

WOMEN'S LEGAL SERVICES AUSTRALIA

POSITION PAPER 14 December 2010

FAMILY LAW AMENDMENT (FAMILY VIOLENCE) BILL 2010

1. INTRODUCTION

- 1.1. Women's Legal Services Australia ("WLSA") is a national network of community legal centres specialising in women's legal issues. WLSA regularly provides advice, information, casework and legal education to women on family law and family violence matters.
- 1.2. We have a particular interest in ensuring that women experiencing domestic violence are adequately protected in the family law process, including the needs of children living with family violence. We also wish to ensure that disadvantaged women, such as those from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander women, women with disabilities and rural women are not further disadvantaged by the process.
- 1.3. WLSA has been actively involved in the family law reform arena for many years, including lobbying, writing submissions, appearing before senate inquiries, participating in focus groups and consultation processes. We have advocated for changes to family law and processes to properly recognise and provide for the complexity and dynamic of family violence and its impact on parents and children.
- 1.4. This paper is not intended to be WLSA's formal and comprehensive response to the 2010 Bill. The aim is to assist the community and colleagues to understand key issues about the proposed amendments and what else is needed to more effectively deal with family violence in the content of family law and its' processes. It is hoped that this paper will enhance the ability of the community and our colleagues to make a submission to the Attorney-General's Department by 14 January 2011.

2. BACKGROUND

- 2.1. In the last 20 years there have been two major changes in family law relating to children. In more recent years there has been considerable social science research published about the developmental needs of children in the context of family law, including where there is family violence.
- 2.2. Additionally, the Federal Government has commissioned four reports relating to the operation of the Family Law Act 1975 as it concerns children, family violence and the interaction of state family violence/domestic violence and child protection laws with family law. These reports were released in late 2010.
- 2.3. This background information is outlined in Attachment 1.



3. FAMILY LAW AMENDMENT (FAMILY VIOLENCE) BILL 2010 (“the 2010 Bill”)

3.1. Introduction

3.1.1. The Federal Government’s response to the problems identified in the Australian Institute of Family Studies, Professor Chisholm and the Family Law Council’s reports (see Attachment 1), and the findings in social science research, is the 2010 Bill. The 2010 Bill is not the Federal Government’s response to the ALRC/LRC report. However, there are aspects of the 2010 Bill that do reflect issues raised in that report.

3.1.2. An Exposure Draft was released for consultation in November 2010. Submissions are due by **14 January 2011**. The 2010 Bill and Exposure Draft can be found on the Federal Attorney-General’s website: www.ag.gov.au

3.1.3. WLSA identifies in this paper its key comments and issues about:

- the proposed amendments in the 2010 Bill, and
- further changes that are needed.

3.2. Taking children’s rights into account

The International Convention on the Rights of the Child has been included as an additional object and principle in children’s matters under Part VII of the *Family Law Act*. We commend this inclusion.

3.3. Broader definition and understanding of family violence

3.3.1. The proposed broadening of the definition of “family violence” in s.4(1) is welcome. It closely aligns with the definition of family violence in Victorian family violence legislation and the recommendations proposed by the ALRC/NSWLRC report.¹

3.3.2. The proposed definition recognizes a range of behaviour covering physical abuse, sexual abuse, coercion, intimidation, harassment, domination, control, torment, damage to property, threats, including threats of self-suicide, economic and financial abuse.

3.3.3. Importantly, the new definition removes the objective test of “reasonableness” and requires only that the victim actually fears for their safety, rather than a reasonable person in those circumstances. Further, the categories of people included as family members has been expanded. These changes are very welcome.

