

**National Association of  
Women and the Law**



**Association nationale  
de la femme et du droit**

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**RESPONSE TO BILL C-22**

***AN ACT TO AMEND  
THE DIVORCE ACT***

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**Prepared by the NAWL Working Group on Family Law**

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## SUMMARY OF RECOMMENDATIONS

### **Keep the language of custody and access:**

1- The terms custody and access should be maintained in the *Divorce Act*, and subsections 16(1) to 16(7) in the current *Divorce Act* should remain unchanged. The other subsections (16(8), (9) and (10) should be repealed, since the list of criteria to be considered under the proposed new section defining the best interest of the child (16.2) would address these.

In the alternative, if the Committee decides to abandon the language of custody and access and replace it with the concept of parental responsibility,

- the responsibilities of caregiving and decision-making must be tied together to prevent abusive fathers from maintaining rigid decision-making control while abdicating any actual caregiving responsibilities;
- the *Act* will need to provide better guidance as to where a child will actually reside;
- the *Act* will need to identify how “supervised parenting” is to be ordered and exercised;
- specific provisions must be added so that shared decision-making responsibilities would not jeopardize an abused woman’s safety interests.
- the Bill needs to address the gap that will exist between the child support guidelines and the *Divorce Act*;
- provisions will need to be made to better protect children from international kidnappings.

### **Improve the best interest of the child test:**

2- Section 16.2 of the *Divorce Act* should specify that the issue of safety and security of both the child and her primary caregiver are the paramount concern when deciding on a child’s best interests.

3- The circumstances in which shared parenting time and/or decision-making are inappropriate must be spelled out, and a presumption against parenting time and decision-making responsibility for the abuser in cases involving family violence must be added to the subsection 16.2 (1) (d).

4- The definition of family violence in subsection 16.2 (3) should be expanded to specifically mention wife assault or spousal violence, and to include “sexual abuse” as well as “psychological abuse,” when it entails a prolonged pattern of behaviour intended to control the victim through humiliation, fear or isolation.

5- The provisions on family violence should also identify the violence risk factors that a court must assess to determine whether a child will be safe in the presence of an abusive parent, as recommended by the B.C. Institute Against Family Violence. In addition, supervised access or visits must be provided for in cases involving family violence, and the courts should monitor the protection of the best interests of the child during a supervised contact period. The services must be accessible, secure and provided by supervisors with expertise in child abuse and violence against women. Services must be racially, culturally and linguistically appropriate to the diverse families across Canada.

6- The proposed subsection 16.2(2)(e) must be amended to include race and ethnic origin in the list of factors to be taken into consideration to determine the best interests of the child.

7- The reference to Aboriginal heritage should appear in its own paragraph, and specifically address the delicate balance that must be achieved to effectively respect and promote the collective rights of Aboriginal Peoples, the equality rights of Aboriginal women, as well as the best interests of the specific child who is affected by a decision.

8- The *Divorce Act* must include a provision that will foster an egalitarian and progressive interpretation of culture, race and ethnic origin that is dynamic and that takes into account the specific and general context in which it arises and is experienced by different families as well as the intersection of gender and class interests.

**Add a Preamble to the *Divorce Act*:**

9- The *Divorce Act* must begin with a Preamble that recognizes the historic and ongoing inequality and disproportionate responsibilities for childcare of women in many if not most families, as well as the gendered nature of power, control and violence. It must acknowledge the ongoing manifestations and experiences of racism, and its negative impact on racialized communities and Aboriginal Peoples, as well as the pervasiveness of discrimination based on sexual orientation, disability and class. It must acknowledge and promote all women's human rights as protected by sections 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*, as well as by international instruments, such as the Declaration on the Elimination of Violence against Women, the Convention on the Elimination of all forms of Discrimination against Women, the Convention on the Elimination of Racial Discrimination and the Beijing Platform for Action. The Preamble should propose an equality rights framework for interpreting the provisions of the *Divorce Act* and, in particular, should prohibit any discrimination on the basis of sex, class or socio-economic condition, Aboriginal heritage, race and ethnic origin, disability and sexual orientation.

10- A specific provision mandating an annual report to Parliament on the application of the *Divorce Act* that specifically directs the Department of Justice to do a gender-based analysis of the impact of the Act on women and children should be included.

**Ensure women's access to justice**

11- Mediation must never be mandatory. A screening mechanism should be provided to identify cases where there is violence or concern about the safety or the emotional, psychological or physical health of the parties. Where a woman discloses past abuse/control issues, she should not be expected to begin or continue with mediation. Mediation should not be recommended as a form of therapeutic intervention for so-called "high conflict" family law disputes. Use of any form of alternative dispute resolution must never be a required prerequisite to family court access nor a requirement for receiving legal aid or any community support services related to family law issues.

12- Legal aid services must be viewed as a right and made available to all women who require them. Legal aid services must ensure that barriers to access, such as literacy issues and barriers for women with disabilities are removed. French language services and language interpretation must be

available when needed. The Federal government must provide adequate funding for legal aid to Provinces and Territories for family law matters and must ensure that provinces and territories use this money appropriately.

13- Lawyers, judges and all family court personnel must receive mandatory training in the new legislation that also includes training on the realities and dynamics of women's poverty and violence against women, racism, homophobia and discrimination against persons living with a disability, and the differential impacts these may have on women, especially in the context of ongoing family court proceedings.

## **Introduction and Overview**

1. The current *Divorce Act* presents a number of challenges and barriers to women with children who leave abusive men. The absence of spelled-out criteria to guide judges in applying the best interests of the child test means that women and children are vulnerable to considerable judicial discretion. The “maximum contact principle” contained in section 16 is not safe or realistic for women leaving abusive men, as it essentially requires them to encourage access by the father to the children. There are no provisions that deal specifically with violence against women and children or that even acknowledge it as a reality for many families. The ban on consideration of past conduct unless it is directly relevant to the best interests of the children is troublesome, given the lack of judicial understanding of the impact on children of witnessing violence against their mothers. Further to these challenges with the current legislation are a number of operational problems such as lack of legal aid, the 40 percent rule of the Federal Child Support Guidelines and the increased use of privatized dispute resolution mechanisms such as mediation.

2. There have been a number of law reform initiatives since 1997. In 2001 the Federal/Provincial/Territorial (FTP) Family Law Committee held a national consultation on different law reform options on custody and access; it released its final report entitled “Putting Children First” in November 2002. The Committee made a number of positive recommendations, including an acknowledgement of violence within families as a factor to be considered in determining the best interests of children. The Committee also recommended that the maximum contact principle be eliminated and that there be no presumption of shared parenting in the *Divorce Act*. However, the Committee failed to identify the seriousness and gendered nature of violence within families and did not emphasize the need for serious attention to and adequate funding of legal aid for family law matters. It also promoted the use of alternate dispute resolution systems without clearly stating the limits of these systems in situations of power imbalance, such as those created by violence against women.

