



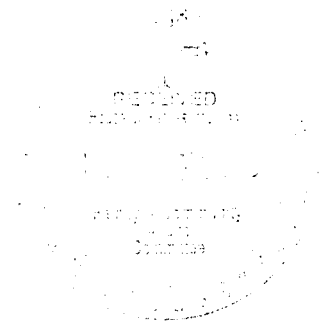
House of Representatives Standing Committee
on Family and Community Affairs

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**Submission of the NSW Immigrant Women's Speakout Association to the
Inquiry Into Joint Residence Arrangements In The Event Of Family Separation**

Soraya Kassim
Chairperson

Prepared by: Monica Mazzone

Contact Person: Monica Mazzone
Organisation: Immigrant Women's Speakout Association
PO Box 31, Harris Park, NSW 2150
Telephone: 02-9635 8022
E-mail: dv_policy@speakout.org.au

Introduction: Immigrant Women's Speakout Association of New South Wales

Speakout is the NSW peak body representing immigrant and refugee women's issues, needs and ideas. As a peak body, its major responsibility is advocacy with and on behalf of Non-English Speaking Background (NESB) immigrant and refugee women on issues of concern. Speakout's current priority policy areas are domestic violence, employment, education and training.

Website: www.speakout.org.au

Speakout welcomes this opportunity to provide input in the inquiry on child residence arrangements after separation.

In the past years Speakout has either developed or contributed to a number of relevant submissions, including:

- Welfare Reform – Working Age Task Force 2003
- Senate Inquiry on Poverty in Australia 2003
- Family Law Pathways Advisory Group September 2000
- Evaluation of Domestic Violence Provisions, Department of Immigration and Multicultural Affairs, September 1999
- Apprehended Violence Orders: A Review of the Law - a Discussion Paper, NSW Attorney General's Department, September 1999.
- Property and Family Law: Options for Change - a Discussion Paper, Commonwealth Attorney General's Department, June 1999.
- Policing and Domestic Violence - a Discussion Paper, NSW Ombudsman, July 1998

Many of our clients have separated from their partners or are in the process of doing so, usually due to past and /or current domestic violence issues. We have included case studies from our own client base, providing fictitious names.

Concerns regarding the introduction of rebuttable presumption of joint residence in the Family Law Act

Speakout has grave concerns regarding the proposed introduction of a rebuttable presumption of joint residence in the Family Law Act.

Our concerns are as follows:

1. Child's best interests as focus of the proceedings

The child's best interests should remain the focus of the Family Court.

Currently the child's best interests are the focus of the Family court proceedings. The current legislation already takes into account the relationship of the child with each of their parents when determining issues of residence and contact.¹

With this proposed amendment, the focus is shifted to parent's rights instead, which may cause increased litigation, with all its financial and psychological costs, and uncertainty for all concerned and may not necessarily be in the best interests of the child. Moreover the factors that must currently be considered before deciding on child residence, (such as child's wishes, capacity of parents to provide for the needs of the child, practical issues, and cultural diversity issues) will be ignored.

2. Assessing each case on its own merits

Each individual case should be assessed on its merit as in current legislation. The proposed bill instead suggests a one-size-fits-all approach. This is problematic for all cases but

particularly so when the child involved is from a migrant background or from a mixed marriage. It is essential that the child's cultural, religious and linguistic needs and their experiences be taken into consideration on a case by case basis, which can only be done if the proceedings are focused on the child and not on the perceived rights of the parents.

In many NESB communities it is the mother's job to take care of the children, especially when they are young. In some cases the father may not have the necessary knowledge and skills. Moreover there does not seem to be any age consideration in the proposed amendment. The emotional and physical needs of a baby or very young child are usually best responded to by the mother, e.g. breastfeeding. It is worth noticing that many cultures extend the breastfeeding period for a longer time than what might be considered normal in Western culture and therefore a 50/50 residence would not be appropriate in such cases.

For recently arrived migrant and refugee children whose parents separate, a rebuttable presumption of joint residence could be very destabilizing. These children already have to adjust to life in Australia and get settled in their new community. It would be quite difficult to have to settle in two houses and two communities, possibly not close to each other, at a time when so much is already going on in their lives.

