
To: Consultation Secretariat
Family Law and Legal Assistance Division
Attorney-General's Department
Robert Garran Offices
National Circuit
Barton ACT 2600
Email: consultation@ag.gov.au

**Re: Submission of the NSW Immigrant Women's Speakout Association Inc. to the Consultation on the Discussion Paper on Proposed Changes to the Family Law System**

On Behalf of the Immigrant Women's Speakout Association of New South Wales, I am lodging our policy submission on proposed changes to Family Law System.

Yours truly
(SIGNED)
Vivi Germanos-Koutsounadis
Chairperson
14 January 2005

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## Summary of recommendations

1. That lawyers are allowed to attend Family Relationship Centres sessions.
2. That information on the new Family Law process, on Domestic Violence and Child abuse in community languages be prominently displayed and provided in Family Relationship Centres.
3. That accredited Cross Cultural training be compulsory for all Parenting Advisers.
4. That all Family Relationship Centres have access to free interpreting services and are required to ensure that NESB clients are provided with interpreting services as needed in their funding agreement.
5. That accredited Domestic Violence and Child Protection training be compulsory for all Parenting Advisers.
6. That Family Relationship Centres provide the above information and referrals to separating parents.
7. That Family Relationship Centres assist separating parents in developing safe and workable arrangements for their children without promoting particular models of child division.
8. Given the unlikelihood of effective screening and the great number of women experiencing violence after separation, and/or separating because of violence, Speakout recommends that attendance at Family Relationship Centres be on a voluntary basis, and not a prerequisite to start proceedings in the Family Court.
9. Failing that, Speakout recommends that a claim that either domestic violence or child abuse has occurred be in itself enough for screening women out of the Family Relationship Centres process.
10. These claims should be investigated by a specialized unit to be established within the Family Court.
11. Screening tools for Domestic Violence and Child Abuse should be developed in meaningful consultation with women's domestic violence services and applied systematically in Family Relationship Centres.
12. Parenting advisers should be trained in using these tools and should be aware that women experiencing violence will not always be identified by using the above tools. Therefore, they should be mindful of safety issues on an ongoing basis and be aware of how to respond to them during and after sessions.
13. That a Family Safety unit be established and attached to the Family Court to coordinate the investigation of family violence and abuse in the context of Family Law proceedings, as recommended in the Family Law Council 2002 report into Family Law and Child Protection.
14. That the Family Law Act be amended to introduce a rebuttable presumption of no contact or only supervised contact, where it has been established on the balance of probabilities that a partner has used violence against a child or a spouse (as in New Zealand Guardianship Act).
15. Failing this, that in case of risk to safety, established by past family violence and/or child abuse or threats of violence, the Family Court would privilege the safety of all parties over the assumption of contact with both parents.
16. That the Government not amend the Family Law to award costs against parents who make "false" allegations of domestic violence or child abuse.
17. That these allegations be instead investigated by the Family Safety Unit mentioned above.
18. That Family Law is not amended to ensure that the Court must consider changing Residency of the Child in case of breaches.
19. That the residential parent is given meaningful opportunity to explain the reason for the breach.

20. That if a non-residential parents does not exercise contact without any reason, over a period of time, the Court will consider varying the order to reflect the level of contact actually happening.
21. Speakout is opposed to all the proposed changes to the Family Law Act.
22. That the Family Law Act be amended to enshrine a "safety first" approach in Family Law as a primary factor of the "child's best interest".
23. That domestic violence be recognized as a child protection issue
24. That the Family Relationship Centres be guided and operate from the above principles
25. That the "child's best interest", continue to be assessed on a case by case approach

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

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

Speakout welcomes this opportunity to provide input on the proposed changes to the Family Law system
In the past years Speakout has either developed or contributed to a number of relevant submissions, including:

- Inquiry Into Joint Residence Arrangements In The Event Of Family Separation 2003
- Family Law Pathways Advisory Group September 2000
- Evaluation of Domestic Violence Provisions, Department of Immigration and Multicultural Affairs, September 1999
- Apprehended Violence Orders: A Review of the Law - a Discussion Paper, NSW Attorney General's Department, September 1999.
- Property and Family Law: Options for Change - a Discussion Paper, Commonwealth Attorney General's Department, June 1999.
- Policing and Domestic Violence - a Discussion Paper, NSW Ombudsman, July 1998

Many of our clients have separated from their partners or are in the process of doing so, usually due to past and /or current domestic violence issues.

