



SPARK

RESOURCE CENTRE INC.

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The Secretariat
House of Representatives Standing Committee
on Legal and Constitutional Affairs
Parliament House Canberra ACT 2006
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Dear Secretariat

Please find attached the submission of SPARK Resource Centre Inc to the inquiry into the provisions of the Family Law Amendment Bill 2005.

This submission addresses the terms of reference which are drafted to implement the measures set out in the Government's response to the House of Representatives Standing Committee on Family and Community Services inquiry into child custody arrangements in the event of family separation, titled *Every Picture Tells a Story*, namely to:

- a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate
- b) promote the benefit to the child of both parents having a meaningful role in their lives
- c) recognise the need to protect children from family violence and abuse, and
- d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

SPARK believes it is crucial the Committee not to re-open discussions on policy issues such as the rejection of the proposal of 50/50 custody in favour of the approach of sharing of parental responsibility.

SPARK would like the opportunity to support this submission with oral evidence.

Yours faithfully

Kath Silard OAM BA SRN PRN
Director

About SPARK Resource Centre

History

SPARK was originally the Council for the Single Mother and her Child. The Council lobbied for economic, social and legal justice for single mothers and their children, eventually helping to get the Supporting Mothers Benefit in 1973. We changed our name in 1979 because our service had extended to include men as well as women sole parents.

Vision / Mission Statement of Organisation

SPARK Resource Centre Inc aims to resource sole parents and pregnant women through information, counselling, practical support and self-help strategies in a community setting to promote positive participation by sole parents in family life and within the wider community. SPARK aims to promote and foster understanding and acceptance of sole parents and their children by the community in order that they may be free from economic, legal and social discrimination.

Aims

- SPARK is a sole parent agency, which offers practical and emotional support for sole parents and pregnant women.
- It actively co-operates and offers supports to other agencies who have sole parent clients.
- SPARK aims to foster understanding and acceptance of sole parent families in Australian society.
- To provide resources and encouragement to sole parents to improve their competence and self-reliance in all aspects of their lives.

Objectives

- To break the cycle of abuse and destructive relationships (this includes education of both sole parents and the community about the effects: short and long term of domestic violence).
- Alleviate poverty and advocate with governments re this objective (includes providing emergency relief and free recycled clothes and goods).
- Assist and advocate for sole parents to access all available resources available to them (e.g. housing, education etc).
- To provide appropriate therapy for survivors of abuse.
- To alleviate social isolation and enhance life and parenting skills of sole parents.

This submission makes recommendations on various sections of the Bill taking into account all four criteria of achievement listed below.

- a) encourage and assist parents to reach agreement on parenting arrangements after separation outside of the court system where appropriate
- b) promote the benefit to the child of both parents having a meaningful role in their lives
- c) recognise the need to protect children from family violence and abuse, and
- d) ensure that the court process is easier to navigate and less traumatic for the parties and children.

SPARK believes that two of the terms of reference are confused:

The b) reference ignores the reality that, when parents are hostile, abusive or violent, 'meaningful involvement' of both parents can be (and is likely to be) dangerous and in certain cases life threatening.

The c) reference should also recognise the need to protect the child's family members from family violence and abuse.

Schedule 1 – Shared Parental Responsibility

Content

Item 2 of the Schedule amends the objects provision of Part VII of the Act to provide that, subject to safety issues, children have the right to know and be cared for by both parents.

Comment

SPARK believes that this provision has faith in the good intentions of separating parents, who will be able to co-operate and agree to provide safe care for their child/ren.

In reality, parents separate because of conflict and this conflict includes physical, financial, emotional and sexual abuse. The domestic violence does NOT stop because the couple separate, often it takes a more dangerous aspect including homicide. The Victorian Health Report (2004) indicated that violence is the main cause of illness in women. In SPARK's experience domestic violence (in all forms) occurs in 67% of separating partners. It is CRUCIAL that safety is established and children are able to live without being exposed to violence or parental conflict. Please note the attached excerpt from Childhood Abused: The Pandemic Nature and Effects of Abuse and Domestic Violence on Children in Australia David F. Brown and Zoran Endekov A Report Commissioned by the Alannah and Madeline Foundation

SAFETY has NOT been emphasised in Item 2 and naivety or idealism are not appropriate in legislation.

