INTRODUCTION

Over the last few years the Women’s Legal Service (WLS) has observed our clients’ experiences in the Family Court and the system which surrounds it with growing alarm. Significant amendments were made to the Family Law Act (FLA) in 1995, becoming operative in 1996, which were supposed to improve the Court’s response to a history of domestic violence. However, as a result of other fundamental changes to the Act and the diminution in the availability of legal aid which occurred at about the same time, we are of the opinion that it has become more difficult for women to raise issues of domestic violence and child abuse in the family law system.

The FLA is only one part of a family law system which also involves the Family Court, Legal Aid, a variety of kinds of mediation services, legal practitioners, Family Report writers, child representatives and other agencies and individuals. This paper seeks to examine some of the major features of the family law system as the WLS observes it from the perspective of our clients.

FEATURES OF THE NEW FAMILY LAW SYSTEM

The following critical features now underlie the new family law system:

1. the philosophy of the Family Law Reform Act (the “Reform Act”), now prescribed by the Act itself, overtly promotes on-going contact by children with both of their parents after a separation;

2. the new terminology in the Reform Act contributes to this approach. The old terms of “guardianship”, “custody”, and “access” have been replaced by “parental responsibility”, “residence” and “contact” and new concepts have been imported with these new words;

3. mediation is now described as “primary dispute resolution” (PDR) and is virtually mandatory before parties can expect a judicial decision;

4. the severe cuts to legal aid funding force women to use informal mediation processes thereby destroying the “voluntary” nature which is espoused as a positive, probably necessary, feature of genuine mediation;

5. fewer women are able to litigate, thereby suppressing the development of jurisprudence relevant to women in the Family Court; and

6. more people - both women and men - are representing themselves in the Family Court. The effects of this on Court administration, the development of jurisprudence and the quality of decision-making has not yet been fully understood or analysed.
THE MEN’S RIGHTS AGENDA

Many of the reforms and changes to process which have been implemented have occurred as a direct result of political pressure from men’s rights groups. It seems to us that, in the mid-1990s, just as the Family Court was beginning to recognise the relevance of domestic violence in cases involving the post-separation arrangements for children, men’s groups and economic rationalism have successfully infiltrated other parts of the law reform process to neutralise this.

An Interim Report published by the Family Law Council (FLC) in March 1998 on *Penalties and Enforcement* in the Family Court called for submissions from women's groups because over 90% of the preliminary submissions which the FLC had received were from men (¶ 2.13). Men have had a successful impact in the political debate about child support and, therefore, most of the reforms which recently been introduced in that area relate to reduction in payments and privatising the scheme, which will render enforcement more difficult.

The latest government discussion paper on *Property and Family Law: Options for Change* promotes a starting point for division of property at 50:50 apparently because many people “believe that decisions about property reallocation are biased towards one of the parties” (p 2). We believe that this document has been strongly influenced by the perceived need to pander to the men’s agenda.

The National Women's Justice Coalition and National Network of Women’s Legal Services have raised their voices in the child support and property settlements debates, but women's groups need to learn to be smarter (particularly at a national level) if we wish to be influential.

UK CHILDREN ACT

The reforms were based heavily on the UK *Children Act* 1989 which had only become operative in the United Kingdom in late 1991. There had been little opportunity for analysis of the social impact of the UK Act and we took the view that the Australian Government was acting with unnecessary haste to embrace untested legislative reform. In 1995 WLS lodged a submission with the Federal Attorney-General about the Bill (ie. the draft Reform Act) and commented on the reliance on the UK legislation:

The *Family Law Act* has now operated in Australia for nearly 20 years. Over that time, an enormous amount has been learnt about the social consequences of the legislation both in respect of arrangements concerning children and financial matters. The Family Court has developed sophisticated systems of case management and policy guidelines as a response to much of what has been learnt. Over the last few years the Family Court has dramatically improved its response to domestic violence by way of guidelines which apply to the operation of the whole of the Court, a number of important judicial decisions and the genesis of a gender awareness programme within the Court. Family Court judges have spoken at conferences on the changing attitude of the court towards domestic violence and have frankly discussed the lack of recognition of this issue in the past.