3. The current *Divorce Act* provisions dealing with post-separation parenting are inadequate, particularly for women and children leaving abusive men. These laws must explicitly acknowledge the reality of violence against women and children within the family and set out provisions to deal with it. Such an acknowledgement will do no harm to the many families where there is no violence.

It will simply and importantly strengthen the rights of the most vulnerable and help create a culture and society that ensures fair and equal treatment for all.

4. Bill C-22, *An Act to Amend the Divorce Act*, was tabled by the Minister of Justice on December 10, 2002. This Bill proposes to change Canadian family law on parenting after divorce dramatically, by eliminating the concepts of “custody and access” and replacing them with the notion of “parental responsibilities”, “parenting time” and “parenting orders”. It provides for an extensive definition of the “best interests of the child” test that takes into account the child’s needs for continuity and the history of caregiving, his or her security interests, family violence and any relevant previous criminal convictions, as well as cultural, linguistic, religious and spiritual upbringing and heritage, including aboriginal heritage. While the Bill makes explicit reference to family violence and to the need to ensure the security of the child and “other” family members, it is completely gender neutral and does not specifically refer to violence against women or to women’s equality interests in family law. The federal government’s overall policy framework within which Bill C-22 has been introduced is heavily biased in favour of mediation, and there is no commitment to increasing federal funding for legal aid in family law matters, which raises serious concerns about women’s access to the mechanisms of justice.

5. Changing the language of custody and access will not solve the problems that have been identified with the operation of the current *Divorce Act*. On the contrary, we are concerned that the proposed “parental responsibility” model will foster many new problems. Extensive litigation will be required to define the parameters of parenting time, the exercise of parenting responsibilities, the “rights” of fathers to shared parenting, and such basic issues as where the children will reside, which parent must pay child support, and how the Hague Convention on the international abduction of children will apply. Thus we recommend that the language of custody and access be maintained. However, we support the inclusion of factors that must be taken into consideration when determining the best interests of the child, and recommend specific improvements to the proposed factors. We recommend that the Bill be amended to address violence against women within the family more effectively, and that race and ethnic origin be added to culture and religion and Aboriginal heritage as relevant factors. A Preamble or an application clause must be included to provide an interpretive framework for parents, lawyers and judges that will encourage them to

consider the ongoing disadvantage of women, racialized communities and other historically disadvantaged groups, and to look to the egalitarian provisions of the *Canadian Charter of Rights and Freedoms* and international human rights instruments to interpret the *Divorce Act*. Finally, we recommend that policies be adopted by the federal government to ensure women's access to justice; specifically, that women have access to legal aid, that mediation never be mandatory, that lawyers and judges receive adequate training, that unified family courts and expedited procedures in cases of violence be in place, and that adequate funding for services be provided.

### **Part 1: Keep the language of custody and access: The parental responsibility model will do more harm than good**

#### The repeal of custody and access

6. Bill C-22 completely eliminates any reference to the words "custody" and "access," and thus proposes to fundamentally change the concepts with which we think about parenting after divorce. Changing the familiar language of custody and access will create confusion in our courts and increase litigation as courts struggle to define precisely what is meant by the concept of "parental responsibility". This has been the experience in England, where there has been extensive litigation to determine the scope and content of parental responsibility<sup>1</sup>. The notions of custody and access, on the other hand, are clear and well-defined, and all family law practitioners and judges, professionals and parents themselves understand the nature of these terms. In fact, in Australia, which has a parental responsibility regime, many people still use the terms "custody" and "access".<sup>2</sup>

#### Parenting patterns can't be changed by legislation alone

7. In principle, the concept that both parents have ongoing responsibilities towards their children is unquestionably a good one. A Bill that directs attention to the needs of children and seeks to achieve

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<sup>1</sup> John Eckelaar, "Parental responsibility – A New Legal Status? (1996) 112 *The Law Quarterly Review* 233.

<sup>2</sup> Rhoades, Helen, Reg Graycar, and Margaret Harrison, (2000) *The Family Law Reform Act 1995: The First Three Years*, Sydney, University of Sydney and Family Court of Australia, at 9. For an overview of the outcome of this legislative experiment in Australia see Helen Rhoades, "The Rise and Rise of Shared Parenting Laws: A Critical Reflection" (2002) 19 *Canadian Journal of Family Law* 75.

more responsible parental involvement from fathers should be a positive step. Unfortunately, as social science studies indicate<sup>3</sup>, too many fathers still believe that the primary care of children is the responsibility of women, and it is still women who in most cases do the majority of housework, provide most of the day to day care for the children, who arrange their work schedules to accommodate their children's needs and who take time off from work to care for sick children<sup>4</sup>. In fact, many women must now also ensure that their children have what they need (sufficient clothing, toys, books, even food) when they are in the care of their fathers.

8. These gendered patterns of caregiving are deeply ingrained and prevail both during marriage and after divorce. Indeed, reports commissioned for the Department of Justice show that, after divorce, a majority of fathers do not share equally in parental responsibility for their children even when they have joint custody, and that mothers often end up doing most of the caregiving work<sup>5</sup>. Will changing the *Divorce Act* to replace the notions of custody and access with the concept of parental responsibility help change these gendered parenting patterns? This has certainly not been the result in those countries that have adopted parental responsibility models. Studies indicate that the introduction of the concept of parental responsibility in England, Australia and many states in the U.S. has done very little to actually change ingrained parenting patterns.<sup>6</sup> Legislation that would create the illusion of shared parental responsibilities and modify parental authority accordingly, while at the same time being unable to actually change parenting patterns, will cause more harm than good.

#### Access Denial: Not a Real Problem

9. Fathers' rights groups have been arguing that the *Divorce Act* needs to be amended to protect fathers from unfair access denial. However, reports commissioned for the Department of Justice

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<sup>3</sup> Katherine Marshall (1993) *Les parents occupés et le partage des travaux domestiques*, Perspectives, Statistics Canada. Cat. 75-001F, p 28

<sup>4</sup> Statistics Canada, The Daily, Tuesday February 11, 2003

<sup>5</sup> Nicole Marcil-Gratton and Céline Le Bourdais, Custody, Access and Child Support: *Findings from the National Longitudinal Study of Children and Youth*, Université de Montréal, Institut national de la recherche scientifique, Presented to the Child Support Team, Department of Justice Canada, 1999, at p. 21: "Interestingly, most children for whom parents said there was a court order for shared custody in fact lived only with their mothers at the time of separation".

