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**VALS SUBMISSION TO THE HONOURABLE PHILLIP RUDDOCK - ATTORNEY
GENERAL IN RESPONSE TO RECOMMENDATIONS CONTAINED WITHIN THE
REPORT ON THE EXPOSURE DRAFT OF THE FAMILY LAW AMENDMENT
(SHARED PARENTAL RESPONSIBILITY) BILL 2005 ("THE REPORT") – SENT 19
SEPTEMBER 2005**

Victorian Aboriginal Legal Service (VALS) is concerned that the Bill and the REPORT ON THE EXPOSURE DRAFT OF THE FAMILY LAW AMENDMENT (SHARED PARENTAL RESPONSIBILITY) BILL 2005 ("THE REPORT") comprehensively fails to deal with:

- Ignorance about the Family Law Act,
- Issues raised by the Family Court and
- Need to understand systemic discrimination.

Realities on the ground

The Joint Committee of Public Accounts and Audit in Report 403: Access of Indigenous Australians to Law and Justice Services highlights the need to improve legal services to Indigenous Australians. Recommendations 2-7 highlight matters which require improved funding. The introduction of compulsory counseling and complicated exemption procedures will create greater need for legal advice. The Report on the Exposure Draft makes no recommendations about access to legal advice.

VALS supports improved access to counselling but the availability of culturally appropriate counselling and mediation services today is minimal. VALS fears that the enthusiasm for greater levels of compulsion in the new system will mean that the needs of Indigenous Australians for culturally accessible legal advice and counselling will not receive the priority that it needs and deserves.

Counselling and mediation should be promoted to parents as a pathway to better outcomes for children rather than turned into a punishment, which is what greater compulsion has the risk of doing. At the same time it has to be recognized that there will be a proportion of people in the community for whom counselling and mediation will not work. It is in the best interest of the child to have a system which does not unnecessarily prolong attempts at counselling or compel people to counselling while ignoring the need for legal advice about the system and ignoring the level of representation available in the Family Court.

Ignorance about the Family Law Act

The Shared Responsibility Bill creates new ambiguity about the operation of the Family Law Act. The submission by the Family Court on this issue highlights many areas of confusion and yet it appears to have been largely ignored.

The emphasis on shared responsibility, joint shared responsibility and equally shared responsibility confuses the issue of who is likely to best be able to protect the child's best interests and how will this be determined. It also obscures the reality that residence is likely to go to one parent and that that parent in the majority of cases will be the mother. The majority of people separate and make arrangements for the care of children without a drawn out court battle.

This does not necessarily mean that there is widespread understanding of the Family Law Act. People who are unable to agree on residence and access issues often have difficulty understanding how the court works and what the law says.

Three issues in particular cause difficulty.

- The Family Law Act provides a child with the right of access to parents. Many parents assume that it is the opposite, a parent's right to access the child.
- The Court is not interested in adjudicating who was more at fault in the marriage ending. The Court is interested in past behavior by parents only to the extent that it is relevant to helping decide how best the child can be looked after.
- Prior family violence by a father does not preclude a father getting access or residence. The Court may still decide to make a residence order to the father because that appears to be in the best interests of the child.

Systemic Discrimination why it matters

It is widely recognized that laws don't affect everyone equally. The classic example is the law prohibiting people from sleeping under bridges. It applies to all people rich and poor but is much more likely to apply to poor people. Increasingly institutional racism and systemic discrimination are being recognized and studied. This phenomenon of institutional discrimination is characterized by Blagg and others as a focus on outcomes rather than intentions or attitudes. To consider outcomes is consistent with the Government's focus on outcomes in its practical reconciliation policies. It is of particular interest in this context because it on the one hand is a factor contributing to the angry dads concerns and on the other hand it should inform discussions about compulsory counselling.

The Government draft bill and the Parliamentary review of the Family Law Amendment Bill share a failure to consider what the real outcomes of this Bill will be. The title of the bill is shared parental responsibility. The title of the Bill repeats a concept which is already in the Family Law Act. The title begs the question of how shared responsibility is to be exercised and what it means in practice. The term shared responsibility has been linked to the idea of considering equal time with the child for both parents. This is the appearance of rebuttable joint residence with the substance missing. The angry dads are not fooled by this Bill but many other people may well be. Joint residence is the least likely outcome on a statistical basis and it has been declining in popularity over the whole of the period 1994-2001.