It therefore seems ironic that at such a critical time in the development of the law and the Court, Australia should throw out its own work, knowledge and expertise and turn to the virtually untried and untested UK *Children Act* as a source for legislative change.
Some commentators in the UK have been studying the operation of the UK Act critically and have noted similar issues to the ones WLS has observed. In a recent article by Professor Carol Smart and Dr Bren Neale they remark:

> In the space of two years cases are being decided in ways completely antithetical to the way they would have been dealt with previously, yet current decisions are always regarded as a sign of the good sense of the judiciary, rather than as shifts in ideology which should be subject to scrutiny. It is our concern that if anyone speaks out against the 'obvious merit' of contact they are now seen as arguing against virtue (p 332).

This is our experience in Australia, particularly within PDR processes. If women commence mediation from a position of wanting to limit contact because there is a history of domestic violence she may be told that it is irrelevant and that raising it will only make mediation and negotiation difficult.

The Smart and Neale article goes on to discuss the "robust" approach to enforcement of contact which is gaining ascendency. Two recent cases are cited where women were jailed for refusing contact. In both cases the fathers were very violent and the children young. In one of the cases the woman was sentenced to 6 weeks' imprisonment, the children were placed in foster care and the father was given contact supervised by social services:

> The judge ruled that it would be far more harmful for the child to grow up without a relationship with her father than to see her mother go to prison (p 334).

We note that the Brisbane Sunday Mail (21 June 1998) reported that a Victorian mother of a 5 year old was jailed for refusing contact. The mother alleged domestic violence and child abuse.

**FAMILY LAW REFORM ACT**

**New Guiding Principle**

One of the positive amendments introduced by the Reform Act extended section 43 of the FLA to include "the need to ensure safety from family violence" as one the guiding principles of the Act. Given this clear policy directive, we would have thought that domestic violence, child abuse and the safety of women and children should have been accorded a high priority in decisions made after the Reform Act became operative. However, this does not seem to be the experience of our client group.

**The Concept of Parental Responsibility**

Before the Reform Act became law WLS was concerned that the mooted proposals would have many unacceptable consequences for women. We saw it as providing opportunities for violent men to harass and retain control over their former partners under the guise of exercising their newly coined "parental responsibilities". Women, on the other hand, would be easily cast as uncooperative and unyielding if their actions to obtain safety for themselves and their children conflicted with the strong philosophy of "sharing".

Our submission about the Bill recorded our concerns regarding the separation of “parental responsibility” from residence. Under the old law custody orders carried with them the right and responsibility to make day to day decisions regarding the welfare of the children. The new proposals...
clearly separated “residence” from “parental responsibility”. All that “residence” meant was that the child lived with that parent. Decision-making was still to be shared by the parents unless the “residence parent” also obtained what was to be called a “special purpose” order.

Where there has been a history of violence, the point of separation is often the most dangerous time for the woman. We submitted that for women with a history of domestic violence, it was essential that any residence order made in their favour also carries with it at least responsibility "for the day to day care, welfare and development of the child". This argument was not accepted and residence orders are therefore significantly less comprehensive than custody orders were. Some women seek “specific issues” orders (for some reason the term “special purpose” was abandoned) which gives them the power to make the day to day decisions while the children reside with them, but women who cannot get Legal Aid are usually unable to negotiate such additions by consent.

Between March 1997 and March 1999 a team from Griffith University undertook research on the impact of the changes to the FLA by interviewing judges, registrars and counsellors from the Family Court, solicitors in private practice, barristers, Legal Aid and community legal centres.

The solicitors specifically identified that the changes had led to an increase in the number of contact applications as well as an increase in the amount of contact sought. One of the solicitors, who takes referrals from men’s rights groups, “said that many fathers who came by this route had a perception that the legislation entitled them to more contact than previously. … the legislation has had the effect that children’s matters were now being perceived increasingly as concerned with parental rights and entitlements” (Dewar and Parker, p 24) This is the complete opposite of the government’s apparent policy objective at the time, which was to reduce notions of ownership in children. However, it is exactly the outcome predicted by women’s groups.

In research currently being undertaken by Regina Graycar, Margaret Harrison and Helen Rhoades on the effects of the changes to the FLA a survey was conducted with 61 family law practitioners in Melbourne in May 1997 (Harrison and Graycar, 1997, p 334). The responses given reveal changes in approach by the lawyers, the parties and the Court. Although four respondents suggested that contact was now "more likely to be set aside or not ordered where there is evidence of violence“ (p 339), other responses indicate increases in shared arrangements and contact:-

I see subtle changes, for example more shared long term and day-to-day care, welfare and development orders (F);

Contact: when matter goes to judicial decision, the judges appear to give much more contact than the "standard" alternative weekends and half school holidays regime - and a lot of times over very strenuous and relevant objections of residence parents (F); and

Impact still evolving. Fathers fighting harder than ever for more involvement in children's lives and for an EQUAL rights approach to children. A lot of litigation about children seems to have been encouraged. It to some extent has been seen as a charter for non-residence parents' rights. Best interests of children perhaps diluted somewhat (F) (p 340).