In case of family reunion sometimes the parent that came first to Australia has not seen the children for a long time. If the family reunion is not successful and the parents separate, it would be unreasonable to expect the children to spend half of their time with a parent they are not used to. While the current legislation allows for looking at the child's best interests in their unique context, the proposed amendment with its one-size-fits-all approach does not allow for cultural diversity issues such as these to be considered.

3. Constrains preventing the rebuttal of joint residence

While the presumption of joint residence is rebuttable, it is debatable how many women would be able to afford legal proceedings to rebut this, particularly in the context of difficulties in accessing Legal Aid in Family Court matters. Financial constraints may make the rebuttal of joint residence impossible, especially for women of NESB background who often experience financial difficulties, particularly if recent arrivals to Australia².

Moreover, women from NESB background face great barriers accessing the Family Court, including lack of English proficiency, lack of information about Court processes in community languages or in plain English, lack of understanding of the legal system, lack of qualified female interpreters and lack of cross cultural awareness for Court staff³.

These barriers are even harder to overcome for refugee women, who due to the experience in their home country are scared of and intimidated by authorities and Courts.⁴

It would be exceedingly hard for a NESB mother with scarce financial resource and scarce knowledge of the Australian legal system to rebut a joint residence arrangement, if she thought that the arrangement would not be in the best interests of the child or even if she thought it would pose a grave risk to the child's safety due to child abuse and domestic violence.

4. Child safety, Domestic Violence and Child Abuse

It is of grave concern that the proposed amendment does not address issues of child safety, including domestic violence (DV) and child abuse. The ABS 96 Women's Safety Australia survey found that 23% Australian women experience abuse from partners as adults in their lifetime, but this figure is nearly doubled if we consider only divorced/separated women: i.e. 42% of divorced/separated women experience abuse. Abusing men often use contact with

the children as a way to keep abusing and intimidating their ex-partner. Links between Domestic Violence and child abuse have also been established, ranging from emotional abuse due to witnessing DV against the mother to child physical and sexual abuse.⁵

It has also been proven that child safety can be compromised in the current Family Law system⁶, as the right to contact is often given priority over the safety of the child, resulting in inappropriate contact orders that put children and mothers at risk being granted, especially at the stage of interim orders. There are concerns that the Family Law Reform in 1995 has introduced a de facto presumption in favour of contact, even when this jeopardises the safety of the children or of the residential parent⁷. It has also been established that the interaction of State Child Protective Services and the Family Law Court results in allegations of child abuse not being promptly investigated or being dismissed as a "strategy" to get residence. We are concerned that a rebuttable presumption of joint residence would put these children and their mothers even more at risk, while mothers experiencing domestic violence may be unable to meet the standard of proof necessary for rebutting this presumption, especially given the difficulties in accessing Legal Aid and the above mentioned barriers facing NESB women accessing the Family Court.

As we have seen repeatedly in our casework, violent men use contact and shared parenting as a way to continue the abuse⁸. This would be even worse if they were granted joint residence.

Case Study 1

██████ is an Asian born woman married to an Australian citizen of Asian origin. They have two children, a 6-year old boy and a 9-year old girl. After a serious incident of domestic violence she left her husband. She applied for an ADVO against her husband and got accommodation at a refuge. Later, she was able to negotiate for rent assistance from Centrelink and got a unit for herself and her children. ██████'s husband insisted to have contact with their children and she was pressured by his family and friends to allow him to see the children.

██████ found out from her children that during the contact time her husband constantly threatened their children. Her husband told their children that if ██████ would not withdraw her ADVO application, they would be sent back to their country of origin. From then on the children were irritable and angry with ██████. Her husband was using contact to continue abusing her emotionally and psychologically as well as creating conflict between ██████ and the children.

Case Study 2

██████ is an Asian born woman married to an Australian citizen of Asian origin. They have a 4-year old daughter. She asked for separation from her husband who had been violent towards her. For example he used to arrive home drunk and throw objects such as cutlery at her and at the child too. After four months of separation, her husband applied for joint residence of their daughter. Her husband's application for joint residence was granted by the Family Court.

