functions in the Family Relationship Centres, as lawyers are not allowed to participate in the individual or joint session with the Parenting Adviser, sessions where important decision may well be made and potentially legally binding Parenting Plans may be agreed on.

WESNET is very concerned that by removing lawyers from the session, a safeguard for women will be eliminated, and women will be pressured even more into signing Parenting Plans that are not in the best interest of the child and that may put the child and/or mother at risk.

Recommendations

4. That lawyers are allowed to sit in the Parenting Advice session, if the clients so require
5. Failing that, that legal advice is sought before any Parenting Plan is signed

Family Relationship Centres

Wesnet welcomes the provision of relevant information to separating couples, as long as the service does not promote a particular model of child residency, but simply presents families with options and information, including: income and housing support, child development, family law, domestic violence and child abuse, drug and alcohol services, mental health issues and services, counselling options, conflict resolution.

However, the role of the Family Relationship Centres in advocating for 'parenting plans' and 'joint parental responsibility' can be in direct opposition to the best outcomes for women and children experiencing family separation due to domestic violence. The overriding presumption that domestic violence and child abuse does not occur in family separation will reflect itself in the philosophy of these Centres.

There is a growing body of evidence that suggests that different types of violence may occur simultaneously in the same family, and that the presence of one form of violence may be a strong predictor of the other. (Tomison and Adam 2000)

In a study of professional decision making and families experiences of the United Kingdom's child protection system, Farmer and Owen 1995 concluded that: "it was as if these two manifestations of violent behaviour, domestic violence and abuse of children, were regarded as quite unrelated despite the increasing research evidence which demonstrates the connection between them". (Tomison and Adam 2000)

It will be vital that these Family Relationship Centres do not fall in to the same trap, thereby siding with the perpetrator and further compromising the safety of the women and children victims.

Equal access to and responsibility for children in separated families can work in separating families where there is no conflict, domestic violence and sexual assault and a good degree of co-operation between the ex-partners (Nicholson, 2003). Even in these cases, practical consideration may make equal time impractical. The push for equal time implied in this proposal may mean that separating families that would have been happy with other arrangements get pushed into unsustainable equal time arrangements that will be difficult to maintain. This may create future conflict, rather than avert it.

Moreover, the financial burden of running two households may be too great for many families to sustain. As some women may find it difficult to re-enter the workforce after many years at home taking care of the children, they will be greatly disadvantaged.

WESNET stresses that any changes to the current Family Law arrangements must be based in practices that prioritise the safety of women and children. The Magellan Project in Victoria is an example of those best practice principles. In the evaluation of the project, it was found that disputes were resolved more

quickly, court hearings for each case fell to almost half, the cost of the cases was less than non-Magellan cases, and, most importantly, the proportion of highly distressed children fell dramatically.

Recommendations

6. That Family Relationship Centre provide the above information to separating parents
7. That Family Relationship Centres restrain from advocating a particular model of child division for all families
8. That best practice learnt from Project Magellan and Columbus is used to develop best practice principles in the new Family Law system
9. That Family Relationship Centres work in partnership with the community and existing services in their local area and with current Family Law Court mediation services which are already set up to respond to domestic and family violence.

Screening for Child Abuse, including Domestic Violence

WESNET supports the proposition that women and children who have escaped domestic violence and abuse should not be exposed to further abuse by a perpetrator in compulsory mediation, joint counselling, or the development of parenting plans.

Moreover, the outcome of the parenting plans or parenting orders must safeguard the safety of the women and children involved.

WESNET is concerned, however, that this discussion paper neither highlights those situations where parenting plans may be inappropriate, nor improves the response of the Family Court to situations where abuse and domestic violence are present. It is also not clear if women will have to “prove” domestic violence and child abuse and to what standard in order to be screened out of the new system.

Wesnet is extremely sceptical that screening will be effectively carried out and that all women and children experiencing domestic violence or child abuse will be diverted from the new system.

In the 1996 Women’s Safety Survey only 18 per cent of women who had experienced physical or sexual assault in the previous 12 months sought professional help after the last incident (ABS 1996). Women may not disclose abuse for a variety of reasons, including: fear that violence will escalate, shame, fear of not being believed, past negative experiences when seeking assistance, lack of information and awareness. Women may also be reluctant to disclose issues such as domestic violence and child abuse to a male parenting adviser. It is of great concern to WESNET that vulnerable women and children, who may not have the capacity to articulate the violence they have experienced at the hands of their partner/father, will be further exposed to abuse by the perpetrator through joint counselling sessions, without legal council.