What Priority has Domestic Violence?
One of the greatest successes of the women’s groups who had been lobbying for change was that the Reform Act included family violence as a relevant factor to be taken into account when deciding what is in the best interests of children in cases about where children live, contact with parents and other people and various other situations (section 68F(2)). It is obvious that where there is or has been domestic violence, this is central to the welfare of children. It should be at the front of all decisions about both residence and contact - whether those decisions are being made by a judicial officer or in the context of some form of PDR.

It may mean that:-

1. the mother feels she is unable to have meaningful ongoing discussions with her former partner about the welfare of the children;
2. the mother fears contact hand-overs;
3. the mother fears for the children's safety while they are with their father;
4. the children are frightened of their father; or
5. contact exchanges are terrifying or traumatic for the children because they do not want to go or because they sense their mother's distress.

In our submission on the Bill we advocated for a qualification on the promotion of on-going contact between parents and children. This was ultimately included in section 60B(2) which states that the principles of on-going contact apply "except when it is or would be contrary to a child's best interests". Although this qualification has proven critical to the interpretation of the Reform Act, in our experience, it has been more difficult for women to obtain orders or agreements which limit or restrict contact since the reforms were implemented.

The Interim Report which has just been released by Graycar, Harrison and Rhoades suggests that it is now very difficult to ensure that domestic violence is taken into account, particularly at interim hearings. A review of judgments from the Family Court showed that:-

... there has been a dramatic reduction in the incidence of orders suspending contact at interim hearings since the reforms were enacted (p 59)

Before the reforms access was suspended in 24.2% of cases at interim hearings. After the reforms that dropped to 3.6%. It is concerning to note that, even since the reforms, no contact is awarded in 22.7% of cases at final hearing (pp 60-61). That means that nearly 20% of the decisions to grant contact at an interim stage are being reversed after the Court has had an opportunity to properly assess the evidence. Such results indicate two things; firstly, allegations raised about domestic violence are generally borne out, and, secondly, children may well be at risk of violence in 20% of cases between the interim and final hearings. This can be or a period as long as 18 months to 2 years.

It is interesting to note that access was suspended in 20.8% of final pre Reform Act hearings. This is less than 4% different from the percentage at interim stage (24.2%) and may mean that better assessments were being made under the old law.
Both the Dewar and Parker Report (p 8) and the Graycar, Harrison and Rhoades Interim Report (pp 54-55) tend towards a conclusion that the principle of the right to contact is significantly more influential than the relevance of family violence.

New Zealand’s Recent Legislative Change

In 1996 the New Zealand Guardianship Act was amended to alter its approach to the relevance of domestic violence in custody and access proceedings. The relevant section of the Guardianship Act applies to all kinds of proceedings relating to custody of and access to children.

Where, in such proceedings, there is an allegation that violence has been used by one of the parties against the child or the other party, the court is required to determine whether or not the violence is proved (section 16B(2)).

Where this is proved, the court shall not-

1. make any order giving the violent party custody of the child;

2. make any order allowing the violent party access (other than supervised access) to that child -

unless the court is satisfied that the child will be safe while the violent party has custody of or access to the child (section 16B(4)).

In considering these matters the court is required to have regard to-

1. the nature and seriousness of the violence used;

2. how recently the violence occurred;

3. the frequency of the violence;

4. the likelihood of further violence occurring;

5. the physical or emotional harm caused to the child by the violence;

6. whether the other party to the proceedings-

   1. considers that the child will be safe while the violent party has custody of or access to the child; and

   2. consents to the violent party having custody of or access to the child;

7. the wishes of the child having regard to the age and maturity;

8. any steps taken by the violent party to prevent further violence occurring; and

9. such other matters as the court considers relevant.
This legislation literally puts the violence at the front of the decision-making process. It ensures a judicial determination on the issue and takes the other party’s perspective into account. Such a law should also ensure that violence is relevant to mediation because all parties would know the legislative framework in which legal proceedings would occur. We have not had an opportunity to explore the practical effect of this provision but it would appear to answer many of our concerns. At the 8th National Family Law Conference held in Hobart in October 1998, Justice Jeremy Aubin of New Zealand remarked that, in his opinion, these reforms had changed the way that judges approached decision-making where there is a history of domestic violence.