During the days when the child was with the husband, it was ██████'s mother-in-law and sister in-law who picked the child up. After two months ██████'s daughter complained about her father's negative attitude and the nagging of her grandmother and aunt. The child narrated how her father kept on drinking heavily

and ignoring her, and her grandmother and aunt blamed [REDACTED] about the break-up of the marriage. The mother in law complained that because of [REDACTED] not looking for work after the birth of the baby and because of her nagging, her son's mental illness got worse. At this point [REDACTED] discovered her husband suffered from schizophrenia, that he had had delusions that the baby was "evil" when she was born and had felt an impulse to harm her. Thelma complained about this to the Family Court and was granted sole residence.

Case Study 3 (from Reconnect Youth and Family Services)

[REDACTED] is an Asian woman married to an Australian husband. They have 3 children. The husband is abusive towards the mother, including physical and emotional abuse and keeps trying to separate her from her family support back in her home country. The children are often witnesses to the violence.

After years of putting up with the violence [REDACTED] leaves. She is granted residence of the children and her husband is granted unsupervised overnight contact every second week-end and half of the school holidays. The husband uses contact to set up the children against the mother and abuses them emotionally. He repeatedly lies to the children, telling them that their mother is a prostitute and does not love them, that she has killed 2 other babies (in reality she had 2 miscarriages!) and wanted to abort them too. The 2 younger children (aged 10 and 6) are very traumatised. The eldest child (14 years old at the time of first contact with the youth service) starts acting out, bullying his brothers and copying the father's violence. He is violent towards the younger siblings and verbally abusive toward his mother.

Change-over times are also used by the husband to threaten and intimidate the mother, even when they are organised in public places (such as Mac Donald's).

This case, coming through a youth service, shows clearly how children suffer in these circumstances and how contact is used by the father to keep abusing the mother through the children, with no regard as to the well being of the children. How much worse this would be in a joint residence scenario!

Case Study 4 (personal experience of a community worker in Western Sydney)

I have included this case study, though [REDACTED] is a migrant not of NESB, because it details very accurately how contact is used to continue to harass the ex-partner and especially how the children are affected. [REDACTED] was very keen on her story being told and chose to tell it herself in her own words:

My name is [REDACTED]. I have been separated from my husband since May 2001. Since that time my ex-husband has on numerous occasions used his access visits with the children to harass and intimidate me. The most serious incident occurred in January 2002, when whilst picking the children up from the family home he took the wiper sniper from the garden shed and proceeded to beat me around the face, head and arms with it. After this incident I applied for and received an AVO.

This however did not stop the harassment. On one occasion whilst at our son's soccer match my ex-husband stood behind me and leaned on my chair. I stood up and moved away as I felt intimidated. A short while later I gave my then 7-year-old daughter a box of wipes to clean her fingers with. She walked over to her

father who took them off her and throw them towards me. They hit me on the hand; I said, "that hit me". He said, "you're an idiot and a greedy f_ing idiot". He then berated me for several minutes in front of the children.

In another instance he rang me before returning the children from an access visit to ask me to give him some of his belongings. I was sure from the tone of his voice that there would be trouble when he arrived. I parked the car outside my home and when he arrived I gave him his belongings and told the children to get in the car. Because of my concerns I had placed a small tape recorder in my handbag. He began to shout at me and call me names, he was angry about the proposed property settlement and said that I was ripping him off. I got in the car and he grabbed me by the hair. He told me he would have me beaten up and that he knew the people who could do this. I drove slowly down the street and he eventually let go of my hair. I took the tape to the XXX police station. The police listened and were very sympathetic. However they had to inform me that this could not be used as evidence because I had not informed my husband that I was taping him.

On another occasion after he had picked up the children I drove to my local shopping centre. When I came out he had parked next to me even though there was many other empty parking spaces. Although this seems a minor incident it is extremely intimidating to have someone who has perpetrated such violence against you park their car next to yours.

At our son's Holy Communion he shouted at me in church because I ran out of film for the camera. After the ceremony we went to a restaurant where he continued to call me names even though I tried to point out that it was our son's day and he was distressing him.