The context of this Bill is the campaign by concerned fathers who are dissatisfied with the Family Court. The Government has done little to educate concerned fathers and the public at large about the Family Law Act and how the Court makes decisions. The previous proposal of a rebuttable presumption of joint residence was widely criticised as impractical and gave unwarranted weight to the often unreasonable attacks on the Family Court. Some of the

proponents of joint residency apparently believe that parents will be more capable of equally sharing responsibility for the child after separation than they ever were when they lived together.

Systemic discrimination is a concept that helps explain some aspects of the operation of the Family Law Act. The proportion of women who obtain custody is much higher than the proportion of men. The Court has to make a decision as to how to ensure the best interests of the child are protected. Women more often have a stronger history of directly caring for the child. In the stereotypical father working and mother at home with children the father will be placed at a disadvantage by this. Shared residence is usually economically and physically impractical. This means that when parents disagree a decision has to be made about who is to have residence.

All other things being equal, the parent who has spent the most time with the child is going to have an advantage. Parenting is already unequally shared in many households and this will often have an effect when a court looks at how a child can best be looked after. The concerned father's real obstacle to achieving residence is generally not the Family Court or the Act, it is the traditional mainstream gender division of roles in relation to child care and the lack of family friendly work arrangements.

The effect of male- female parenting roles on Court orders is not set in stone. Changes are occurring. Evidence that the Court decisions reflect changing social conditions and changing parenting roles is highlighted by reviewing the trends over several years of court decisions. Residence orders to mothers are declining, orders to fathers are increasing, joint residence is decreasing-it is the least likely outcome and orders to third parties are increasing. (See **Attachment Two Family Court Residence Order Outcomes - 1994-95 to 2000-01**)

It is misleading to place increased emphasis on shared parental responsibility without clarifying that this does not imply equal time looking after the child. The one line in the Bill which clarified the fact that shared responsibility does not mean a presumption of equal time 61DA (1) has been recommended for removal by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The Government has a responsibility to make legislation as clear as possible to people. Removing this note would be a step backwards in terms of clarifying how the Bill will work at a time when much more should be done to clarify this matter.

We reject the Report's proposal that "all references to the term 'joint parental responsibility' in the Exposure Draft be replaced with references to 'equal shared parental responsibility'". The word "Joint" could also be removed as it adds nothing to the term shared responsibility.

Government should explain the operation of the family court

The Government should be clear with people and explain that the court has to look at what is best for the child and that often the mother has a stronger track record of directly caring for a child than the father. The principle of protecting child's best interests will mean that some men will be disadvantaged by their comparative lack of time spent looking after their children. Where joint residence is impractical there is often no better option. This is a situation where there is systemic discrimination but given the need to protect the child's best interests and mothers often having more runs on the board in terms of child care it is something that should be accepted. The trend in family court decisions towards residence orders to men and other parties eg extended family reflects the court responding to changing social patterns and role changes.

VALS believes that the debate about who obtains residence indicates there is a high level of misunderstanding about the Family Law Act. There is a lack of understanding of the importance

and effects that the principle of protecting the best interests of the child has on the outcome in a society where parenting is not equally divided. These and other matters are hard for people to understand and there has been little done to remedy this.

Recommendation 3 in the Report should be opposed and the Department's rationale for originally including the explanatory note in 61 DA (1) should be applauded.

More needs to be done to explain what the Family Law Act says and how the Family Court makes decisions. Analysis of the outcomes of the Court highlights systemic bias against fathers but this has to be understood as largely a consequence of underlying gendered distribution patterns of child care and work and the Act giving priority to the best interests of the child.

Compulsion to counselling- What are costs or unintended consequences?

The Government and the Committee appear to believe that compelling people to attend counselling and mediation prior to commencing court procedures is an unequivocal good. There are economic and social costs which should be considered about compulsory counselling.

There will be significant resource wastage in the following situations:

- Where there is entrenched conflict between parents who attend counselling, in the majority of cases counselling will be a waste of time and money.
- People who resent being compelled to attend counselling will pay lip service to the counselling and wait for their day in court
- People who are not aware of their rights to refuse to go to counselling and find this out later will criticize the system and may try to alter or renege on any agreements reached.
- People who have been subject to family violence but have not reported it to police or services (the vast majority of women who have experienced family violence) may reluctantly choose to participate in counselling rather than try to prove they have been subject to family violence. This may mean that they feel compelled to agree with their violent partner in counselling or that they will simply go through the motions in order to get to the court. (See attachment one from our previous submission which quotes figures on women affected by family violence and who they speak to)

The money spent on counselling in all the circumstances above will be wasted or of very little value. This will reduce the level of resources for parents who wish to participate in counselling. More importantly in the scenarios above there will be additional uncertainty for the child or children as the counselling stage unnecessarily prolongs the process.