<sup>6</sup> See Rhoades, supra note 2.

show that, in fact, “failure to exercise access appears to be much more prevalent than access denial or unwarranted access denial”<sup>7</sup>. Indeed, another study shows that, after divorce, a majority of fathers do not comply with child visitation commitments.<sup>8</sup> Most mothers would welcome increased parental involvement from fathers after a divorce, on the condition that it does not threaten their children’s well-being or security<sup>9</sup>. When mothers do prevent access it is typically out of concern for the safety and well being of the children at a particular moment. The Lisa Dillman case is an example.<sup>10</sup> Where custodial parents deny legitimate access without reason, there are adequate remedies already in place within both the family and criminal courts.

#### Parenting time: a vague notion

10. The concept of parenting time is entirely new, not only in Canadian family law, but also in Common Law. Indeed, in the many jurisdictions that have adopted a parental responsibilities model, none have adopted the language of “parenting time”. Most refer to “residential parent” and “contact parent”. However, Bill C-22 does not refer to the child’s residence, primary or otherwise. This is problematic: where a child will eat supper, do her homework, have her bath and sleep at night are the most basic questions, and the answers to them will not be clear under the proposed reform. Will both parents who have parenting time be required to have a complete home for the child? Will children of divorce now all have two homes, ...or will they effectively become “homeless”? Or is this Bill simply assuming that regardless of any legal status, the mother will always be there to provide clothing, food and shelter for the child? If a change of language must be considered, why did the

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<sup>7</sup> Pauline O’Connor, *Child Access in Canada: Legal Approaches and Program Supports*, presented to Family, Children and Youth Section, Justice Canada, 2002-FCY-6E, at p. 9.

<sup>8</sup> Nicole Marciel-Gratton and Celine Le Bourdais, *Custody, Access and Child Support: Findings from the National Longitudinal Study of Children and Youth*, , loc. cit., note 5, at p. 22; See also Christin Schmitz, “Denial of child access not the main problem: CBA”, *The Lawyers Weekly*, vol. 18, no. 4, May 29, 1998, pp. 7, 29. .

<sup>9</sup> Debra Perry et al., *Access to Children Following Parental Relationship Breakdown in Alberta* (Calgary: Canadian Research Institute for Law and the Family, 1992), at 37 et seq.. Linda Neilson, “Partner Abuse, Children and Statutory Change: Cautionary Comments on Women’s Access to Justice” (2000) 18 *Windsor Yearbook of Access to Justice* 115, at 142-3.

<sup>10</sup> In this case, the mother of two young girls fought to prevent court-ordered visits by the girls with their imprisoned, sex-offender father, who had been convicted of sexually assaulting their step sister as well as other women.. She was at one stage found in contempt of court for not abiding by the access orders. Deborah Tetley, “Daughters Stop Visit to Imprisoned Father”, *Calgary Herald*, 28 May 2001; *Schneeberger v. Schneeberger*, [1999] S.J. No. 817 (Sask. C.A.), (Q.L.). See also: Susan B. Boyd, *Child Custody, Law, and Women’s Work* (Toronto: Oxford University Press, 2003), 136.

Department of Justice not adopt language used in other jurisdictions, such as “residence” and “contact”? However, it is important to note that even in these jurisdictions, litigation has increased, including post-order litigation about contact.<sup>11</sup>

11. This new terminology also raises concerns about the enforcement of parenting agreements and parenting orders. What will happen when a parent does not bring a child back to the other parent or does not make sure that a child is given her medicine? How can the other parent intervene to protect the best interests of the child? It is sometimes necessary to involve the police when an order is breached. Currently, the police are often reluctant to enforce these orders, claiming they are unclear or that the police have no jurisdiction. The new terminology will only make enforcement more difficult.

12. The present laws on custody and access provide for “supervised access” when a parent has abused a child or risks harming the child. Will the new concept of parenting time allow for “supervised parenting”, and if so, how would this be done? Would that parent still benefit from the presumption set out in subsection 16(8) that parenting time carries the exclusive responsibility for day-to-day decision-making?

#### The problems with defining parental responsibility

13. While the terms custody and access are to be replaced by the concept of “parental responsibility”, this key concept is not defined in Bill C-22. The problem with defining parental responsibility is that most of the actual work of good parenting is invisible. Because women are usually the primary caregiver, the work of mothering is taken for granted and is only noticed in its absence . . . or when it is done by a man!. The adequate exercise of parenting responsibilities by women and men is still defined by gendered and sexist expectations and standards. A simple change of language in the *Divorce Act*, without systemic social change in men’s education about parenting, in workplace culture and in the economic consequences of caring for a child, will not achieve the goal of ensuring that both parents exercise their share of parental responsibilities.<sup>12</sup> There is also a risk that the evaluation of each parent’s exercise of parental responsibilities will be watered down to

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<sup>11</sup> Rhoades, *supra* note 2

<sup>12</sup> Rhoades, Graycar and Harrison, *supra* note 2; Boyd, *Child Custody, Law, and Women’s Work* (Toronto: OUP Press, 2003), chs. 7-8.

an examination of parental “capacity,” which will entail a lowering of parenting standards that is not in the best interests of the child. Indeed the test may become “can the parent take care of the child?” instead of “is it in the best interest of the child to be in the care of this parent?”.

14. The notion of parental responsibility is also potentially imbued with problematic expectations as to what constitutes adequate or good parenting. These expectations may be based on racial, class-based, heterosexist and able-ist standards and prejudices held by those involved in decision-making – mediators, assessors, lawyers and judges. For instance, some judges may automatically assume that it is in a child’s best interests to reside with the parent with greater material wealth, or with a heterosexual parent rather than a lesbian mother. Others may assume that a mother with disabilities is unable to care for her child adequately. While the best interests of the child test and basic human rights standards provide a guide for defining the boundaries of adequate parental responsibility, crafting a specific definition of parental responsibility remains a challenge. Replacing the notions of custody and access with parental responsibility will introduce confusion and uncertainty and will not help families resolve difficult disputes.