Because of the reasons just mentioned, the Family Relationship Centres will undoubtedly see women in a situation of domestic violence. Mediation is never appropriate in such cases, as the power differential between the parties makes it impossible to work.

If domestic violence and child abuse cases are not screened out of the process, the outcome of parenting plans, such as equal time and equal parental responsibility, will also expose women and children to continuing abuse and risk to safety.

Women may be too scared to oppose such plans in a joint session, or may not be believed and supported by the Parenting Adviser. A Centre that operates on the principle of joint parental responsibility will be less open to indicators of violence or abuse, as the focus of sessions will be on developing a parenting plan, not assessing what post-separation situation will be best for children. The awarding of costs

against parents who make so called “false allegations” of domestic violence and abuse will also compromise the screening process.

Recommendations

10. That attendance at Family Relationship Centres be on a voluntary basis, and not a prerequisite to initiate proceeding in Family Law
11. That a claim that either domestic violence or child abuse has occurred is in itself enough to screen a family out of the Family Relationship Centre and referred to the Family law system and to appropriate support services

Training For Family Relationship Centres Advisers

In order to better identify domestic violence and child abuse, Family Relationship Centre staff will have to be trained according to standards currently in existence in the domestic violence and child support sector.

WESNET recommends that women’s organisations with extensive experience in providing services to women and children escaping domestic violence be consulted in designing and providing the training for the Family Relationship Centres. Such training should include: domestic and family violence, child abuse, the interaction between domestic and family violence and child abuse, the impact of domestic violence *on* children (including of the impact of witnessing domestic violence) and the increased risk of violence during separation. The training should also include cultural diversity issues, Aboriginal issues and same sex couple issues.

Family Relationship Centres should also be aware of the need for using interpreters for clients of non english speaking backgrounds. Interpreters should be provided at no cost to the client.

The evaluation proposed for the initial 15 centres must include indicators that reflect the extent of this training, where the training was obtained and how work practices reflect this training.

Recommendations

12. That screening tools be developed in consultation with existing domestic violence services
13. That training comprehensive training in relation to domestic violence and child abuse be developed in conjunction with existing domestic violence and child protection services
14. That such training be compulsory for all Family Relationship Centres advisors
15. That community services experienced in domestic violence and child protection be included in the evaluation of Family Relationship Centres
16. That if a client of the Family Relationship Centres, who has not initially disclosed domestic violence, discloses it during the process of developing a parenting plan or afterwards, the plan will **not** be considered a starting point for subsequent disputes under Family Law

Domestic Violence, Child Abuse and the Family Law System

The Family Law system as it currently stands is not adequate in protecting women and children escaping domestic violence and child abuse. In its ruling of 1988, the High Court established that the interests of the child are paramount in determining contact, and this is reflected in the current wording of the Family Law Act. However, in practice, allegations of child abuse and domestic violence are often rejected as false by perpetrators and judges, while mothers are perceived as paranoid and vindictive.

Research has shown that where allegations of child abuse are made in the Family Law Court, approximately 10% of these are proven to be false, a proportion no higher than in any other reporting structure (Hume 1997 and Brown et al 1998)

The Child and Family Violence Unit at Monash University in Victoria reported on a sample of 20 Victorian families where significant child maltreatment had been substantiated. The research found that domestic violence was identified in 60% of the cases. In an Australian study of 206 cases of child abuse, domestic violence was found to exist in 40% of the instances of sexual abuse and 55% of the physical abuse cases (Goddard and Hiller, 1993). An examination of 50 cases where allegations of child sexual abuse had been made in the context of proceedings in the Adelaide Registry of the Family Court of Australia revealed that:

- 68% of the 50 cases included additional allegations of inter-spousal domestic violence
- 32% of the 68% described the inter-spousal domestic violence as chronic and severe
- In 42% of the 50 cases, the child sexual abuse was confirmed by investigators. (Hume 1998)

However, if the basis for determining child residency is the *best interest of the child* surely we are obligated to assume a child is in danger until domestic violence or child abuse allegations are investigated, as the consequences of not believing these stories are so extreme. Can we justify dismissing such allegations on the premise that they might be untrue when the consequences for women and children are so dire, and the evidence base supports the truth of the majority of accusations?