Speakout appreciates that the government has decided not to implement a 50/50 rebuttable presumption of shared residency, as we think that each case should be decided on its own merits.

However, Speakout has grave concerns regarding the proposed changes to the Family Law system, many of which echo the concerns we expressed in our precedent submission regarding the rebuttable presumption. We are also disappointed that instead of focusing on increasing and ensuring safety for women and children in Family Law, the discussion paper buys into myths of false allegations of domestic violence and child abuse.

Our concerns are as follows:

## General concerns:

We have similar concerns to the ones expressed in our previous submission as the proposed changes to the Family Law System, particularly the proposed amendments to the Family Law Act, are bringing in again the rebuttable presumption of shared parental responsibility with great stress on considering equal time arrangements.

There is a very strong push, both in the Family Relationship Centres procedures and in the proposed changes to the Family Law Act to promote equal parental responsibility and equal time. This may not be the best outcome for all families. In fact research has proved that equal time works best for separating families that manage to stay in friendly terms, that live relatively close and can support this arrangement from a financial and practical point of view.

Many families will not meet these criteria, particularly if they are going all the way to the Family Court for a resolution of children related disputes.
The government is proposing a number of ways to encourage separating parents to strongly consider shared parental responsibility and equal time through the Family Relationship Centres and the parenting plans and advisers initiatives, as well as requiring parents to attend a dispute resolution process before taking a parenting issue to Court.
If after all this parents still cannot come to an agreement, and proceed to Court, it would seem that they are not separating in an amicable and cooperative way. It is therefore worrying that they will still be pressed towards shared arrangements, which require a high degree of cooperation and communication.

The proposed initiatives and legislative changes seem to shift the focus of the proceedings away from the best interest of the child and the unique situation of each family towards pre-determined outcome, allegedly best for all families. This does not allow for factors such as the age, cultural background of the child, migration experience or relationship to parents to be really taken into consideration, as well as parents' ability to cooperate.

## Concerns re Family Relationship Centres

The lack of legal representation in Family Relationship Centres parenting sessions is of great concern to Speakout. The sessions that parents will have to attend before being allowed to file Court proceedings can potentially produce a legally binding document, in the form of a Parenting Plan that the Family Law Court will refer to if there are future disputes.
We are very concerned that women may be pressured into agreeing to Parenting Plans that are not in the best interest of the children and/or do not take into account the risk to the safety and well being of women and children.
Women from a Non-English Speaking Background (NESB) may not have adequate language skills to fully understand the proceedings and what they are agreeing to. Moreover, in our experience NESB women, especially if recently arrived, may often lack information on the legal system and generally on support systems in Australia, as well as not having enough information on Family Law issues. We are extremely concerned that they will be in a very unequal position negotiating child residency arrangements with an ex-partner, especially in the case of mixed marriages. Even when both partners are migrants, often men have more access to the Australian mainstream community and information about all these issues.
We are concerned that Parenting Advisers may not be trained in cross-cultural issues to deal with the above issues.
Moreover we are concerned that interpreters may not be provided systematically when needed and will be at the discretion of the Parenting Adviser, thus further disadvantaging immigrant and refugee women.
Women who have experienced domestic violence will of course be in a powerless position vis-à-vis the perpetrator in these joint sessions. They and their children may also be put at risk during and after the session, and arrangements agreed to in the Parenting Plans may be potentially dangerous for both women and children.
The lack of legal representation will increase the chance of women in these situations being pressed into unsafe agreements.