Capacity to benefit

People who are in regional and remote areas will have greater difficulty complying. People who have a cultural background which does not include counselling and mediation will have greater difficulty benefiting.

Grounds for Exemptions from Counselling

The Family Court Submission states that significant numbers of parents (and other applicants) will want to seek an exemption from counselling and that a finding in relation to that exemption will be required prior to a Part vii order being heard.

The Court submission advances a number of reasons for its assumption that there will be a large number of people applying for exemptions. Paragraph 29.1-29.7, Pg 10.

They include:

- 30 % of matters include allegations of violence, or abuse or the risk of one or both of these
- Significant numbers of applicants who regard their circumstances as urgent
- Significant numbers of applicants who do not qualify for a certificate but who simply do not want go down the path of attending a Family Relationships Centre.....the other party's drug abuse, alcohol abuse or mental illness are some of the examples that spring to mind.

The Family Court submission then considers the additional problem of large numbers of respondents not turning up on the return of the application.

The large number of cases of people going to compulsory counselling where there will be no effective benefit which our submission outlines and the large number of cases where people will seek an exemption which the Family Court outlines should be cause for rethinking compulsory counselling.

Compulsory counselling has the capacity, if not inevitability of diverting resources from people who are willing to try counselling to people who are not.

The 'exemption from counselling' process will divert considerable Family Court resources from hearing matters to considering whether someone should be compelled to go to counselling.

VALS is not opposed to counselling and mediation and believe it could have significant benefits for some clients. Services need to be culturally accessible. There are no Koori people who are qualified to do Family Court mediation for example.

There should be a cost benefit analysis done on whether compulsory counselling is worth the expense. People who are motivated to try counselling will receive much more benefit than people who are dragged there screaming. VALS believes that it would be more strategic to spend money on improving the accessibility of counselling particularly for Indigenous people than wasting it on people who don't want it and wasting court time on processing exemptions.

Access to legal advice prior to compulsory counselling

Complication associated with obtaining exemptions, ensuring exemptions are reasonable and avoiding fines means there is a considerable argument for preliminary legal advice prior to compulsory counselling.

There is such a preoccupation in the Bill with avoiding matters going to court that the problem of people being ignorant of the Family Law Act and what the Court's role is has been ignored. The risk of a poor outcome to counselling because one party is much better informed about the system than the other would be reduced if legal advice was provided at the start of the process. The provision of legal advice to parents prior to counselling has been rejected by the Committee.

Where one parent has greater knowledge or has obtained legal advice before counselling they will have greater chance of using the counselling to their advantage. (As men generally have higher incomes and are more likely to be able to afford legal advice this will generally disadvantage women however there will be a smaller percentage of cases where men are disadvantaged because women have obtained legal advice)

A wider issue is where one or both parents are ignorant of the law or have a completely wrong belief about what the court will consider or what the law says. Counselling may be ineffective simply because the legal context has not been explained.

The assumption that the registrar will be the gatekeeper deciding whether to exempt a person from compulsory counselling is also another stage where a person could benefit from having had legal advice. Aboriginal people and people from CALD communities will be less confident in dealing with Court staff than mainstream court users.

Registrars are frequently busy and are unlikely to have time or training to explain the processes and exemptions in detail. Reliance will be placed on brochures and written material which again will disadvantage people with low literacy, people whose culture is different to the dominant culture and those who lack confidence in dealing with government officials.

The Committee Report wants to introduce penalties for false reports of family violence. This overlooks the much larger problem that the majority of women who have been subject to family violence have not reported to police or a service. It may appear fair to say that people will be exempted from compulsory counselling if they have suffered family violence but for 70-80 percent of women who have not disclosed this to services they will face real difficulty accessing the exemption clause. Add to this the threat of fines for false reports and the exemption to the requirement to attend counselling, looks to be a very weak safeguard.

If the Government believes that counselling is an important precursor to making a parenting plan surely provision of legal advice prior to counselling is the minimum step necessary to make sure it works effectively Legal Advice will help reduce power imbalance between the parties, explain the operation of the exemptions, assist someone to apply for an exemption while minimizing the risk of later being fined and deal with the problem that not everyone can read or understand a brochure. It will enhance the likelihood that a parenting plan will reflect a genuine agreement of the parents. Where there is a case for exemption it will save time and money by diversion from the counselling option.

Other issues raised by the Family Court

The Family Court submission is highly critical of the two tier approach proposed in section 68F. Pg33-35.