#### Confusion in the proposed decision-making responsibilities

15. Bill C-22 introduces a separation between the responsibility for the primary care of a child and the responsibility for making decisions that relate to the child. This type of decision-making responsibility is broken down into three categories under the proposed subsection 16(5): the responsibilities for making major decisions with respect to the child’s health care, education and religious upbringing; the responsibility for making decisions relating to a specific matter affecting the child; the responsibility for making decisions affecting the child other than those provided for above. Nothing in the proposed model would prevent a scenario where a mother would have 80 per cent of all parenting time (and parenting responsibility), but the father would have equal decision-making authority. To expect a mother who is providing primary care to her children to consult with their father every time she needs to make a decision is unwieldy, frustrating and counterproductive for all parties, including the children. It is also antithetical to most people’s understanding of being “separated.” Where two people have separated or divorced, even if just because their lives have progressed in different directions, it is unusual for them to be able to collaborate and cooperate closely for many years, which is exactly what is required by a shared parenting model. Where the separation follows an abusive relationship, it is not just unusual but dangerous.

16. In addition, there would be a great deal of confusion and overlap between the areas of decision-making identified in subsection 16(5)(d), which refers to the responsibilities for making decisions affecting the child “other than those provided for under subsection 16 (5) b) and c)”<sup>13</sup> and the day-to-day” decision-making authority granted to the parent who is exercising parenting time. Again, it can be expected that extensive litigation will be required to delineate these different types of decisions.

#### A de facto presumption of shared parenting

17. While the parental responsibility model seems neutral and does not create a formal presumption in favour of joint custody or shared parenting, in its interpretation and application by judges, lawyers and other family law professionals, women will in fact have to contend with a basic expectation that parenting time and/or decision-making authority should be shared with their ex-spouses. Indeed, research shows that joint custody and shared parenting are already becoming the new models for parenting after divorce: Statistics Canada indicates that 37 per cent of all court orders relating to custody and access now mandate joint custody of the children<sup>14</sup>. This may be a reflection of the pressure now placed on mothers in the context of mediation, the impact of the 40% rule in the child support guidelines, and the favourable reception by some judges and mediators of the shared parenting ideas in the Report of the Special Joint Committee on Custody and Access.

18. The model presented in Bill C-22 would lend itself to a default presumption of joint parental responsibility until there is a specific parenting order directing otherwise. According to one expert, under this model, “parenting responsibility would be jointly held by both parents, and would remain so until an order or agreement provides otherwise.”<sup>15</sup> In countries that have introduced a parental responsibilities model, such as Australia and the UK, as well as many American states, research

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<sup>13</sup> par 16 (5) b) refers to decisions relating to a child’s health care, education and religious upbringing, and par. c) refers to decisions relating to the responsibility for making decisions relating to a specific matter affecting the child.

<sup>14</sup> Joseph Brean, “Joint custody on the rise in divorce settlements, Statistics Canada finds most marriages likely to fall apart after four years”, National Post December 3, 2002.

<sup>15</sup> Cossman, p. 95.

indicates that judges, lawyers and other family law professionals have gradually adopted a *de facto* presumption in favour of shared parenting<sup>16</sup>.

#### Why mandatory or *de facto* shared parenting would be wrong

19. While shared parenting can be a good arrangement for parents who are able to cooperate, who are equally committed to providing care for the child and who both agree that shared parenting or joint custody would be in the best interests of the child, it is definitely not appropriate in situations of abuse of power and/or violence.

20. Given the fact that mothers provide the majority of care most of the time, both before and after separation, a legal presumption that parents would share equally in the care of the children would result in a significant change in the status quo for many children. Unless important reasons exist to justify such a change, custody and access laws must remain focussed on the stability needs of the children.

#### The risk of increasing women's vulnerability to control and violence

21. If badly interpreted, the proposed provisions on decision-making authority could lead to situations where women are once again subjected to marital authority and control, despite the fact that they are divorced. For an abuser, decision-making authority often provides the foundation to continue exercising control: to prevent their ex-partners from becoming independent and to ensure that they remain connected with them. Decisions made by someone who is involved for reasons of power and control and not out of genuine interest in the children will more likely reflect the decision-maker's interests than those of the children. They will certainly not reflect the concerns of the mother, and they could jeopardize her security as well as that of the children

22. While the proposed criteria defining the best interests of the child do direct a judge to take into consideration the safety of the child and "other family members" in making a parenting order, this language is not sufficient. Specific provisions must be included and operational supports must be strengthened to encourage judges not to order shared parenting time, shared decision-making

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<sup>16</sup> Helen Rhoades, Reg Graycar, and Margaret Harrison, (2000) *The Family Law Reform Act 1995: The First Three Years*, Sydney, University of Sydney and Family Court of Australia; Rebecca Bailey-Harris, Jacqueline Barron and Julia Pearce, "From Utility to Rights? The Presumption of Contact in Practice" (1999) 13 *International Journal of Law, Policy and the Family* 111-131.

responsibilities or other forms of decision-making that would jeopardize an abused woman's or a child's safety interests.

#### The negative impact on child support payments

23. The Child Support Guidelines are structured around the notion of "custody and access". Indeed, the calculation of child support awards is based on the income of the "non-custodial" parent (except in Québec, where different rules apply). If the language of custody and access is abandoned, there will be more uncertainty about how the guidelines will apply. Indeed, with the proposed notion of "parenting time," it may be difficult to identify a residential parent or a primary caregiver parent. It is certain that even more litigation will follow the passing of Bill C-22 if it remains unchanged, since the Bill will allow for the recalculation of child support payments "at the request of either or both spouses", on the basis of updated income information. In addition, the Bill would make it easier for an ex-spouse to engage in inter-provincial proceedings to vary, rescind or suspend support orders without notice to the other spouse (section 18(2)). In other words, with the changes proposed in Bill C-22 mothers will have to deal with more - not fewer- judicial proceedings, in a context where legal aid and advocacy services have been drastically reduced in many provinces.

#### The weakening of international kidnapping provisions

24. Another complication that will result from the proposal to abandon the language of custody and access will be the difficulty of using international treaties that still use those expressions. In particular, the Convention on the Civil Aspects of International Child Abduction (The Hague Convention) refers to custody and access, not "parenting time". Bill C-22 proposes that a parenting order "may" refer to the Hague Convention in order to define who is deemed to have "custody or rights of access" for the purposes of that treaty. The Bill further provides that if the court is silent on the issue, each person to whom parenting time has been allocated "is deemed to have rights of custody for the purposes of that Convention" (ss. 22.1(2)). This implies that unless there is a specific reference stating which parent has "custody" for the purposes of the Hague Convention, both parents will be presumed to have joint custody as long as they have at least some "parenting time" with the child. This would certainly make it more difficult to limit international kidnappings. Inasmuch as it is immigrant women who most often (although not exclusively) have to deal with international kidnapping, this might increase the already disadvantaged position that they face, as immigrants and women of Colour, in law and in society.

