

From: April_Pham@agd.nsw.gov.au
Sent: Tuesday, 19 August 2003 4:10 PM
To: Committee, FCA (REPS)
Subject: Submission to Parliamentary Inquiry on Joint Residence

Submission No: 1284
Date Received: 19-8-03
Secretary:



Parliamentary Joint
Residence ...

Dear Committee Members,

Please find attached the Violence Against Women Specialist Unit, Attorney general's department, submission to the Parliamentary Inquiry on Joint Residence.

Regards

April Pham
Senior Policy Officer
02 9228 8621

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VIOLENCE AGAINST WOMEN SPECIALIST UNIT

SUBMISSION TO THE PARLIAMENTARY INQUIRY ON JOINT RESIDENCE ARRANGEMENTS IN THE EVENT OF SEPARATION

INTRODUCTION

This submission highlights some of the current concerns of the Violence Against Women Specialist Unit (VAWSU), which is part of the NSW Strategy to Reduce Violence Against Women. The VAWSU consists of 18 Regional Violence Prevention Specialists based throughout NSW, and a team of project and policy officers who conduct statewide campaigns and develop and promote sound policies and practices in the prevention and reduction of violence against women. While the Strategy has a focus on the prevention of violence against women, VAWSU's work involves education campaigns targeting men to challenge violent attitudes and behaviours, piloting programs for perpetrators of violence, conducting work with young people around healthy relationships, and working with children affected by domestic violence.

Although VAWSU does not conduct direct service provision, it is informed of the range of experiences and issues facing women experiencing domestic violence, and accessing the Family Court through its extensive networks and partnerships with the communities across NSW.

The VAWSU appreciates the opportunity to provide input into the Parliamentary Inquiry into Joint Residence Arrangements in the event of Family Separation. VAWSU supports legislative and policy changes that improve the safety of children in the event of separations, as often children are placed in positions where they are vulnerable to further abuse from a violent parent (often the father) through access and joint residence orders.

In the event of separation, VAWSU supports the development of safety mechanisms enshrined in legislation and policy that enforce considerations of the safety of women and children in court decisions around access and residence issues. VAWSU opposes any legislative proposals that provide a legal presumption in favour of joint residence, and contact with parents where there is a history of domestic violence.

It is important that such an Inquiry reinforces the "best interest of the child" principle that is set out in the Family Law Act, and make provisions that protect children from future violence. The safety of children MUST be a paramount consideration in the courts' granting of residence and contact orders.

VAWSU is gravely concerned at the potential for the erosion of the consideration of the rights of children to be safe, being outweighed by considerations of parents' rights to joint residence and contact.

Therefore, VAWSU wishes the Inquiry to consider the following concerns pertaining to the legal presumption of joint residence in the event of separation:

Prevalence and Impact of domestic/family violence

The prevalence and impact of domestic violence cannot be underestimated. Statistics from the 1996 ABS Women's Safety Survey indicate that 23% of women had experienced violence from a current or previous partner.

Therefore it is crucial that the prevalence and impact of domestic violence on families and the community be considered in legislation, policies and court practices to acknowledge the experiences of women and children victims of domestic violence and to promote better access to justice for women and children.

The consideration, when making court decisions around parental orders, of the history of violence is extremely important as women and children are in immense danger in the period during and immediately after separation, which includes the period when women are attending court for contact and residence orders¹. Up to 40% of murders of women by their intimate previous or current partners occur when women are leaving their partners².

Research indicates a definite and high correlation between the occurrence of domestic violence and child abuse. Recently the Victorian pilot Project Magellan, which was a project managing family court residence and contact disputes when allegations of child abuse have been made, documented that domestic violence occurred in 75% of cases involving serious child abuse³.

Increasingly, the Family Court is hearing cases where domestic or family violence is a core issue⁴. The research by Rhoades et al⁵, further indicated the vulnerability of women and children and the possible lack of justice for women and children in the Family Court.

Thus it is pivotal that mechanisms are in place to ensure the safety of women and children engaged in family court proceedings.

Current operations of parental orders/effectiveness of orders

Since the 1995 reforms to the *Family Law Act 1975 (Cth)*, which gave children a right to have contact with their parents, many fathers, and indeed some members of the legal profession including the judiciary, have interpreted these reforms as giving fathers a right to have contact with their children. In Victoria, contact applications doubled from 12,646 in 1995 to 24,681 in 2000⁶. The research by Rhoades et al.⁷ also indicates a strong shift in favour of contact orders since these reforms.

Some judicial officers display a lack of understanding of the impact of violence on children and at times have failed to provide protection for children when they make orders awarding the violent partners with rights to contact.

There is much anecdotal evidence of cases where the safety of the child and the history of family violence have not been adequately considered. Women have expressed enormous anxiety and grave fear when the court has granted a contact order in favour of the violent

¹ Hore, E, Gibson, J and Bordow, *Domestic Homicide, Family Court of Australia*, Research Report No 13, March 1996.

² Mouzas, J, *Femicide: The Killing of Women in Australia 1989-1998*, Australian Institute of Criminology, Canberra, 1999.