## Parenting Advisers qualifications, skills and training

Parenting Advisers will need to carry out very sensitive sessions and be able to identify a number of issues and either deal with them or refer appropriately.

They will need to have qualifications, training and experience in domestic violence and child abuse, risk assessment, cultural issues, as well as highly developed counselling and mediation skills. They will have be able to understand and convey to clients the legal implications of any Parenting Plans they may agree to and will need to have a very good knowledge of services available where they can refer separating parents.

**Recommendations:**

1. That lawyers are allowed to attend Family Relationship Centres sessions.
2. That information on the new Family Law process, on Domestic Violence and Child abuse in community languages be prominently displayed and provided in Family Relationship Centres.
3. That accredited Cross Cultural training be compulsory for all Parenting Advisers.
4. That all Family Relationship Centres have access to free interpreting services and are required to ensure that NESB clients are provided with interpreting services as needed in their funding agreement.
5. That accredited Domestic Violence and Child Protection training be compulsory for all Parenting Advisers.

## Provision of information re family separation

Speakout welcomes the provision of free information and referrals to separating parents.
However, such services should not embrace and promote a particular pre-determined view of child custody arrangements, but provide information and options to families.
Information provided should include: income support, housing, child development, family law system, legal aid, domestic violence legislation and services, conflict resolution, drug and alcohol services, mental health services, counselling services.

**Recommendations**

6. That Family Relationship Centres provide the above information and referrals to separating parents.
7. That Family Relationship Centres assist separating parents in developing safe and workable arrangements for their children without promoting particular models of child division.

## Cost of sessions after 3 hours

We are skeptical that 3 hours of joint sessions with a Parenting Adviser will be enough to solve the complex issues of child residency arrangement after separation, if all necessary precautions and screening procedures are followed.
For NESB clients, the need to use interpreters and to provide information on Australian legal and support systems will undoubtedly increase the time needed to provide appropriate advice.
We are concerned that parents may be required to continue the counselling/mediation process after the free hours and may have to pay for it. It is not clear what will happen if parents are not able to afford further sessions.

## Screening for Domestic Violence (Domestic Violence) and Child Abuse (Child Abuse)

The issue of domestic violence and child abuse in the context of separating families is not a marginal one. The ABS 1996 Women's Safety Australia survey found that 23% Australian women experience abuse from partners as adults in their lifetime, but this figure is nearly doubled if we consider only divorced/separated women: i.e. 42% of divorced/separated women experience abuse.

According to research by the Australian Institute of Family Studies, "66% of separating couples Brown point to partnership violence as a cause of marital breakdown"[1].
Both research[2] and our casework experience, confirm that violent men use contact and shared parenting as a way to continue abusing and intimidating their ex-partner.

Speakout acknowledges and appreciates that the proposed changes will not apply in cases of Domestic Violence and Child Abuse, but we remain deeply unconvinced that these cases will be screened out effectively.
Many women do not disclose abuse for various reasons, including shame, fear of not being believed, or negative past experiences with services and agencies. Some migrant and refugee women are not aware that domestic violence is a crime and have no information on support services or legal remedies available. Some women may fear that they will shame their family or community by raising this issue.
We are therefore extremely concerned that women may end up in inappropriate and potentially very dangerous mediation session with perpetrators of violence.

Even if there is no risk during the session, Speakout maintains that there cannot be proper counselling or mediation in cases of abuse as the power differential between the partners is too great.
Women in this situation may agree to Parenting Plans that will put them and their children in danger because they do not feel able to oppose the perpetrator's wishes.
It is also not clear what the procedures for disclosure will be, and how women will have to substantiate domestic violence or child abuse in order to be able to proceed directly to the Family Court. We are concerned that women will have to prove Domestic Violence or Child Abuse to impossible standards in order to be screened out from proposed changes.
We are concerned that women will be accused of making false allegations in order to be screened out of this process, if they are unable to prove domestic violence or child abuse.
Fear of being accused of false allegations will actively discourage women from reporting domestic violence and child abuse to the Family Relationship Centres, thus invalidating the screening process.