### Recommendations:

We recommend that the terms custody and access be maintained in the *Divorce Act*, and that subsections 16(1) to 16(7) in the current *Divorce Act* remain unchanged. The other subsections 16(8), (9) and (10) should be abrogated, since the list of criteria to be considered under the proposed new section defining the best interests of the child (16.2) would address the issues for which they provide.

In the alternative, if the Committee decides to abandon the language of custody and access, and replace it with the concept of parental responsibility,

- the responsibilities of caregiving and decision-making must be tied together to prevent abusive fathers from maintaining rigid decision-making control while abdicating any actual caregiving responsibilities;
- the Act will need to provide better guidance as to where a child will actually reside;
- the Act will need to identify how “supervised parenting” is to be ordered and exercised when both parents have parenting time;
- specific provisions must be added so that shared decision-making responsibilities would not jeopardize an abused woman’s safety interests.
- the Bill needs to address the gap that will exist between the child support guidelines and the *Divorce Act*, and
- provisions will need to be made to better protect children from international kidnappings.

### **Part 2. Improve the Definition of the Best Interests of the Child Test**

25. The introduction of criteria in this Bill (section 16.2) to assist judges and others in considering the best interests of the child is a significant positive initiative that we support. Indeed, criteria can reduce confusion and assist judges, lawyers, mediators, court staff and parents themselves in considering appropriate factors in custody and access cases.

### Elimination of the maximum contact presumption

26. The maximum contact presumption now contained in subsection 16(10) would be eliminated with this Bill, and this is a very important change. Many experts have noted the serious problems caused by this presumption, most glaringly exemplified by the Lisa Dillman case.<sup>17</sup> While the proposed subsection 16.2(2) b) would still direct judges to look at the “benefit to the child of developing and maintaining meaningful relationships with both spouses”, we hope that courts will not interpret this provision to enforce contact between children and their abusive fathers, as was done under subsection 16(10).

### The history of care for the child

27. This factor (section 16.2(c)) is of utmost importance. For children, the upheaval associated with the separation of their parents is sufficient without adding to it any significant change in their daily routines or their primary caregiver. They should be able to rely on a continuation of whatever caregiving arrangements were in place before the separation. Judges can make parenting orders on a case-by-case basis, unlimited by any presumptions, so that they reflect the ongoing parenting arrangements within each family. Whichever parent provided most of the care prior to separation should continue to provide most of the care after separation. Care should be examined globally and should not be a mere totalling of minutes spent in the presence of the children, in order to accurately reflect who is taking the responsibility for child-related planning as well as the day to day physical care of the children. This principle has recently been endorsed by the American Law Institute, which has adopted the “Approximation Rule”, by which parenting after divorce is determined on the basis of the amount of time a child has spent in the care of each parent prior to separation<sup>18</sup>. This principle truly reflects and respects the needs of children.

### Family violence

28. Violence against women has serious consequences for children exposed to it. The behaviour and attitudes of an abusive man can have a profound and lasting destructive impact on the children’s well

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<sup>17</sup> Jonathan Cohen & Nikki Gershbain, “For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact” (2001) 19 Canadian Family Law Quarterly 121.

<sup>18</sup> Katherine Bartlett, “Improving the Law Relating to Postdivorce Arrangements for Children”, in Ross A. Thompson and Paul R. Amato, eds, *The Postdivorce Family: Children, Parenting, and Society*, Thousand Oaks, CA: Sage Publications, 1999, 71-102.

being that will continue with ongoing post-separation contact<sup>19</sup>. In addition, the ongoing exposure of the mother to her abuser because of a custody order will have a negative impact not only on her safety and equality interests, but on the children's well being. It is imperative that these realities be a legislated consideration when decisions about post-separation parenting are being made, and that the safety of the abused parent and of the children be acknowledged as a paramount consideration.

29. Bill C-22 proposes to include "family violence" as a factor in the determination of the best interests of the child (section 16.2(d)). However, the definition does not go far enough in identifying the many kinds of violence that women experience at the hands of abusive spouses. Indeed, the definition refers exclusively to physical violence. This definition is too narrow and does not include other very damaging expressions of male violence such as sexual and psychological abuse. Failure to consider all of the tactics used to maintain power and control over women in a relationship will ultimately fail both mothers and children and put them at risk of further harm.

30. Another weakness of the proposed criterion is that it fails to identify wife assault as a specific and significant element of "family violence." Specific focus needs to be placed on male violence against women. The generic reference to "family" violence without a focus on wife assault or spousal violence will side-track efforts at understanding this unique manifestation of historically unequal relations between men and women in the family, and the threat that it represents to the well-being of children.

31. The provisions on family violence should identify the violence risk factors that a court must assess to determine whether a child will be safe in the presence of an abusive parent, as recommended by the B.C. Institute Against Family Violence<sup>20</sup>. We also endorse the Institute's recommendations that the circumstances in which shared parenting time and/or decision-making are inappropriate must be spelled out, and a presumption against parenting time and decision-making responsibility in cases involving family violence must be added to the provisions. Supervised access

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<sup>19</sup> For an extensive review of the literature on this subject, see Peter Jaffe, Nancy Lemon, Samantha Poisson, *Child Custody and Domestic Violence*, London, Sage, 2003.

<sup>20</sup> B.C Institute Against Family Violence, *Position Statement on the proposed amendments to the Divorce Act (Bill C-22)*, Vancouver, March 11 2003. See appendix 1

or visits must be provided for in cases involving family violence, and the courts should monitor the protection of the best interests of the child during a supervised contact period.

### Race and culture

32. Because of systemic racism, poverty, a lack of access to services and other social barriers, many women of Colour, immigrant women and Aboriginal women face increased challenges in family court. Judges and lawyers may have biases and prejudices about certain cultures and religions and hold a negative opinion of “different” parenting practices in different communities, which will have a discriminatory impact on their evaluation of what is in the best interests of the child<sup>21</sup>. Studies indicate that the parenting style of women from marginalized communities is more likely to be contested by child welfare authorities<sup>22</sup>. It is important that decision-makers be encouraged to look at these differences positively, and that a child’s culture and heritage be honoured and promoted in all its dimensions. It is also important that a careful approach be taken with regard to a bi-racial child’s identity that takes into account the evolving and dynamic self-definition that the child may adopt with respect to her identity, language and community. Culture must be understood in its different contexts, and as a concept that is fluid and whose meaning is sometimes contested by some community members.