**Has the Reform Act Kept People Out of Court?**

The Act sought to increase the role of alternative dispute resolution (and hence make it "primary dispute resolution" - PDR) within both formal legal processes and outside the legal system. It appears that PDR was expected to provide a more cost effective means of resolving disputes between parties and that the availability of PDR avenues (and other "simplifications" under the Reform Act) would minimise, not only the need for matters to proceed to trial, but also the number of applications brought in the Court.

Notwithstanding the amendments, which came into effect in mid 1996, over four thousand five hundred (4500) more files were opened in the Court in the 1996-97 financial year, as compared to the 1995-96 financial year:-

Residence applications were 47% higher than the previous year's figures for custody and guardianship. Contact applications in 1996-97 were 58.5% higher than 1995-96 figures for access and 37% higher than the previous peak in access applications in 1993-94. (FLC, 1996-1997, p 45)

It was precisely these kinds of applications which the 1995 amendments were predicted to reduce in number. From the statistics it seems that the changes in terminology and approach to parenting matters has not assisted in reducing, or even maintaining, the number of matters brought before the Court for consideration. We understand, from informal discussions with staff in the Federal Attorney-General's Department, that many of the applications swelling the numbers are being initiated by men.

The Dewar and Parker report comments on a “striking theme” which emerged from follow-up interviews with registrars:-

… the legislation seems to have intensified the pre-existing dispositions of parents - those who were in any case inclined to agree now have a much richer range of resources with which to frame that agreement, while those parents who were in any case inclined to disagree now have a much more powerful armoury with which to do so (p 18).

It was our concern at the time of enactment that the government was legislating for the wrong group. Those who can agree will do so no matter what the law says. Legislation should be for those who will not be easily able to agree. In that group will be found the families which have been traumatised by domestic violence and sexual abuse.
Encouragement to Use "Primary Dispute Resolution" (PDR) Mechanisms

One of the most serious concerns of the WLS is the way in which non-judicial mechanisms are being given primacy as the acceptable way to resolve issues at the time of a relationship breakdown. While it is valuable to encourage parents or former partners to reach agreement about future arrangements for their children or the distribution of their assets and finances, in many instances this may be extremely difficult and traumatic.

Those who promote mediation (particularly at policy level in government) claim that cases with a history of domestic violence are excluded. This appears to ignore the reality of what is known about the prevalence of domestic violence in the community and the way in which that intersects with people who require formal intervention in dealing with separation issues. Many women who contact the WLS for assistance have suffered domestic violence ranging from severe verbal abuse to brutal physical attacks requiring hospitalisation.

In terms of understanding the extent to which family violence is likely to impact on the processes of the Family Court, it is interesting to note the statistics provided by the 1996-97 Annual Report relating to the Counselling Section. In accordance with the Court's Family Violence Policy:-

single interviews are offered when there has been a history of domestic violence in the relationship and one of the parties indicates they are worried about their physical safety and are afraid of attending a joint interview with the other party (p 28).

Of the 25,869 cases in person dealt with by the Counselling Section, approximately one-third (8,597) cases were conducted by separate interviews because of family violence in 1996-97.

Because of the emphasis on reaching agreement through PDR, the process often appears to militate against acknowledgement of the relevance of domestic violence in children's arrangements and diminish the relevance of the best interests of the child.

WLS has long been concerned by the manner in which mediation processes are evaluated. The focus is usually on the proportion of cases which settle and apparent client satisfaction, rather than examining whether the agreements struck are "fair", "just" or in the best interests of the children. It seems ironic that so much thought goes into formulating legislation to regulate family law decision-making, but the policy concepts which direct this legislative reform play no role in the framework of mediation. The irony is exacerbated by the policy push for increased use of mediation which can result in agreements which entirely fail to reflect the policy concepts which have informed the legislative reform.