**Recommendations**

8. Given the unlikelihood of effective screening and the great number of women experiencing violence after separation, and/or separating because of violence, Speakout recommends that attendance at Family Relationship Centres be on a voluntary basis, and not a prerequisite to start proceedings in the Family Court.
9. Failing that, Speakout recommends that a claim that either domestic violence or child abuse has occurred be in itself enough for screening women out of the Family Relationship Centres process.
10. These claims should be investigated by a specialized unit to be established within the Family Court.
11. Screening tools for Domestic Violence and Child Abuse should be developed in meaningful consultation with women's domestic violence services and applied systematically in Family Relationship Centres.
12. Parenting advisers should be trained in using these tools and should be aware that women experiencing violence will not always be identified by using the above tools. Therefore, they should be mindful of safety issues on an ongoing basis and be aware of how to respond to them during and after sessions.

## No contact with abusive parents/partners

Speakout is pleased that the government agrees that children do not have to have contact with abusive parents. This needs to be reflected in the Family Relationship Centres and Court proceedings. However the strong focus on shared parental responsibility and equal time may jeopardize this.
In particular we are concerned that women disclosing Domestic Violence or Child Abuse will not be believed and will be accused of making false allegations and therefore disadvantaged in the outcomes of the proceedings as "non-cooperative" parents, as well as being put at increased risk of violence and abuse.
We also note that not enough consideration is being given to the safety of women where Contact/parenting orders are made that cause the woman to either come into contact with the perpetrator at changeover, or be put at risk by the perpetrator being able to find out her whereabouts through contact.
The strong push to ensure that both parents have contact with the children also lacks a recognition that witnessing Domestic Violence is in itself a form of child abuse, and does not acknowledge anywhere the proven strong links between Domestic Violence and Child Abuse.[3]

In relation to maintaining safety for all as a paramount consideration in Family Law, Speakout recommends that the government consider introducing a provision similar to legislation in New Zealand, that introduces a rebuttable presumption of no contact in case of Domestic violence and child abuse and recognizes causing a child to witness Domestic Violence as a form of emotional abuse.

In this respect, we are pleased to see that the Government intends to increase the Contact Order Program, as there are long waiting periods for them.

**Recommendations:**

In order to make Family Law safer for women and children Speakout recommends:

13. That a Family Safety unit be established and attached to the Family Court to coordinate the investigation of family violence and abuse in the context of Family Law proceedings, as recommended in the Family Law Council 2002 report into Family Law and Child Protection.
14. That the Family Law Act be amended to introduce a rebuttable presumption of no contact or only supervised contact, where it has been established on the balance of probabilities that a partner has used violence against a child or a spouse (as in New Zealand Guardianship Act).
15. Failing this, that in case of risk to safety, established by past family violence and/or child abuse or threats of violence, the Family Court would privilege the safety of all parties over the assumption of contact with both parents.

## Breaches and Punitive approach

We cannot help but notice and regret the punitive approach to residential parents, mostly mothers, apparent in the discussion paper.

It seems that the government subscribes to the men's rights lobby that there are untold numbers of false allegations of Domestic Violence and Child Abuse and that many residential parents deny contact for no good reason.

Research has proven that the percentage of false allegations in Family law cases is in fact quite small and that instead protective parents (mostly mothers) and children find it very hard to be heard and protected from abuse in a pro-contact culture.[4]
On the contrary a study of order contravention applications brought by non-resident parents (mostly fathers) has found that the majority were without merit[5]. This would confirm our experience that abusive men use Family law proceedings to keep abusing and controlling their ex-partners.