33. Bill C-22 does propose to take into consideration culture, religion and Aboriginal heritage in the determination of the best interests of the child (section 16.2(e)). However, the proposed list falls short of some important aspects of a child’s life , such as race and ethnic origin. As has been argued by the African Canadian Legal Clinic<sup>23</sup>, a child’s self esteem and identity may be strengthened by continuing contact with the parent of the race and culture that she will be perceived to be part of, and such a parent may more effectively provide the child with the skills to face discrimination and racism in the future. It may also be necessary to shield a child from the racism of a parent’s family, and help the child deal with internalised racism and develop racial pride. The Supreme Court of

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<sup>21</sup> Susan Boyd, *Child Custody, Law, and Women’s Work*, at 14-15.

<sup>22</sup> M. Tourin and N. Trocmé “Facteurs associés à la décision d’entreprendre des poursuites criminelles à la suite d’un signalement pour abus sexuel ou physique envers un enfant » (2000) 33 *Criminologie* p.? (check cite).

<sup>23</sup> Factum of the intervener African Canadian Legal Clininc in *Van de Perre v. Edwards*, available at [www.aclc.net](http://www.aclc.net)

Canada, in the *Edwards v. Van der Perre* case has recently recognized that, while it must be examined on a case-by-case basis, “race can be a factor in determining the best interest of the child because it is connected to the culture, identity and emotional well-being of the child”<sup>24</sup>.

34. Further, given Canada’s shameful colonial past and the ongoing legacy of cultural genocide that persists with respect to Aboriginal peoples, the issue of Aboriginal heritage or upbringing should appear in its own paragraph and specifically address the delicate balance that must be achieved to effectively respect and promote the collective rights of Aboriginal Peoples and the equality rights of Aboriginal women, as well as the best interests of the specific child affected by a decision.

35. Finally, there is a risk of possible misinterpretation of these new references to culture, race and Aboriginal heritage. Culture, for example, is often invoked by abusive men to justify oppressive or abusive behaviour or to provide legitimacy to male domination in the family<sup>25</sup>. Some may say that, in their culture, men automatically have custody of the child or that women and girls who have extra-marital sexual relations should be severely punished. The *Divorce Act* must include a provision that will foster an egalitarian and progressive interpretation of culture that is dynamic and that takes into account the specific and general context in which it arises and is experienced by different families as well as the intersection of gender and class interests.

#### Recommendations:

Section 16.2 of the *Divorce Act* should specify that the issue of safety and security of both the child and her primary caregiver are the paramount concern when deciding on a child’s best interests.

The circumstances in which shared parenting time and/or decision-making are inappropriate must be spelled out, and a presumption against parenting time and decision-making responsibility in cases involving family violence must be added to subsection 16.2(1)(d).

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<sup>24</sup> *Van de Perre v. Edwards*, [2001] 2 SCR 1014, at par 40.

<sup>25</sup> Beryl Tsang, *Child Custody and Access: The Experiences of Abused Immigrant and Refugee Women*, Toronto, Education Wife Assault, 2001.

The definition of family violence at subsection 16.2(3) should be expanded to specifically mention wife assault or spousal violence, and to include “sexual abuse” as well as “psychological abuse,” when it entails a prolonged pattern of behaviour intended to control the victim through humiliation, fear or isolation.

The provisions on family violence should also identify the violence risk factors that a court must assess to determine whether a child will be safe in the presence of an abusive parent, as recommended by the B.C. Institute Against Family Violence.(see Appendix One) In addition, supervised access or visits must be provided for in cases involving family violence, and the courts should monitor the protection of the best interests of the child during a supervised contact period.

The proposed subsection 16.2(e) must be amended to include race and ethnic origin in the list of factors to be taken into consideration to determine the best interests of the child.

The reference to Aboriginal heritage should appear in its own paragraph, and specifically address the delicate balance that must be achieved to effectively respect and promote the collective rights of Aboriginal Peoples and the equality rights of Aboriginal women, as well as the best interests of the specific child affected by a decision.

The *Divorce Act* must include a provision that will foster an egalitarian and progressive interpretation of culture, race and ethnic origin that is dynamic and that takes into account the specific and general context in which it arises and is experienced by different families, as well as the intersection of gender and class interests.

**Part 3. Protect children’s best interests by promoting women’s equality rights: Add a Preamble to the *Divorce Act***

**Women’s realities are erased in Bill C-22**

36. It is of great concern that there is no reference in Bill C-22 to women’s historic and ongoing inequality and disproportionate responsibilities for childcare in the family, and no stated concern about the particular impact of the *Divorce Act* on women. The Bill is couched in “gender-neutral”

terms such as “parenting responsibilities” and “family violence”. This approach is contrary to stated federal government promises to conduct gender-based analysis, to instil gender equality in all of its laws and policies, and to promote women’s equality vigorously. The Canadian government has committed itself to evaluating the impact of its laws and policies on women by doing a gender-based analysis<sup>26</sup>. Internationally, Canada endorsed the *Beijing Platform for Action* (“PFA”) that calls on governments to “seek to ensure that before policy decisions are taken, an analysis of their impact on women and men, respectively, is carried out”<sup>27</sup>. In addition, the *Canadian Charter of Rights and Freedoms* and Supreme Court of Canada jurisprudence have established that the constitutionality of legislation must be evaluated by its impact on historically disadvantaged groups, and in particular on women. Legislation will be deemed discriminatory if it has the effect of exacerbating pre-existing disadvantage, depriving these groups of equal protection or equal benefit of the law.

#### The Supreme Court of Canada’s concern for women’s equality in family law

37. The Supreme Court of Canada has indeed recognized that marriage often reinforces women’s inequality (for example *M v. H*<sup>28</sup> and *Moge v. Moge*<sup>29</sup>). As Justice L’Heureux-Dubé wrote in *Willick*, the *Divorce Act* must be interpreted in a way that is “*sensitive to equality of result as between the spouses*”<sup>30</sup>. More specifically, Justice L’Heureux-Dubé wrote in *Young*:

*“When implementing the objectives of the Act, whether considering joint custody or fashioning access orders, courts, in my view, must be conscious of the gap between the ideals of shared parenting and the social reality of custody and childcare decisions.... Research uniformly shows that men as a group have not embraced responsibility for childcare. The vast majority of such labour, both before and after divorce, is still performed by women, whether those women work outside the house or not, and women remain the sole custodial parent in the majority of cases by mutual consent of the parties. ... Nor does a joint custody order in most cases result in truly shared custody. Rather in day-to-day practice, joint custody tends to resemble remarkably sole custody...”* (emphasis added)<sup>31</sup>.