For example, it is our experience that a woman has almost no chance of reaching a mediated agreement at the Family Court or Legal Aid that denies or restricts the father's contact with his children - no matter what she alleges in respect of violence and lack of care-giver experience before the separation. (Some of our clients advise us that their solicitors have told them in Legal Aid conferences that domestic violence is not relevant to questions of residence and contact.) However, the Court is bound to take the violence into account and it is possible that safer orders would be made if more of these cases were judicially determined rather than mediated.
EVIDENCE AND PROCEDURE IN CASES INVOLVING CHILDREN

Family Reports

Another growing concern for us relates to the use of Family Reports. The way in which the Family Court has directly involved people with social science backgrounds in children's cases is one of its most innovative and vital features. However, the Court has come to place huge trust and reliance on the assessments of these experts. When they do not have a good understanding of the dynamics of domestic violence, the reports which emanate can be devastating for women. Clients report instances where the report writer has appeared to be charmed by the violent man. The consequence of this is that the woman is described as difficult or unreasonable. Her attitude towards her former partner is seen as bitterness or irrational hatred. For years women working in the field of domestic violence have tried to explain that some men who are violent in their intimate relationships can be quite charming in public life. At one of the first major conferences on domestic violence in Australia in 1985, Dawn Rowan, a refuge worker explained-

From the women in our client group, 80% of men who beat their wives are charming to everyone else and are not identifiable outside the family as violent or criminal (p 27).

Despite this, there are many report writers who appear to be attracted to these charming men who are able to present as unusual and caring fathers. It is our view that this unusual interest in their children is often a manifestation of the flip side of an obsessive desire to control their wives and prevent them from creating a new and independent life.

It has been observed that there is often a small group of professionals who become willing to appear regularly in the courts as experts. This phenomenon is not limited to the Family Court and is probably a natural consequence of the fact that most professionals never want to go near a court! However, it means that a small group of people become well known and respected by the judges and their views become very influential. If one of these experts has a blind spot about an issue such as domestic violence, this can affect the lives of a significant number of women. WLS has noticed the repeated influence of a couple of individual experts in the cases of our clients who have contacted us in desperation after apparently unsafe residence or contact orders have been made in response to a Family Report.

Interestingly, field workers such as refuge workers and domestic violence workers are not necessarily given a great deal of credibility in the Family Court and are not regularly called upon to give evidence or explain the conduct and responses of women who may appear to be acting "unreasonably" or "irrationally".

WLS has worked with a number of women who have lost residence of their children to violent men largely as the result of the assessment of the parties contained in the family report.

Child's Representatives

Similar problems arise with some child representatives. Many clients report that they feel no sympathy
for their position from the child representative. This has always been the problem with the Family Court's philosophy that counsellors, judges and children's representatives should maintain neutrality. It has led to inappropriate processes and unsafe practices in the past. (A detailed Practice Direction on Family Violence which the Family Court introduced in 1993 seems to have partly been intended to break down the consequences of this approach.)

Where the children's representative demonstrates no apparent understanding of domestic violence, a woman survivor feels alienated and desperate. She may then either appear to act hysterically in her desire to have her concerns heard or may become silent about her concerns, convinced that she cannot be heard.

Although there are guidelines for Children's Representatives which provide useful information on how to deal with family violence these do not appear to necessarily be followed by all children's representatives. (see Representing the Child's Interests in the Family Court of Australia: Report to the Chief Justice of the Family Court of Australia, Sept 1996, pp 42-43).

A WLS client reported recently that the children's representative refused to speak directly to her during the lead up to the interim hearing. This was despite the fact that the woman was acting on her own behalf because she had been refused legal aid on the merit test on the basis of an adverse family report.

On the other hand the children's representative was in regular contact with the father's solicitor. The judge awarded residence to the father at that interim hearing notwithstanding the facts that the mother was unrepresented, she challenged the contents of the Family Report and she had always been the primary care-giver of the child both before and after separation.

THE LITIGANT IN PERSON

In respect of litigants in person our major concern is that the gendered aspect of this be fully understood. There is no doubt that either or any party can find themselves unwillingly representing themselves in the Court but in our experience, men sometimes choose this course, whereas women are rarely in that position voluntarily.

Men use self-representation as a way to shake off the moderating influence a lawyer might bring. It allows them to bring repeat applications without cost and to directly cross-examine their former partner.

Women are often fraught by the thought of representing themselves and become extremely stressed during their preparations and appearances. Due to the current lack of legal aid funding we are assisting a number of women to represent themselves in Court. We are assisting with the preparation of documents and providing advice on court procedures. Some of our clients are successful and others obtain appalling results.