Family Dispute Resolution (FDR)

Content

Item 9 provides that people applying for a parenting order will be required to first attempt to resolve their dispute using family dispute resolution services. A court cannot hear an application for a parenting order unless the applicant provides a certificate of attendance at family dispute resolution or that failure to do so has been caused by the other party's refusal or non-attendance.

Exceptions to attendance are

1. Where the parties have agreed to consent orders.
2. Once substantive court proceedings have commenced.
3. Where there is or has been family violence or abuse, subject to the party satisfying the court that there are 'reasonable grounds' to believe that abuse or violence has occurred or may occur.
4. Where there is an existing order relating to an issue in a current contravention application and the person has shown 'serious disregard' of the order.
5. In cases of urgency such as relating to location and recovery of a child including cases of child abduction,
6. Where a party is 'unable' to participate effectively in family dispute resolution due to incapacity (significantly intellectually impaired or substance addicted) or physical remoteness without access to a telephone.

Even where a person meets a ground of exemption, the court may still order them to attend family dispute resolution.

Where a party does not attend family dispute resolution due to the existence or risk of family violence or child abuse, parties must obtain information about the issue/s in dispute from a family counsellor or family dispute resolution practitioner before the application is considered by the court.

All applications made after July 1 2008 will need to be fully compliant with these provisions.

Comment

SPARK observes that, again, the issue of violence is treated in a naïve, idealistic way rather than the reality it is for too many women and children. All too often violence is NOT disclosed because both parties minimise it and most organizations/professionals find it challenging to explore this issue. Yet if it is ignored or "reasonable grounds" are left up to individuals to decide, children will be left at high risk: already there are annual reports of homicide after separation ... however, stalking, harassment, belittling and all forms of violence continue AFTER separation. At the present time mothers and their children are NOT protected by the legal system. Item 9 perpetuates the myth that domestic violence is a rare occurrence.

Repeatedly, SPARK is counselling women who have been appallingly attacked (experienced domestic violence) and they are called "liars". Even medical evidence has been ignored because (we think) of the fear of false allegations and

the seeming need to protect fathers' visitation rights and ignoring the very real issue of violence endemic in our communities.

A larger range of indicators of violence/abuse in separated families needs to be provided to the court to support 'reasonable grounds'. These should include but not be limited to:

- allegations of abuse or violence by a party must be followed up immediately***
- children's disclosures of abuse or violence must be followed up immediately***
- any police records, reports, prosecutions, convictions pertaining to violent conduct of a party***
- any mandated child protection notifications against a party***
- any child protection records pertaining to a child of a party***
- any audio or video recording of abusive or violent conduct by a party including threats to harm or kill***
- the existence of a previous or current Restraining Order against a party***
- any witness statements attesting to violent or abusive conduct by a party.***

In addition every member of the family has a right to safety, which should be expressed and provided. The court specifically has responsibility to ensure that its orders do not expose parties or children to actual or threatened harm. When the Court orders expose parties to violence, harm or death then the Court needs to compensate victims.

It is urgent that the Family Law system has the ability, knowledge and power to address family violence. It is crucial that the recommendations of the Family Law Council in its Family Law and Child Protection Report (2002) and letter of Advice on Family Violence under Division 11 of the Family Law Act (2004) should be implemented immediately.

Presumption of Joint Parental Responsibility

Content

Item 11 provides a new presumption for the court to consider in making an order, that parents have joint parental responsibility for the child except where there are reasonable grounds for the court to believe that a parent of a child or a person who lives with a parent of a child, has engaged in child abuse or family violence. The presumption will also be rebutted where the court considers that joint parental responsibility would not be in the best interests of children.