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<sup>26</sup> Status of Women Canada, (1995), *Setting the Stage for the Next Century: The Federal Plan for Gender Equality*, Ottawa, SWC, par. 35

<sup>27</sup> United Nations, Report of the Fourth World Conference on Women, Beijing, China, 4-15 September 1995, A/CONF.177/20, 17 October 1995, Beijing Platform for Action.

<sup>28</sup> *M. v. H.*, [1999] 2 S.C.R. 3, at par. 181.

<sup>29</sup> *Moge v. Moge*, [1992] 3 C.R. 813, at par. 47 and 70, respectively.

<sup>30</sup> *Willick v. Willick*, [1994] 3 S.C.R. 670, at par. 52.

<sup>31</sup> *Young v. Young* [1993] 4 S.C.R. 3, at par 46.

38. If future legislation and policy do not acknowledge the social and economic realities of women's and children's lives, the end result will be legislation that appears equitable, but that in reality reinforces women's dependence and subordination vis-à-vis their spouses, as well as threatens their security, their dignity and their freedom. This result is contrary to the best interests of their children.

#### Adding a Preamble to the *Divorce Act*

39. This is why it is very important to add a Preamble – or an “application” provision -- to the *Divorce Act* that would provide an equality-rights framework for family law professionals and decision-makers. Such a Preamble would allow for a contextualized interpretation of the experiences of the women, men and children whose lives will be affected by these decisions and would help decision-makers take into consideration factors that would ensure a fair and egalitarian outcome.

40. There are many precedents in Canadian law for such a Preamble. For example, Bill C-71, *An Act to Amend the Criminal Code (self-induced intoxication)* provides the following in its Preamble:

“Whereas the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to equal protection and benefit of the law as guaranteed by sections 7, 15, and 28 of the Canadian Charter of Rights and Freedoms”<sup>32</sup>

Another example can be found in Bill C-27, *An Act to Amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, which has the following passage in its Preamble:

“Whereas the United Nations Declaration on the Elimination of Violence Against Women (General Assembly resolution 48/104, 20 December 1993) and the Platform for Action of the Fourth World Conference on Women (Beijing, 1995) recognize that violence against women both violates, and impairs or nullifies, the enjoyment by women of their human rights and fundamental freedoms”<sup>33</sup>

More recently, the new *Immigration and Refugee Protection Act*<sup>34</sup> was enacted, including an “application” provision that provides the following:

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<sup>32</sup> 1995 Statutes of Canada, Chapter 32.

<sup>33</sup> 1997 Statutes of Canada, Chapter 16.

<sup>34</sup> 2001 Statutes of Canada, Chapter 27

“3(3) This Act is to be construed and applied in a manner that ... d) ensures that decisions taken under this Act are consistent with the Canadian Charter of Rights and Freedoms, including its principles of equality and freedom from discrimination and the equality of English and French as the official languages of Canada; ....f) complies with international human rights instruments to which Canada is a signatory; ...”

#### Recognizing caregiving and violence against women

41. The Preamble to the *Divorce Act* should recognize the specific position of women in Canadian families, in particular the fact that both historically and currently women have been and most often remain the primary caregivers of children. The Preamble should acknowledge the prevalence of violence against women and the fact that this violence is a manifestation of historically unequal relations between men and women, as has been recognized in the United Nations Declaration on the Elimination of all Forms of Violence Against Women. The Preamble should state that the constitutional right to life, liberty and security of the person must be guaranteed equally to women and to children, and that the *Divorce Act* should be interpreted accordingly. It should also acknowledge Canada's commitments under the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW).

#### Recognizing the specific needs of Aboriginal peoples

42. Women's constitutional equality interests are also greatly affected by the ongoing racism and discriminatory attitudes in society, in the legal profession and in the courts. Countless reports have pointed to the unbearable conditions in which Aboriginal men and women live in Canada and the ongoing legacy of colonialist policies against Aboriginal women in the *Indian Act* and in family law. This legacy has a profound impact on how the legal profession and the courts deal with Aboriginal mothers in many different contexts, including custody and access.<sup>35</sup> It may also sometimes have a negative impact on the approach that Band Councils and other decision-making authorities on Reserves may adopt, relative to the custody and access of children. Thus a preamble to the *Divorce Act* must urge decision-makers to be attentive to the needs of Aboriginal children and to the equality rights of Aboriginal women.

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<sup>35</sup> See Marlee Kline, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 *Queen's Law Journal* 306.

### Recognizing the ongoing manifestations of racism

43. Similarly, the Preamble must take into consideration racial discrimination, the systemic inequality of racialized women, and the ongoing manifestations of racism in different institutions, including the legal system. It must also recognize the many ramifications of the social and economic disadvantages flowing from racism in the context of divorce. In particular, the preamble must encourage an interpretation of “culture” that is dynamic, egalitarian, and human-rights oriented. It should make specific reference to Canada’s commitments arising from its having ratified the *Convention on the Elimination of Racial Discrimination*.

### Protecting women and children against homophobia, able-ism and other discriminatory attitudes.

44. The Preamble must also encourage decision-makers to make sure that homophobic value judgments against lesbian mothers are screened out of the post-divorce parenting determination process, and that judges and other family law practitioners not base their decisions on a parent’s sexual orientation. They must also avoid giving undue consideration to a mother’s disability (or their perception of her disability) with respect to her capacity to parent her child adequately.

45. The Preamble should have a general prohibition against discrimination against those who are historically disadvantaged on the basis of class or socio-economic condition, Aboriginal heritage, race and ethnic origin, disability or sexual orientation. Without a comprehensive gender equality analysis and strategy, any forthcoming legislation on post-separation parenting will promote women’s continued inequality. In fact, as long as women remain the primary caregivers of children, enhancing women’s equality is in the best interests of children. Law reform can and must simultaneously take into account and promote both the best interests of children and the equality interests of women.

### Creating a reporting mechanism to hold government accountable

46. Finally, a mechanism for monitoring the interpretation and the application of the *Divorce Act* provisions on women and on children should be put in place. Precedent exists for such a mechanism,

for example in the *Immigration and Refugee Protection Act* which provides for an annual report to Parliament that must include “a gender-based analysis of the impact of this Act”<sup>36</sup>.