Awarding costs against parents who make "false" allegation of Domestic Violence or Child Abuse is extremely worrying, as we fear that allegations that cannot be substantiated, but are not disproved either, will be considered false. Because of the private and often secret nature of the abuse, it can be extremely difficult to prove domestic violence and especially child abuse to criminal standards.
In fact, research proves that the interaction of Federal Family Law system and State based Child Protection system often FAILS children in situation of abuse, as allegations are not properly investigated, are often dismissed as a strategy to get residence and unsupervised unsafe contact, or contact arrangements that jeopardize the safety of the mother are granted to the abuser[6].

Similarly the proposal to reverse who the child lives with, following more than one breach of Parenting Order, does not take into consideration that mothers may have very good reasons to suspend contact, especially if the child alleges abuse or if she fears for the child or her own safety.
This should be taken into serious consideration, keeping in mind that allegation cannot always be easily proved. This provision would also be inconsistent with the best interest of the child, instead it enshrines a "revenge" mentality in favour of the non-residential parents, irrespective of the child's interest.

We do not want a situation where a woman to whom her child has disclosed abuse by the separated partner is faced with the choice of either losing residency of the child or letting the child attend unsafe contact. Just the threat of this outcome, will prevent women from seeking help in cases of Child Abuse or Domestic Violence, for fear they will not be believed or would not be able to prove the allegations, due to factors beyond their control.
This will also of course impact on the screening process, as women will not disclose Domestic Violence or Child Abuse to the Family Relationship Centres, and will therefore not be screened out of the process, as appropriate and intended.
In short, all these punitive measures will mean that women and children experiencing abuse, many of whom will not have been screened out of the new Family Law system, will be put at great risk.

On the other hand, there does not seem to be any provision in relation to non-residential parents, mostly fathers, seeking increased contact but not availing of it.
While the residential parent must make children available for contact, according to Family Law Orders, there is no obligation for residential parents to exercise it.
There are cases where increased contact time means that the residential parent will receive less Child Support payments, but once the contact is granted the non-residential parent does not avail of it. This is by no means an uncommon scenario. It not only creates financial difficulties for the residential parent, but also generates daily life disruption and frustration for the children involved. However not availing of ordered contact on a regular basis is not an automatic nor easy cause of changing that order in favour of the residential parent.

**Recommendations**
Given the above evidence Speakout recommends:
16. That the Government not amend the Family Law to award costs against parents who make "false" allegations of domestic violence or child abuse.
17. That these allegations be instead investigated by the Family Safety Unit mentioned above.

18. That Family Law is not amended to ensure that the Court must consider changing Residency of the Child in case of breaches.
19. That the residential parent is given meaningful opportunity to explain the reason for the breach.
20. That if a non-residential parents does not exercise contact without any reason, over a period of time, the Court will consider varying the order to reflect the level of contact actually happening.

## Proposed Changes to Family Law Act

**Concerns re rebuttable presumption of equal shared parental responsibility**
While the presumption of equal shared parental responsibility and the equal time starting point assumptions are rebuttable, it will be difficult for women to afford legal proceedings to rebut this, particularly in the context of difficulties in accessing Legal Aid in Family Court matters and of the punitive approach to awarding costs discussed above.
NESB women, and particularly recent arrivals, who are often financially disadvantaged, experience language barriers and lack information on Court processes in Australia, will face even greater difficulties.
It is our experience that NESB women find going to Court an intimidating and difficult experience.
Recent anecdotal evidence from our casework suggests that women married to Anglo Australians find it particularly difficult to get positive outcomes form the Local Court in relation to AVOs, due to discrimination, stereotyping and their disadvantage due to the perpetrator's familiarity with the legal system in Australia and better English skills. We think that this scenario may also be experienced in relation to Family Law proceedings, thus making it extremely hard for this group of women to rebut the presumption.

For all the reasons discussed above, we are fearful that women and children experiencing domestic violence will be put at a greater risk of continued abuse or will be discouraged to leave an abusive relationship by the rebuttable presumption of shared parental responsibility and equal time as well as by the requirement that parents attend a dispute resolution process before they can take a parenting order to court.