In her 2003 report on the safety of children in the Western Australian Family Law Courts, Susan Jenkins highlighted the hostility many women face when trying to protect their children from further abuse. She reports that mothers are described as “angry and aggressive, paranoid, and neurotically overprotective”. A perception promoted by some advocates for father’s rights, and perpetuated by the practices of the Family Law system, is that accusations of domestic violence or child abuse are used by women to prevent access to children. As Jenkins notes, however, “disclosure itself is regarded as a highly probable indicator of sexual abuse” (Jenkins 2003).

Kathryn Rendell’s research in 2000, showed that “fear of trauma, risk of not being believed, fear of the perpetrator and limited support” were the most dominant barriers to reporting abuse on contact visits (Rathus et al, 2000). By creating a system that punishes those who cannot substantiate reports of domestic violence and child abuse, this fear will be increased. A lack of formal communication channels between the child protection system and the family law system may mean that incidences of child abuse may be reported in one system and ignored in the other (Brown et al 2001).

Punitive measures against residential parents

Wesnet is extremely concerned at the punitive measures against residential parents (mostly mothers) proposed in the discussion paper, specifically the awarding of cost against parents who make “false allegations” of abuse and the changing of residency orders in case of breaches (discussed later).

Domestic violence and child sexual assault cannot always be proven for a number of reasons. They are crimes mostly occurring in the privacy of the home, often with no witnesses. Forensic evidence is not always available, and often the prosecution can only rely on the word of the victim. However, the fact that allegations cannot be proven does not mean that they did not occur or that the allegations were false or malicious.

Punitive measures, such as awarding costs against parents who make ‘false’ allegations of domestic violence or child abuse, or who support their children’s claims of abuse, will result in fewer women and children exposing the violence. This may not only negatively impact on the screening process of the Family Relationship Centres, but also expose more children to further abuse by the perpetrator.

Wesnet is deeply concerned by the lack of recognition of the implication and extent of domestic violence in child residency disputes apparent in the Discussion Paper. The strong emphasis on shared parenting and the sidelining of domestic violence do not allow for the recognition that witnessing domestic violence is in itself a form of child abuse, nor are the proven links between domestic violence and child abuse explored in any way.

Recommendations

17. That claims of domestic violence and child abuse be investigated by the Family Law Court following the Project Magellan and Columbus model
18. That costs are not awarded against parents who make “unproven” allegations of domestic violence or child abuse
19. That witnessing domestic violence is recognised as a form of child abuse at the hands of the perpetrator of the violence

Amendments to the Family Law Act

Shared parental responsibility and equal time

WESNET is deeply concerned about the proposal to amend the Family Law Act to make equal shared parental responsibility a rebuttable presumption and to require consideration of equal time.

This in practice brings in through the back door the Rebuttable presumption of 50/50 residence that was rejected by the House of Representative Standing Committee Report “Every picture tells a story”. Equal shared parental responsibility and equal time are not necessarily the best outcome for all families in all circumstances. It is important that magistrates and judges retain the principle of the best interest of the child as the ultimate criteria on which to base decisions. The best interest of the child must be established prioritising the safety of the child and of all parties.

For women and children experiencing domestic violence, both equal shared parental responsibility and equal time will have a detrimental effect on their lives, as they will be used by the perpetrator to continue controlling and abusing them, as contact often is already. The requirement to consult will be certainly used to maintain control over women and children after separation.

The months following separation present the period of greatest risk to women of death or serious injury (McMahon & Pence, 1995, Mouzos and Makkai, 2004) yet at this time of heightened danger, the victimized woman is expected to negotiate arrangements of contact and residence (Pagelow, 1993). This is a context in which abusive spouses can use issues of contact and residence to continue to exercise coercive control over their partners (Katzen and Kelly 2000). It is also a context in which it is frequently assumed that separating couples can put aside their differences ‘for the sake of the children’ an assumption which does not reflect understanding of the nature and dynamics of domestic violence, and which can result in an abused woman being labeled as ‘hostile’ within the legal system because of her attempts to protect her children and herself from violence. (Laing 2000).