I now have a silent number because my husband used the pretence of calling the children to verbally abuse me or threaten me. He now only has phone contact with the children through my mobile phone. He has found two ways of harassing me through this. One, he sends me abusive text messages such as "you are a piece of s__", "you are an idiot" and "you are an old bag". The other way he uses phone contact to abuse myself and the children is to ask our daughter aged 8 years to phone me, then he shouts "tell your mother" and then commences to shout a string of abusive comments which she is supposed to relay to me. She finds this very distressing. However she is too afraid of him to refuse.

Although I don't doubt that the children love their father they dislike visiting him. They tell me he shouts at them all the time. They beg me not to tell him the things they say because he'll get angry.

Our daughter would tell me she does not want to go to her father's and then say, "promise you won't tell him or I am dead". This is very much the role of a victim of domestic violence, walking as they say on eggshells for fear of upsetting the perpetrator. I believe that our daughter has already assumed the role of a domestic violence victim.

The children have told me about several incidents that have occurred during access visits that I am concerned about. However I feel helpless to protect them. When I have tried to talk to him about the children's concerns he has called me an idiot and berated the children at the next access visit.

If I were to complain to the father I believe he would call me an idiot and then berate them. If I were to complain to DOCS and they investigated, then I believe the children would be punished (by the father).

There is a real concern that women may decide to stay in a violent relationship rather than risking losing their children or exposing them to harm during the time the children have to spend with a violent father without supervision.

We are also concerned that Local Courts would be more reluctant to include children in a mother's ADVO if there was a joint residence order in place in the Family Court.

5. Prior involvement in child care and voluntary cooperation

Joint residence works best for couples where the father was actively involved in the care of the child before the separation and where parents can communicate and cooperate voluntarily. These couples do not tend to go to Court but make their own arrangements. The families where residence and contact issues are finalized by the Court are families where there was and there is no cooperation and communication, therefore joint residence is unworkable. They are often families with unresolved DV and child abuse issues.

Moreover, parenting patterns have not changed significantly and mothers remain in general the primary care givers to their children. They are the ones that give up or reduce work and career options as well as immediate and lifelong earnings. It is their labour force participation, not the fathers', that is still shaped by child bearing and caring responsibilities.⁹

There are no reasons to expect roles would change significantly after separation. Parenting roles and child caring behaviour before separation should be taken into account on deciding matters of residence and contact. The fact that most children reside with the mother after separation is not a bias of the Court against fathers, but simply a reflection of the fact that mothers still are the primary caregivers of children in our society. Current Law can already give fathers sole or joint residence where this is in the best interests of the child or where he has been the primary care giver.

6. Practical and financial issues

The proposed amendment does not take into consideration practical and financial issues that would have to be addressed for a joint residence arrangement to be successful. These include the need to set up 2 homes with rooms and equipment for the children, and the problems that may arise when the parents do not set up home close to each other. Many women are poorer after separation or divorce and cannot afford to keep residing in the area they were living during the marriage. In some cases they may want to live away from the other parent due to issues of abuse or simply to be close to extended family and support networks. This is particularly relevant for NESB women, especially if recently arrived in Australia. For these or other reasons, the parents may not be living close to each other. This presents a number of problems in relation to joint residence, such as the child being able to attend school easily, continuity of access to other services (e.g. childcare or doctor) and the amount of time the child is expected to be travelling between one and the other home.

7. Poverty and single mothers families

Splitting parenting responsibilities 50/50 will cause a reduction in child support payments from payer parents. Most single parents families are headed by women and many already

live in poverty. Women are often employed in part time or casual jobs, especially if they have family responsibilities. As we have seen through the case work of our Skilled Migrant Placement Officer, NESB women face additional barriers in accessing the labour market, including lack of English, lack of qualifications or qualifications not being recognised, lack of support network and access to childcare and lack of transport. A reduction in child support payments would increase poverty for these women and their children as many fixed costs of raising children will not decrease if the children spend more time with the payer parent (e.g. rent, furniture, toys and other equipment).