**Requirement of consultation**
As contact with children is often used by abusive partners to continue abuse and harassment of mothers who have escaped from an abusive relationship, we do not support that the Family Law Act be amended to include a requirement to consult each other in relation to decisions about children where domestic violence or abuse has been identified.

**Requirement to attend a dispute resolution process before taking a Parenting issue to court**
As explained above, we are not convinced that all cases of abuse will be screened out and therefore remain concerned that victims of domestic violence will have to attend dispute resolution processes with the perpetrators of the violence.
We are particularly concerned that the Family Court will take into account the refusal to attend and award costs to the other parents, without being first required to ascertain the reasons of the refusal and to rule out domestic violence and abuse.

**Grandparents**
While we acknowledge the positive role that many grandparents play in the life of their grandchildren, we are concerned that in cases where domestic violence or abuse is present, an abusive parent to whom the Court has not granted Contact, can gain unsupervised access to the children through the grandparents.
This should be taken into consideration by any Parenting Plans involving grandparents.

**Overseas provisions**

For the reasons discussed above we are against the inclusion of provisions based on the Florida legislation in the Family Law Act. Mothers who seek to protect their children from abusive fathers or who fear for their children's and their own safety, are often labeled "unfriendly", or "uncooperative" and will be greatly disadvantaged by such provision.

Instead Speakout recommends the introduction of provisions based on the New Zealand legislation, which provides for a rebuttable presumption of no custody or unsupervised contact where a parent has been violent to a child or the other partner.

| **Recommendations** |
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| 21. Speakout is opposed to all the proposed changes to the Family Law Act. |

## Conclusions

With 66% of separating couples indicating violence as a cause of marriage breakdown and considering the increasing amount of evidence proving the failure of the interaction of Family Law/Child protection systems in protecting children and women who are victims of abuse at the hands of the father/ex-partner[7], it is imperative that the safety of children and adults is given priority in any Family Law proceedings and in any system dealing with separating families.

| **Recommendations** |
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| 22. That the Family Law Act be amended to enshrine a "safety first" approach in Family Law as a primary factor of the "child's best interest". |
| 23. That domestic violence be recognized as a child protection issue |
| 24. That the Family Relationship Centres be guided and operate from the above principles |
| 25. That the "child's best interest", continue to be assessed on a case by case approach |

We take the opportunity to advise you that we are also interested in being heard at any Public Forum you may hold regarding this matter.

## References

[1] Quoted in Laing l., Domestic Violence and Family Law, Australian Domestic & Family Violence Clearinghouse, 2003

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

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

[4] Brown T., Sheehan, R. Frederico M. and Hewitt L. Resolving family violence to children: the evaluation of Project Magellan, a pilot project for managing Family Court residence and contact disputes when allegations of child abuse have been made Monash University, 2001; Rhoades H., Graycar R., Harrison M., The Family Law Reform Act 1995: Can changing legislation change legal culture, legal practice and community expectations? Interim Report 1999
Hay Alison, Child protection and the family court of Western Australia: the experiences of children and protective parents, Paper presented at the Child Sexual Abuse: Justice Response or Alternative resolution Conference, Adelaide, 2003.

[5] Lesley Laing, Domestic Violence and Family Law, Australian Domestic & Family Violence Clearinghouse, 2003

[6] Family Violence Committee Family Violence Consultation Report, Family Court of Australia, June 2003, Family Law Council Family Law and Child Protection Final Report 2002; Australian Institute of Criminology Issue Paper no. 91 Child Abuse and the Family Court 1998; Brown T., Sheehan, R. Frederico M. and Hewitt L. Resolving family violence to children: the evaluation of Project Magellan, a pilot project for managing Family Court residence and contact disputes when allegations of child abuse have been made Monash University, 2001
Rendell K., Rathus Z., Lynch A., An unacceptable risk, Women's Legal Service Inc., Brisbane

[7] See Lesley Lang, Domestic Violence and Family Law, Australian Domestic & Family Violence Clearinghouse, 2003 for a very good summary of the research.