Comment

Parents rarely have equal, joint parental responsibility prior to the breakdown of their marriage. SPARK is concerned that the presumption of joint parental responsibility is too sweeping and does not allow for changes in circumstances: work, illness, loss of interest ... determination of parental responsibility should be examined by looking at the unique circumstances of each child plus each parents'

relationship with the child prior to separation and during separation. We have counselled fathers (and occasionally have them attend classes) who disclosed basic ignorance about their children: health issues, even ages and birth dates, normal child behaviours and having expectations of maturity when the children were under 4 years of age. It is crucial that parents act responsibly towards their children. Evidence of this behaviour can be determined by previous behaviour towards the child. Ongoing contact can also be evaluated: this requires input from children and not just anecdotal evidence. In 2003 I had a father in a parenting class who described his contact with his 7 year old son in glowing terms, I was contacted by welfare agency FACS after the school reported bruising (extensive) and withdrawal behaviour in the boy. He was removed from his father and placed in foster care. Indicators of the circumstances in which joint parental responsibility would not be in a child's best interests should be developed immediately with reference to research evidence and include, in addition to circumstances of violence or abuse, circumstances of; for example

- *substance abuse*
- *significant intellectual impairment arising from disability or illness*
- *continuing high conflict*
- *absence for a significant period from exercising parental responsibility*
- *dangerous driving (including speeding).*
- *not exercising parental responsibility and then expecting (often after an absence of years) immediate "full" responsibility.*

Children's needs to physical and emotional well-being must be a priority.

Substantial Time with each Parent

Content

Item 14 provides that Advisers (as defined in the Bill and including legal practitioners, FDR practitioners, family counsellors) assisting in the making of a parenting plan are required to inform their client/s of the possibility of the child spending substantial time with each of the parties if it is practicable and in the best interests of the child.

Item 23 provides that the court must consider making an order that a child spend substantial time with each parent, if a parenting order provides parents with joint parental responsibility for the child. The court must consider whether both parents wish to spend substantial time with the child and whether it is reasonably practicable for the child to spend this time with each parent and whether it is in the child's best interests.

Comment

Children very often have their own interests, concerns and the assumption that children SHOULD spend substantial time with both parents ignores sporting, health, friendship and interest commitments. There is no indication of how "practicable" will be measured. SPARK has already seen children who are refused access to sporting practice, health appointments, friendships etc because of a lack of understanding and co-operation between parents.

Where a child is pre-verbal, or suffering from a disability it is essential the

Advisers to the Court need to be well informed on the "norms" of emotional and physical development of children. SPARK has seen incidences where toddlers have been exposed to dangerous situations: drug and alcohol use; kept up late (schedules are important for children's well-being and safety); breast feeding babies forced to spend weekends with fathers because of inappropriate orders. Both parents need to be able to provide age appropriate accommodation, food and activities for the children in their care. Attachment behaviour in babies and toddlers needs to be considered.

Children with ongoing medical issues: medication/physio etc need to have their needs full supported NOT ignored. Often children have been returned tired, unwell and agitated. SPARK was asked at a school parenting forum by TEACHERS for strategies to cope with children's exhaustion after visits with their fathers.

Parenting Plans

Content

Parenting plans/orders provide for the time a child spends with particular people, the allocation of parental responsibility, 'other communications' a child is to be made to have, child maintenance and the form of consultation about parental decisions and processes for changing plans by agreement.

A parenting plan will override a prior court order to the extent of any inconsistency.

Parenting plans will also be able to deal with other relatives of the child including step-parents, siblings, grandparents, uncles and aunts, nephews and nieces and cousins

Comment

SPARK agrees supporting parents to agree to processes for consultation and for changing plans where this is possible. It is again concerning that there is no systematic or relevant attempt to include children in the determination of their lives through either parenting plans or orders. Children do have ideas/opinions/concerns, which need to be addressed.

Children's lives can be very traumatic if they are subjected to a constantly changing sequence of plans/orders about their lives. The approach of continual change of plans may in practice inhibit children's capacity to pursue educational and vocational opportunities which rely on continuous participation. Similarly, children with health issues need continuity of health care providers and practice.