8. Normative effect of a presumption

Only 5% of separating couples going to Court for child or property issues have their issues settled by the Court. However, should a presumption of joint residence be accepted into Family Law, it would have repercussions far beyond this group of parents, as joint residence would be taken to be the "normal standard" whether it is or not in the best interests of the child. Given the lack of knowledge on Family Court matters and the barriers that NESB women face in accessing legal information and assistance, it is likely that at least some women would be pushed into joint residence agreements irrespective of whether or not those agreements were in the best interests of the child, if they were lead to believe this was the norm in Australia. This is particularly so for NESB women partnered with Australian men, where the knowledge imbalance in relation to legal issues is greatest.

Conclusions

In conclusion residence and contact arrangements need to be in the best interests of the child and decided on a case-by-case basis. Many couples manage to come to fair and amicable arrangements without the involvement of the Court. It is the most bitter and acrimonious cases that are decided by the Court, often cases where violence and abuse are involved, or where parents cannot be cooperative in any way. Such cases are the least suited for joint residence. For migrant and refugee women and children it is also especially important than issues to do with their culture and with their experience of migration be taken into consideration, which can only be provided by a legislation that includes a case-by-case approach.

Recommendations:

1. That the proposed amendment to the Family Law Act to introduce a rebuttable presumption of joint residence be discarded.

2. That instead the Act be amended to introduce a rebuttable presumption of no contact or only supervised contact, where it has been established that a partner has used violence against a child or spouse (as in New Zealand Guardianship Act). Persons who have been found to have used violence would have to prove why they were now safe before contact is allowed. Persons convicted of a sex related crime would not have unsupervised contact under any circumstances.
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We take the opportunity to advise you that we are also interested in being heard at any Public Forum you may hold regarding this matter.

Footnotes

¹ Section 65E of the Family Law Act requires that, when deciding whether to make a particular parenting order in favour of a child, to consider the best interests of that child as the paramount consideration. Section 68F(2) sets out a number of matters that must be considered when determining those best interests. These matters include:

(b) the nature of the relationship of the child with each of the child's parents and with other persons;

(e) the capacity of each parent, or of any other person, to provide for the needs of the child, including emotional and intellectual needs;

(g) the need to protect the child from physical or psychological harm caused, or that may be caused, by:

(i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or

(ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person;

(h) the attitude of the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents

(i) any family violence involving the child or a member of the child's family

² See our submission to the Senate Inquiry on Poverty in Australia, 2003

³ See Maria Dimopoulos, MyriaD Consultants Pty. Ltd. The Family Court of Australia Review of Family Violence Guidelines Consultative Workshops Report, 2002 and the Family Violence Committee Family Violence Consultation Report, Family Court of Australia, June 2003

⁴ Consultation On Family Breakdown Amongst People Who Have Newly-Arrived In Australia As Part Of The Humanitarian Program Issues Paper, 2003

⁵ See for example Marie Hume, The relationship between child sexual abuse, domestic violence and separating families, paper presented at the Child Sexual Abuse: Justice Response or Alternative Resolution Conference in Adelaide, May 2003, or Kaye M, Stubbs J and Tomie J; Negotiating child residence and contact arrangements against a background of domestic violence, Working Paper No 4, 2003, Family Law and Social Policy Research Unit, Griffith University. <http://www.gu.edu.au/centre/flru/>.

⁶ Family Law Council Family Law and Child Protection Final Report 2002; Australian Institute of Criminology Issue Paper no. 91 Child Abuse and the Family Court 1998

Brown T., Sheehan, R. Frederico M. and Hewitt L. Resolving family violence to children: the evaluation of Project Magellan, a pilot project for managing Family Court residence and contact disputes when allegations of child abuse have been made Monash University, 2001

⁷ Family Violence Committee Family Violence Consultation Report, Family Court of Australia, June 2003

⁸ Rendell K., Rathus Z., and Lynch A. An unacceptable risk: A Report on child contact arrangements where there is violence in the family (. Women's Legal Service, Brisbane 2000

⁹ See for example: Time to deliver paid maternity leave, Women's Electoral Lobby (Australia) submission of July 2002 to the Human Rights & Equal Opportunity Commission <http://www.wel.org.au/issues/work/02pmlsub2.htm#rationale>