Our workload has become totally skewed by these demands and we are unable to meet the need for new client appointments because of the on-going demands of these cases. Further, most women who do not live in the south east corner of Queensland have no access to such services. As a small organisation, we obviously do not make any real impact on the overall situation of women who are self-representing.

On a technical note, self-representation prevents the right of re-examination. (This is the right to ask further questions of a witness after they have been cross-examined by the other side. It is a limited right but can be essential to clarify new issues which may have been raised.) A client of ours of who represented herself recently in the Family Court has reported that after she was cross-examined she had
wanted to clarify some points which had arisen but could find no avenue to do that. We realised that the rules of procedure seem to exclude the right of re-examination for self-representing parties. Perhaps judicial officers need to be more creative or perhaps there is a need to re-visit rules relating to procedure where there are litigants in person.

We also believe that there is a subtle problem caused when women represent themselves. To some extent lawyers play a "shielding" role in the courts. Clients who are emotionally stressed by the proceedings can "let off steam" with their lawyer and present a calm exterior to the court. When the lawyer is removed they are exposed in all their vulnerability. Where a violent man is represented, his aggression is often concealed. Meanwhile his frightened partner, who is terrified about the consequences of the hearing, is forced to be her own advocate. She is often battling against a Family Report that has described her as "over-anxious" and has been frustrated and demoralised by her contact with Legal Aid. This creates an extraordinary disadvantage as she exposes her "hysteria". All that the father (and maybe the Family Report) has said about her appears to be played out before the judge's eyes.

ENFORCEMENT OF CONTACT ORDERS

We are noticing increasing numbers of women being dragged back to Court on contravention applications relating to contact, when the reason for non-compliance with the terms of the order relates to the man's ongoing violence or the reluctance of the children to spend time with the violent parent. Many of these orders seem to have been made by consent in circumstances where the women were unable to obtain legal aid to pursue the order they really believed would work and ensure the safety of themselves and their children. The men are frequently unrepresented.

Of great concern to us is the fact that it is almost impossible for the women to obtain legal aid to defend the proceedings because if they are technically in breach of the order, Legal Aid assesses their case as having no merit. We are aware of a number of cases where women have successfully defended these cases notwithstanding the "no merit" assessment from Legal Aid.

In our experience, the following are common features in enforcement proceedings against women:-

1. history of domestic violence by the man towards the woman which has often been confirmed by the successful obtaining of a protection order;

2. there have often been breaches of the protection order and successful prosecutions. Given the difficulty which women often experience in convincing the police to take any action, successful prosecutions are generally solid evidence of serious and repeated violence;

3. the woman often has some evidence of sexual abuse or neglect during contact;

4. one or both parties is/are unrepresented;

5. the relevant order will often have been made by consent;

6. legal aid being available only for a conference and the woman understanding that there will be no legal aid for court proceedings if the only dispute is about the terms of contact arrangements; and

7. where there have been significant court proceedings, including the preparation of a Family Report,
the woman is often described as hysterical, difficult and derogatory towards the father, while he is found to be so charming that one wonders why she ever left him.

A number of judges interviewed in the Graycar, Harrison and Rhoades research commented that:

contravention applications are being brought predominantly by fathers who act for themselves and interpret the Reform Act as giving them “more rights than they have” … Several noted that such applications are frequently frivolous and without merit (p 52).

**Consent Orders and Contempt**

In research which has been conducted by the Australian Law Reform Commission and the Family Law Council on contact cases a relationship was noted between difficult contact cases and consent orders (ALRC, 1994, p 49). An interesting opinion, consistent with our observations, was offered by one of the male practitioners in the survey conducted by Graycar and Harrison:-

I was initially cynical - took the view that the reforms would not change outcome. Anecdotal evidence suggests that greater contact [is] likely to be sought and obtained (often by consent) in contested matters (p 340).

Here we see a combination of the Reform Act, increased use of PDR and the new orthodoxy on contact leading to greater contact being ordered by consent. In some situations this is a wonderful outcome for children who will have a better opportunity to develop a meaningful relationship with their father. In other instances this will be a prelude to tense exchanges, fearful mothers, traumatised children and contravention applications.

The Attorney-General has recently made announcements that the Government will reform family law on parenting orders to improve enforcement. We believe that the real issue is whether appropriate parenting orders are being made in the first place. If not, introducing draconian measures to “improve enforcement” is potentially dangerous for children, women and men who are the players in the cases where the orders do not work. These are generally situations of high conflict and tension, with a history of violence and the possibility of serious violence, including murder and murder/suicide - generally perpetrated by the father.