**Recommendation:**

The *Divorce Act* must begin with a Preamble that recognizes the historic and ongoing inequality and disproportionate responsibilities for childcare of women in many if not most families, as well as the gendered nature of power, control and violence. It must acknowledge the ongoing manifestations and experiences of racism and its negative impact on racialized communities and Aboriginal peoples, as well as the pervasiveness of discrimination based on sexual orientation, disability and class. It must acknowledge and promote all women’s human rights as protected by sections 7, 15 and 28 of the *Canadian Charter of Rights and Freedoms*, as well as by international instruments, such as the Declaration on the Elimination of Violence against Women, the Convention on the Elimination of All forms of Discrimination against Women, the Convention on the Elimination of Racial Discrimination and the Beijing Platform for Action. The Preamble should propose an equality rights framework for interpreting the provisions of the *Divorce Act* and, in particular, should prohibit any discrimination on the basis of sex, class or socio-economic condition, Aboriginal heritage, race and ethnic origin, disability or sexual orientation.

A specific provision mandating an annual report to Parliament on the application of the *Divorce Act* should be included that specifically directs the Department of Justice to do a gender-based analysis of the impact of the *Act* on women and children.

**Part 4: Ensure Women’s Access to Justice**

**Mediation**

47. The current *Divorce Act* requires that lawyers discuss with their client the possibility of reconciliation and inform the client of facilities that might be able to assist such a reconciliation. It also requires that a lawyer mention mediation to a divorcing client. Bill C-22 would mandate lawyers to talk about “other family services known to the barrister.” No mention of violence or power imbalances is made in this section and it would seem that a lawyer must mention alternative

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<sup>36</sup> IRPA, section 94f).

dispute resolution mechanisms in all cases. Since mediation is never appropriate in cases where a woman has been abused by her partner, or where there is a power imbalance between the parties, an exception to this requirement should be indicated in the section for cases not appropriate for alternative dispute mechanisms. A screening mechanism should be provided to identify cases where there is violence or concern about the safety or the emotional, psychological or physical health of the parties.

48. Bill C-22 would also amend subsection 16(6) of the *Divorce Act*, to allow a court to “provide for a dispute resolution process for any or all future disputes regarding parenting arrangements, if the process has been agreed to by the persons who are to be bound by that process.” It is worrisome that some women may agree to forego their rights to access the courts in “any or all future disputes.” Provisions should be made for protecting the best interests of the child and the security and equality interests of children and their mothers, and the *Divorce Act* should authorize judges to set aside agreements made under the threat of violence or other forms of coercion.

#### **Legal aid**

49. Legal aid plans must be expanded to allow access to all those who require it regardless of geographic locations or financial considerations. As a result of their disadvantaged economic status, it is most frequently women who need family law legal aid. Further marginalized communities among women experience additional poverty, which limits their access to justice even more if legal aid is not adequately funded. Funding for family law legal aid has been severely curtailed across Canada and does not command the same priority as legal aid for criminal law matters. This imbalance disadvantages primarily women. Legal aid funding must be increased to ensure that women do not experience gender discrimination within the overall legal aid system.

#### **Education**

50. It is important that judges, lawyers, mediators and assessors receive appropriate training on the gender dynamics involved in family law issues and violence against women and its impacts on children, as well as the cultural and other biases that may influence their decision-making process.

### **Parenting Classes**

51. Parent education should not be attached to the family law process. Information sessions that outlines the impacts of separation and divorce on children are not parenting classes. If such information sessions are to be provided, they must also screen out cases in which there is women or child abuse, emphasize the impact of child abuse on children and support the right of women to leave abusive relationships.

### **Unified family courts**

52. We are hoping that the proposed funding and support for unified family courts will help expedite the family law process and ensure that women can have access to knowledgeable and qualified judges. However, unified family courts are not an automatic answer to the problems that women currently face in the legal system. What is needed is a specific expedited process within all family courts to screen for violence and provide supports to move the process along quickly and safely.

### **Funding for services**

53. The federal government has announced that \$63 million will be invested in support services in family law over the next five years. This amount is not sufficient to respond adequately to the needs of women and children across all the provinces and territories. Extensive services need to be put in place for screening cases for violence against women and children, training legal professionals and other family law professionals, tools for family court players, women's advocates who can provide safety planning and family court support for women, etc. Given the likelihood of increased litigation due to the new legislation, the need for increased funding for services such as legal aid, screening and women's advocates is considerable.

### **Recommendations:**

Mediation must never be mandatory. A screening mechanism should be provided to identify cases where there is violence, or concern about the safety or the emotional, psychological or physical health of the parties. Where a woman discloses past abuse/control issues, she should not be expected to enter or continue with mediation. Mediation should not be recommended as a form of therapeutic intervention for so called "high conflict" family law disputers. Use of any form of alternative dispute

resolution must never be a required prerequisite to family court access nor a requirement for receiving legal aid or any community support services related to family law issues.

Parent education should not be attached to the family law process. Information sessions that outlines the impacts of separation and divorce on children are not parenting classes. If such information sessions are to be provided, they must also screen out cases in which there is women or child abuse, emphasize the impact of child abuse on children and support the right of women to leave abusive relationships.

Legal aid services must be viewed as a right and made available to all women who require them. Legal aid services must ensure that barriers to access, such as literacy issues and barriers for women with disabilities are removed. French language services and language interpretation must be available when needed. The Federal government must provide adequate funding for legal aid to Provinces and Territories for family law matters and must ensure that provinces and territories use this money appropriately.

Lawyers, judges and all family court personnel must receive mandatory training in the new legislation that also includes training on the realities and dynamics of women's poverty and violence against women, racism, homophobia and discrimination against persons living with a disability, and the differential impacts these may have on women, especially in the context of ongoing family court proceedings.

Appendix:



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**Incorporated under the Society Act**

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**Position Statement 2** (*Approved by the Board of Directors March 11, 2003*) (**EXCEPTS**)

**Subject:** The proposed amendments to the *Divorce Act* (*Bill C-22*)

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### **3. Specifying Violence Risk Factors**

As in New Zealand, we suggest that the *Divorce Act* set out the following factors that a court must consider in assessing whether the child will be safe: "In considering whether or not a child will be safe while a violent party has custody of or access to the child, the Court shall have regard to the following matters:

- a. the nature and seriousness of the violence used;
- b. how recently the violence occurred;
- c. the frequency of the violence;
- d. the likelihood of further violence occurring
- e. the physical or emotional harm caused to the child by the violence;
- f. whether the other party to the proceedings
  - i. considers that the child will be safe while the violent party has custody of or access to the child,
  - ii. consents to the violent party having custody of or access (other than supervised access) to the child;
- g. the wishes of the child, if the child is able to express them, and having regard to the age and maturity of the child;
- h. any steps taken by the violent party to prevent further violence occurring;
- i. such other matters as the Court considers relevant."

The court should also be directed to have regard to whether the primary care giver feels safe from further violence.