In this detailed analysis the Court identifies possible confusion and increased litigation, different interpretations of the significance of the two tiers, children's views and the wording of the provisions. This analysis appears to have been overlooked by the Report.

The Family Court makes a number of other comments which we agree with such as deleting 63DA (2A), problems posed by the wording of 65DAA and the recommendation to omit 65DAC (2). In the case of 65DAC (2) The Family Court sensibly points out that it is simply not possible to require a decision to be made jointly where parties do not agree.

Conclusion:

As the majority of women who have experienced family violence have not reported it to police or other services the exemption process will be effectively denied to them. The penalty regime for false reports will reinforce this. This will undermine the effectiveness of counseling and potentially puts children at greater risk.

The Report's failure to accept the importance of legal advice for people in general and disadvantaged groups in particular suggest the goal of avoiding adversarial court proceedings has trumped the idea of people having any right to know how the Family Law system works. Counsellors and mediators will effectively be put in the position of giving legal advice or failing this allowing the better informed party to prevail over the worse informed party.

The Bill in its present form promises to elevate the concept of shared responsibility by reducing the effectiveness of the Family Court, increasing compulsion on parents to attend counselling, encouraging the use of penalties and diverting scarce resources into assessing whether exemption applications are meritorious or not.

The Child's best interests are to be promoted by inserting the words shared responsibility, together with either jointly or equally throughout the Bill and by promoting the fiction that these changes will alter the fact that women are more likely to be awarded residence even though the new Bill removes the term residence.

Further work is necessary on the Bill if it is to avoid disadvantaging children even further.

Attachment One:

Extract from VALS submission to the House of Representatives Standing Committee on Legal and Constitutional Affairs Inquiry into the (Shared Parental Responsibility) Bill 2005

It is widely recognised that surveys of the incidence of family violence will be an undercount due to victims not reporting family violence. The undercount is a result of victims blaming themselves or being fearful and unsupportive community attitudes. The 1996 Australian Bureau of Statistics 'Women's Safety Survey' indicated that 38% of women had experienced family violence since the age of fifteen and that 7.1% of women had experienced family violence in the last twelve months. It is highly likely that due to the under-reporting of family violence and circumstances of people approaching the Family Court the percentages of Family Court users experiencing family violence would be considerably higher than this in reality.

Of those people who had experienced family violence in the last twelve months only 19% had reported it to the police, only 12% had spoken to a counsellor, 18% had told no one. 58% of people had told a neighbour or friend and 53% had told a family member. (Australian Bureau of Statistics 1996).

The above figures suggest that either counselling is generally not available, not known about, or not sought in the majority of cases.

Attachment Two:

Family Court Residence Order Outcomes - 1994-95 to 2000-01

Financial Year	In favour of father	In favour of mother	Joint residence	Split residence	In favour of other applicant	Total
Number						
1994-95	2042	9833	680	402	376	13333
1995-96	2139	9824	660	378	424	13425
1996-97	2530	9795	432	799	570	14126
1997-98	2937	10419	483	707	665	15211
1998-99	2867	10047	428	734	577	14653
1999-00	2750	9473	305	558	727	13813
2000-01*	2585	9183	329	559	538	13194
Percentages						
1994-95	15.3%	73.7%	5.1%	3.0%	2.8%	100.0%
1995-96	15.9%	73.2%	4.9%	2.8%	3.2%	100.0%
1996-97	17.9%	69.3%	3.1%	5.7%	4.0%	100.0%
1997-98	19.3%	68.5%	3.2%	4.6%	4.4%	100.0%
1998-99	19.6%	68.6%	2.9%	5.0%	3.9%	100.0%
1999-00	19.9%	68.6%	2.2%	4.0%	5.3%	100.0%
2000-01*	19.6%	69.6%	2.5%	4.2%	4.1%	100.0%

Source Data: Outcomes Report Blackstone

Notes:

- Orders made in the Family Court of Western Australia are excluded as data is not available.
- VALS submission to the Honourable Phillip Ruddock – Attorney General in response to Recommendations contained within the Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 – sent 19 September 2005**

- Data for Darwin Registry have been available only since 1996-97.
- Figures include both orders made by consent and orders made as a result of contested hearings.
- The terminology was changed from custody to residence by the Family Law Reform Act 1995 which was proclaimed on 11 June 1996.
- "Joint" residence is where the order is for each child to spend some time residing with each parent and "split" residence is where the order is for each parent to have one or more of their children residing with them on a full time basis.

Source of table http://www.familycourt.gov.au/court/html/residence_orders.html