There is also a need for children to be able to actively indicate if they experience significant distress arising from the plan/order. It is crucial that there are regular evaluations of orders and their practicality, impact and relevance to children's lives.

If the terms of the plan/order provide for specific purposes of outcome for the child, there should be a review mechanism to check if the anticipated outcomes have actually occurred. If there are any undesirable unintended consequences

arising from the plan/order then it needs to be immediately stopped/evaluated before the child is seriously disadvantaged/traumatised. Currently, when orders are made that children spend time with parents who have been violent or abusive to them or other family members, there is no way to assess whether the order is helping or harming the child.

It is vital that parenting plans are reviewed (at least after 6-12 months) to see if the child's individual needs are being developed or whether the plans have had a detrimental effect on the child. If this is the case new appropriate plans need to be drawn up and implemented

Best Interests of the Child

Content

Items 26 to 36 provide for determining the best interests of the child and include a first tier of two factors – the benefit to the child of having a meaningful relationship with both of her/his parents and the need to protect the child from violence or psychological harm.

The second tier lists factors already existing in subsection 68F(2) of the Act. There is also a new factor to consider the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationships with the other parent.

There is also an amendment providing explicit direction that uncontested or interim family violence orders are not an independent factor in considering a child's best interests.

Comment

Despite the statement about the need to protect the child, these amendments undermine the existing (already) inadequate protections for children and adults from violence and harm in the family law system. The need to protect the child from violence is ignored and considered subordinate to the child's 'benefit' from a meaningful relationship with both parents. When a child is killed by a parent there is no opportunity for a meaningful relationship with anyone. SAFETY for the FAMILY MUST BE THE PRIORITY.

Further the 'friendly parent' provision has been an incredible advantage, where it has been implemented, for parents who use violence or abuse. Parents who use violence and abuse welcome the opportunity to threaten and harm their targets whilst protective parents seeking to avoid threats and injury have every reason to avoid the violent parent.

Violence is expensive emotionally, fiscally (c. an eight billion dollar problem in Australia). It appears that the anecdotal evidence of men's groups has, unfortunately impacted on the government to the detriment of children's and women's welfare. These men's groups pass on false information as reality e.g. "5 men commit suicide a day" ... because of marriage breakdown where as the ABS figures indicate that the TOTAL of people who commit suicide breaks down to 6 suicides a day. These statistics (2003) include women and the all age groups (young adolescents to the elderly) ... yet the publicity of these men's groups is

dangerously promoted as the truth... Women and children remain at HIGH RISK and SPARK is concerned that their needs are being ignored and brushed under the carpet to placate men's lobby groups.

The safety of the child and the child's family should be the first threshold condition of meeting a child's best interests. All considerations of a child's best interests by Advisers and the courts should work systematically through the indicators in this section of the Act.

The 'friendly parent' provision should be deleted at the present time. Parents and children's rights to safety needs to be TOTALLY established.

I have witnessed children begging not to be forced to go on "access" and yet if their mother stops access she is likely to be imprisoned. (In 2004 a mother was gaoled after not presenting her six year old child – who refused to go on access. The child indicated she had been abused by the father.) Older children have been forced into the role of "protector" of younger siblings.

I have counselled parents who have been reviled by their ex-partner causing a huge deterioration in the child's well-being. The motivation was revenge ... just like the motivation for murdering one's children and self is based on a need to inflict revenge. The CHILDREN'S SAFETY MUST BE PARAMOUNT.

Schedule 2 – Compliance Regime

Content

The Bill proposes amendments reflecting changes so that children have a meaningful relationship with both of their parents to the greatest extent possible. Make up contact can be ordered and the Bill provides directions about when the court must consider making a costs Order and/or ordering compensation for costs incurred in relation to contact that did not take place because of the breach. The court is also given broader powers to impose bonds. The Bill clarifies that there is a low standard of proof for compliance matters at the 1st and 2nd stages on the basis that the sanctions are not criminal. If the matter is a stage 3 contravention matter - there is a presumption that the court will order costs against the party in breach unless it is not in the child's best interests.