**LEGAL AID**

Throughout the paper we have identified our concerns about legal aid. We conclude by covering a few other aspects not raised in the submission.

**Indirect gender bias**

We believe that there is an indirect gender bias operating in the way that grants of aid are allocated. Merit is assessed on a basic system of "ticking boxes" under the heading of establishing whether there is a "genuine dispute". The problem for women is that, if they leave with the children and apply to legal aid so that they can have formal residence/contact orders in place, they will be refused because there is no "genuine dispute" from their apparent perspective. This leaves a woman who has separated from a violent man in a very difficult position. Either she gives
him contact without the benefit of an order in place - and panics about the safety and return of the children, or she denies him contact. As many women actually want their children to continue a relationship with their father after separation, even if he has been violent towards her, this stark decision is very disturbing. She actually wants to give contact but wants the security of a court order.

If her decision is to deny contact, the man will automatically obtain legal aid because he is being denied contact and the box of genuine dispute is ticked. (The woman is even at risk of the man obtaining legal aid and applying to a court - often a Magistrates Court - for *ex parte* residence and a warrant for the return of the children.) Otherwise the father at least starts off as the "denied" father and she as the "difficult and unco-operative" mother in the eyes of legal aid before any history of the case is revealed. The irony is that the mother may have even contacted legal aid for the sole purpose of trying to devise a situation under which she feels safe providing contact but her contact with legal aid is unlikely to even be recorded. It may just have been a telephone call to the Call Centre in which she will have been advised that her situation does not warrant a grant of aid.

If the parties get to a legal aid conference the "right" to contact for the father dominates the process. There is almost no legal aid to litigate about the terms of contact arrangements - eg. Whether it should be overnight or supervised. This really only happens where there is evidence of sexual abuse. It seems ironic that when women want to give contact, but propose appropriate conditions, they are either forced into "standard" arrangements or find themselves acting for themselves in the Family Court.

Women will be told by their solicitors to settle at a legal aid conference if the father is requesting "standard contact" (ie. every second weekend, half the school holidays and perhaps some other occasions). If the woman refuses to agree to this she will be judged unreasonable and therefore will not get further aid. Therefore, solicitors who are aware of this push their clients to settle believing this to be in their best interests. The clients come way feeling brow beaten and unheard. They have not even seen the outside of the Family Court.

If the woman applies for legal aid after this, or before, she will be refused on the basis of merit because what she is proposing (ie. a refusal of contact or a more limited arrangement, is not considered reasonable). The reasonableness of the man's proposal in the factual context of his relationship is not assessed.

This seems to be a fundamental flaw in the guidelines. It is just the party who is applying for legal aid who is judged under the merit test. Their precise proposal has to be considered reasonable. The fact that their main purpose is to oppose an unreasonable (and maybe dangerous) Court application from the other party does not seem to be considered. In our view that should be the test. Is it reasonable for the legal aid applicant to oppose the proceedings or proposal made by the other side? The detail of their final position can be negotiated during the processes that should follow.

There is an irony here. Where the women have a strong defence which is easy to see they can get legal aid and a lawyer. Where the defence is more subtle and requires a re-examination of the original order and an exposure of the extent of violence in the case, they are refused legal aid and must argue the case themselves.

What has happened to the role of lawyers? Must they now only do the easy cases while the hard cases are presented by litigants in person who are already dealing with the huge personal stress inherent in their lives.
We should add that some of our clients have won various applications in the Family Court after being refused legal aid on the basis of merit. This should call the efficacy of the merit test into question.

**BIBLIOGRAPHY**

Attorney-General's Department, (1997), *The Delivery of Primary Dispute Resolution Services in Family Law*, Commonwealth of Australia


Family Court of Australia (1996) *Representing the Child's Interests in the Family Court of Australia*, Report to the Chief Justice of the Family Court of Australia

Family Court of Australia (1996), *Annual Report - 1995-96*

Family Court of Australia (1997), *Annual Report - 1996-97*


Family Law Council (1998), *Child Contact Orders: Enforcement and Penalties*, Commonwealth of Australia

Family Law Council (1997) *Annual Report - 1996-97*


14


Smart, C. And Neale, B, *Arguments Against Virtue - Must Contact be Enforced?* in May [1997] Fam Law 332