We are aware that the Government states that the proposed provision in Family Law reinforcing equal shared parental responsibility and equal time will be subjected to the need to protect children from harm and will not apply in case of violence or child abuse. However we are again not convinced that screening will be that effective.

Moreover it is not clear what requirements will need to be met for the Court to be satisfied that there is evidence of violence, abuse or entrenched conflict to reverse the presumption. As mentioned above domestic violence and child abuse are often difficult to prove to a criminal standard. Often the women

and children have not sought external help or talked to anybody about the abuse due to fear and shame. Emotional and psychological abuse are particularly hard to prove, as they leave no visible signs.

Women need to be protected from post-separation abuse too and there does not seem to be any measure in the proposed changes to Family Law supporting women's right to safety if equal parental responsibilities and time are implemented in the context of a violent relationship.

As discussed above the requirement to attend a joint dispute resolution session with a parenting adviser at a family Relationship Centre or other provider before being able to take an issue to Court will also greatly disadvantage women in situation of domestic violence who have not been screened out or who are not believed by the Family Relationship Centre about the violence/abuse.

Recommendations

20. That shared parental responsibility is not made a rebuttable presumption in Family Law
21. That equal time is not made a compulsory starting point in Family Law
22. That each child situation is considered on a case by case basis
23. That Parenting orders must safeguard the safety of the residential parent as well as that of the child

Changes to enforcement provisions in the Family Law Act (breaches)

The punitive approach against residential parents, mostly mothers and the myth of false allegations and vindictive mothers is again apparent in the Discussion paper approach to breaches of Contact Orders. While evidence disputes these myths, as discussed above, research support the view that often abusive parents use Family Law proceedings to continue harassing their ex-partner. A study of breaches applications brought by non-residential parents found that the majority were found to be without merit (Laing, 2003).

We think it is absolutely absurd to consider changing the parenting order in relation to which parent the child lives with because of breaches.

The decision as to which parent the child lives with should always be made with the best interest of the child as the paramount consideration, which is not going to be applied if this reverse happens for no other reason than breaches. A number of issues need instead to be considered in relation to who the child lives with, including first of all safety of the child, the child relationship with the parents, the child's wishes, practical issues such as school and support networks, if other siblings are present etc.

Research (quoted above) proves that false allegations are relatively rare in Family Law. On the contrary women and children find it hard to express their concerns against a pro-contact culture (Jenkins, 2003), and domestic violence is often not considered relevant to child custody disputes (Laing, 2003).

Women sometimes breach the order in order to protect themselves, but more often their children, from violence and child abuse occurring either at change over or during contact time. Again it is not easy to prove to a criminal standard that abuse took place, but that alone should not invalidate the claim and make it a false allegation.

This provision means that women that act in such a way to protect their children, will instead be punished by losing residency and the children will be put at a greater risk of harm. It becomes practically impossible for a protective parent to take seriously and act on her child's allegations that s/he has been abused during contact, without risking losing the child to the abusive parent altogether.

Instead of implementing these punitive proposals, Wesnet recommends that the Government put in place effective and efficient measures to investigate domestic violence and child abuse swiftly within the Family Court system, as will be discussed in relation to the New Zealand legislation below.

Contact Issues for Non - Residential Parents

While in the discussion paper much is made about residential parents (usually mothers) breaching Contact Orders, there is nothing about the more common scenario where the non-residential parent (usually fathers) does not exercise his contact privileges.

We are aware of a number of cases where fathers seek increase contact, but when that is granted they are not interested in exercising it.

Increased contact may cause a reduction of Child Support payment or Centrelink benefits paid to the primary carer, and in some cases this seems to be the main motivation for the father to seek it, as then there is no further interest in the child.

In other cases contact is only exercised sporadically, at the whim of the non-residential parent. However the residential parent still has to make the children available for contact according to the Contact Order, or risk being in breach of the order.

The fact that a father does not turn up at the appointed time or at all to exercise contact creates practical disruption to the primary carer and emotional distress and frustration to the children. However, this is rarely if ever considered a just reason to modify the Order and reduce Contact.