Comment

These Proposed changes again totally negate the needs of children: when a parent is drunk, on drugs, agitated, verbally or physically abusive it is in NO-ONES interest for the child to have contact. Research is negated or ignored when the capacity to stop access that is detrimental/dangerous to the child is prevented.

In recognition of the popularity of contravention applications being used by ex-partners to legally harass residence parents, all applications for contravention proceedings should place the burden of proof on the party bringing the application. Further penalties should be available to the court when applications are found to be without substance and the party bringing the application is

exploiting the family law system as a form of harassment and control.

It is essential that parents have the ability to protect their children from violence and abuse. This ability to protect children needs to be supported and parents not penalised and put in the position of having to deal with contempt charges.

Schedule 3 – The Conduct of Child Related Matters

Content

The Bill provides for changes in the way child related matters are conducted. These changes are based on the Children Cases program that has been piloted by the Family Court in NSW. They allow for the Court to act in a more inquisitorial manner. Principles are set out in the Bill to guide the Court in a less adversarial approach. These Principles include:-

- Ensure the proceedings are focussed on the child
- The Judicial Officer must control the conduct of the hearing
- Ensure that the proceedings are conducted in such a way to encourage the parents to focus on the children and on their ongoing relationship as parents
- The proceedings should be conducted as expeditiously and with as little formality as possible

This proposed recommendation provides a number of general responsibilities that the Court must carry out to give effect to the principles. This includes considering whether the likely benefits in taking a step in the proceedings justify the costs of taking it.

Significant changes are proposed in relation to the rules of evidence. Even where the rules of evidence in relation to hearsay evidence are applied a representation made by a child about a matter that is relevant to the welfare of that or another child is admissible.

Comment

The focus on the child is a crucial and a welcome change in direction. Yet the capacity for the court to inform itself of the child's circumstances and risks to the child's safety has still to be improved. The recommendations of the Family Law Council's report on Child Protection and Letter of Advice on Family Violence are critical to the court's capacity to know what has happened to the child. All too often the needs of children are ignored or negated, because relevant information is ignored or the implication of the information is trivialised

Implement as a matter of urgency the Family Law Council recommendations on child protection and family law and elevate the right to safety as the first condition of meeting a child's best interests.

Excerpt from:

Childhood Abused:

The Pandemic Nature and Effects of Abuse and Domestic Violence on Children in Australia

David F. Brown and Zoran Endekov

A Report Commissioned by the Alannah and Madeline Foundation

Executive Summary

This report is the result of a joint partnership between staff of the Alannah and Madeline Foundation and academics at La Trobe University, Melbourne. The title of the report Childhood Abused: The Pandemic Nature and Effects of Abuse and Domestic Violence on Children in Australia is intended to draw attention to the widespread and pervasive nature of child abuse. As many authors cited in the report point out, child abuse cuts across all social levels and consequently preventative action is a responsibility to be addressed not only within families but within the broader community. While the report cites an array of data tables the reader should not be distracted from the tragedy that lies behind the statistics.

The aim of this report is to present current data and opinions related to child abuse in Australia. However, it is clear that although there may not be a universally agreed upon definition of child abuse both the data and informed opinion agree that child abuse in Australia is a very significant and alarming social problem. Much of the data and opinion cited in the report relates to behaviours at the level of individual adult caregivers and the effects of these behaviours on the child. However, it is commonly accepted that the ultimate responsibility to provide remediation and preventative responses to the challenges presented by child abuse lies at the level of the broader community and society.

The data indicate tragic levels of child abuse in the Australian community. In summary the child abuse and neglect data indicate that:

- ***there were 198,355 child abuse notifications in Australia in 2002 – 2003***
- ***child abuse notifications increased to 219,384 in 2003 – 2004***
- ***in 2002 – 2003 it was estimated that one child was reported to be abused or neglected in Australia every 2 minutes***
- ***in 2002 – 2003 it was one report of child abuse for every 25 children in Australia***
- ***for every child reported to be abused or neglected, countless others may***