³ Brown, T, Sheehan R, Frederico M, and Hewitt L, *Resolving Family Violence to Children: The Evaluation of Project Magellan*, Monash University, Melbourne, 2002.

⁴ Rhoades, H, Graycar R and Harrison M, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, legal Practice and Community Expectations?*, 2000.

⁵ Rhoades, H, Graycar R and Harrison M, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, legal Practice and Community Expectations?*, 2000.

⁶ Family Court of Australia, *Annual Report*, Melbourne 2001.

⁷ Rhoades, H, Graycar R and Harrison M, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, legal Practice and Community Expectations?*, 2000.

partner. This can place women in a position where they may breach the order by refusing to allow contact due to fear for the safety of their children.

Protecting the interest and safety of children must be a paramount consideration in matters where there is a history of family violence, over and above the rights of parents to contact.

The delays in reaching final hearings and the readiness of the Family Court to grant interim orders that maintain existing residence and contact arrangements until the final hearing is a practice that jeopardises the safety of children and undermines the legislative requirement under s65E of the *Family Law Act 1975 (Cth)* to consider the best interest of the child in family law orders. The readiness of courts to grant interim orders to maintain stability for the child/ren often means the history of violence and the impact of violence on children is not considered as it not called into evidence. In final hearings, a Family Report is also called for, which advises the court of the existence and impact of family violence. The research by Rhoades et al.⁸ indicate that in fact, judges do make 'no contact' orders at final hearings when they have the opportunity to consider all the evidence of domestic violence and the impact that such behaviours have on children. Thus, it is advantageous for the safety of women and children for the matter to be progressed to the final hearing where evidence of domestic violence can be properly heard and considered.

Many women and advocates complain that the violent partner has used the court process as an extension of his power and control tactics to intimidate and coerce women into arrangements that are disadvantageous to women and their children's interest. For example, demanding that children be placed in childcare or day care facilities only, and not accepting the care of children by other support systems that women may employ. Women have complained that the violent partner has used the contact situation itself as a way to continue contact with and abuse the woman.

Court processes, including 'contravention orders' are used as tools to exact power and control over women. There is evidence of an increase in the number of contravention orders as a result of allegations of a breach of the contact order (from 786 orders filed in 1996/1997, to 1976 in 1999/2000). In 89% of cases, these orders were filed by the fathers. Many of these cases are unsubstantiated (62%) and such applications are used as a tool to harass the woman⁹.

Risk of Further Violence

A presumption in favour of joint residence in the event of separation gravely jeopardises the safety of children. The operation of such a presumption would mean that children may be exposed to further violence and forced to live with violent parents. Such a presumption also exposes women to be manipulated by violent ex-partners to reconcile the relationship, or forced to endure seeing their children exposed to the violence which they had hoped to escape by leaving the violent partner in the first place.

Also, as it is in its current form, there is growing concern that women are granted orders that do not take into consideration the history of violence and thus such orders may fail to protect

⁸ Rhoades, H, Graycar R and Harrison M, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations?*, 2000.

⁹ Rhoades, H, Graycar R and Harrison M, *The Family Law Reform Act 1995: Can Changing Legislation Change Legal Culture, Legal Practice and Community Expectations?*, 2000.

women and children. There is also alarming physical and verbal abuse and intimidation happening at the contact changeovers, and more often than not, the contact orders fail to take this into account.

This increase in violence at contact changeovers is consistent with international trends. Particularly, research in England and in Denmark indicate that contact changeovers are increasingly becoming dangerous encounters for women and children¹⁰.

Therefore, if anything, further provisions are needed to ensure the safety of women and children in the event of separating from violent partners, rather than the employment of provisions such as a presumption in favour of joint residence, which would put children at further risk of violence.

Undermining the provisions of the *Family Law Act 1975*

The legal presumption of joint residence of children in the event of separation severely undermines provisions set out in the Family Law Act that promotes “child’s best interest”. Currently, in making parental orders, the Family Court must consider factors set out in s68F of the *FLA* which includes:

- Any expressed wishes of the child;
- The need to protect the child from physical or psychological harm;
- Any violence which has occurred.

These factors clearly highlight the court’s recognition of the impact of domestic/family violence and the courts desire to provide protection for children affected by domestic/family violence.

Recommendations:

VAWSU recommends that factors in s68F of the *Family Law Act* be maintained.

VAWSU would endorse a legal presumption of NO RESIDENCE (or NO JOINT RESIDENCE) or NO CONTACT to the offending partner where there is a history of domestic/family violence.

VAWSU recommends that where ACCESS is considered, that it be SUPERVISED ACCESS.

Contact: April Pham

Position: Senior Policy Officer

Tel: 02 9228 8621

Email: april_pham@agd.nsw.gov.au

Contact: Gaby Marcus

Position: Manager, VAWSU

Tel: 02 9228 8081

Email: Gaby_Marcus@agd.nsw.gov.au

¹⁰ Radford, L, and Hester, M, *Domestic Violence and Child Contact Arrangements in England and Denmark*, The Policy Press, UK, 1996.