Recommendation:

24. That when Contact is frequently not exercised without a valid reason, the Family Court will consider varying the Contact Order in such a way that it reflect the actual level of contact that is taken up by the non- residential parent

International Legislation

Wesnet is against the inclusion of provision similar to the Florida legislation in Family law.

We believe that such provisions would be used to disadvantage parents trying to protect children experiencing abuse at the hand of their partner/ex-partner, or trying to protect themselves from ongoing domestic violence.

Women may have very good reasons, such as being fearful of their ex-partner because of violence or having great concerns regarding the safety of their children, for not wanting to facilitate contact with the other parent. On the other hand, an abusive partner will have no qualms in granting contact to a non-abusive partner, they may even see this as an opportunity to continue harassing them.

Wesnet would instead encourage the Government to introduce in the Family Law Act a provision similar to the New Zealand legislation, that provides for a rebuttable presumption of no custody and no unsupervised contact where a parent has been established to have been, on the balance of probabilities, violent to the other parent or to the child (Busch & Robertson 2000).

Such provision, in conjunction with the establishment of an Investigative Unit in the Family Court to look to provide a fast response to allegation of abuse and domestic violence, would go a long way in implementing a “safety first” principle in Family Law.

Recommendations

25. That the Family Law Act be amended to introduce a rebuttable presumption of no residency and no unsupervised contact, where it has been established on the balance of probabilities that a parent has used violence against the other parent or a child of the family
26. That an investigative unit is established in the Family Court to investigate and determine allegations of domestic violence and child abuse

Summary of Recommendations

1. That the Family Law Act be amended to include a “safety first” principle as a determinant factor when establishing the child’s best interest
2. That the child’s best interest remains the paramount criterium to determine child custody arrangements according to each family situation, and that no particular model of child custody arrangement is inscribed in Family Law
3. That children are given meaningful opportunities to be heard and for their wishes and concerns to be taken into account
4. That lawyers are allowed to sit in the Parenting Advice session, if the clients so require
5. Failing that, that legal advice is sought before any Parenting Plan is signed
6. That Family Relationship Centre provide the above information to separating parents
7. That Family Relationship Centres restrain from advocating a particular model of child division for all families
8. That best practice learnt from Project Magellan and Columbus is used to develop best practice principles in the new Family Law system
9. That Family Relationship Centres work in partnership with the community and existing services in their local area and with current Family Law Court mediation services which are already set up to respond to domestic and family violence.
10. That attendance at Family Relationship Centres be on a voluntary basis, and not a prerequisite to initiate proceeding in Family Law
11. That a claim that either domestic violence or child abuse has occurred is in itself enough to screen a family out of the Family Relationship Centre and referred to the Family law system and to appropriate support services
12. That screening tools be developed in consultation with existing domestic violence services
13. That training comprehensive training in relation to domestic violence and child abuse be developed in conjunction with existing domestic violence and child protection services
14. That such training be compulsory for all Family Relationship Centres advisors
15. That community services experienced in domestic violence and child protection be included in the evaluation of Family Relationship Centres
16. That if a client of the Family Relationship Centres, who has not initially disclosed domestic violence, discloses it during the process of developing a parenting plan or afterwards, the plan will **not** be considered a starting point for subsequent disputes under Family Law
17. That claims of domestic violence and child abuse be investigated by the Family Law Court following the Project Magellan and Columbus model
18. That costs are not awarded against parents who make “unproven” allegations of domestic violence or child abuse
19. That witnessing domestic violence is recognised as a form of child abuse at the hands of the perpetrator of the violence
20. That shared parental responsibility is not made a rebuttable presumption in Family Law
21. That equal time is not made a compulsory starting point in Family Law
22. That each child situation is considered on a case by case basis
23. That Parenting orders must safeguard the safety of the residential parent as well as hat of the child
24. That when Contact is frequently not exercised without a valid reason, the Family Court will consider varying the Contact Order in such a way that it reflect the actual level of contact that is taken up by the non- residential parent
25. That the Family Law Act be amended to introduce a rebuttable presumption of no residency and no unsupervised contact, where it has been established on the balance of probabilities that a parent has used violence against the other parent or a child of the family
26. That an investigative unit is established in the Family Court to investigate and determine allegations of domestic violence and child abuse

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