3.4. Issues with definition of family violence

¹ ALRC Report 114, NSWLRC Report 128, p. 55

- 3.4.1. The list of behaviours in the definition of family violence is exhaustive. This means only behaviour that falls within that list is considered family violence. WLSA recommends that this list be examples of types of behaviour, so that other forms can be taken into account in individual cases.
- 3.4.2. Whilst this contemporary definition of family violence will hopefully be educative and lead to a greater understanding of the dynamics and forms of family violence, WLSA is concerned that it does not specifically state that family violence is a pattern of behaviour over time used by perpetrators as a tool to gain and maintain power and control over their victims. Specific mention of forms of family violence less obvious to an observer, as these are particularly insidious, need to be included in the definition.
- 3.4.3. Women are more likely at risk of claims of mutual family violence in the family law context. The broader definition of family violence proposed could enable perpetrators of violence to mutualise circumstances of family violence by portraying a victim's resistance to violence as intimidation, harassment/torment or other conduct that is now included in the broader definition. It is imperative that the broader definition does not have unintended consequences for victims of violence and their children. WLSA argues that the notion of the predominant aggressor should be recognized in the *Family Law Act*.

3.5. Broader definition and understanding of child abuse

- 3.5.1. The proposed broadening of the definition of child abuse in s.4(1) is a positive change. It recognises that causing a child to suffer serious psychological harm is child abuse and this harm can arise from being subjected to, or **exposed to, family violence**. The extended definition also includes serious neglect of the child. Child abuse continues to include sexual assault and involving children in sexual activity.
- 3.5.2. There is a new s.4(1AD) which defines when a child is "exposed to family violence". It refers to a child seeing or hearing family violence or "otherwise experiences the effects of family violence" and a non-exhaustive list is provided.
- 3.5.3. The definition of "exposed to family violence" links directly to the best interests of the child primary considerations in s.60CC(2):
 - (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
 - (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

(Note: changes proposed by the 2010 Bill to the best interests considerations are

discussed below).

3.6. Issues with the definition of child abuse

- 3.6.1. WLSA welcomes the recognition of children's exposure to family violence in the context of child abuse and in the primary considerations of the best interests factors. However, WLSA is concerned that the list of examples of what constitutes "exposure to family violence" is narrowly limited to specific incidents or events of physical violence inflicted on a family member. It is likely that the list of specific examples of being exposed to family violence will be used to restrict the meaning of "experiences the effects of family violence".
- 3.6.2. Importantly, the proposed definition of exposure to family violence does not recognise the broader impact on children just from living in a family environment where their parent is the victim of family violence, in all its forms (as identified in the proposed new definition of family violence). Research shows that children in these situations have even greater needs than other children whose parents have separated. This is a glaring inconsistency and gap in the proposed changes.
- 3.6.3. WLSA hold the view that the proposed definition of exposure should make it clear that it means exposure by the person who perpetrates family violence (to avoid unintended consequences that a victim of violence has exposed the child to violence). It must be clear in the *Family Law Act* that victims of violence must not be held responsible for not being able to remove children from the violence.
- 3.6.4. WLSA recommends that the definition of "exposure" to family violence include a specific reference to all the forms of family violence as defined in the 2010 Bill.
- 3.6.5. The emphasis in the second primary consideration is on protecting children from future harm. Whilst past family violence is likely to inform that consideration, it is WLSA's view that the relevance of past family violence and its impact, needs to be specifically referred to in the primary consideration about protection. This should not be left to implication or summation. The different and individual needs of children that have experienced family violence must be taken into account in this consideration.
- 3.6.6. Further, the impact on the capacity of a caregiver to parent, who is victim of family violence (eg. because of post traumatic stress and the other impacts of family violence), is not addressed in the proposed changes. It is imperative that the complex and far-reaching impact of family violence on a caregiver and the children is addressed in the considerations of the best interests factors, particularly the primary considerations. A failure to do this will lessen the impact of the broadening of the definition of family violence and child abuse and will not achieve the Federal Government's aim of improving the safety of children and not tolerating family violence

and child abuse.

- 3.6.7. WLSA also argues that children's exposure to family violence and child abuse cannot be isolated from the experience of family violence on their caregivers:

...family violence towards a parent may affect the ability of the victim to parent effectively²

- 3.6.8. Protection of children's caregivers who are victims must also be a priority and not artificially treated as a distinct issue from protection of their children, with different outcomes.

- 3.6.9. The 2010 Bill does not rectify the complexity of the *Family Law Act* having definitions of "family violence" and "child abuse". The lack of clarity and inconsistency in this terminology and meanings continues in the proposed changes. As the ALRC/LRC Report states:

Child abuse is an element of family violence and family violence may be an important factor in child neglect. For the victims it is therefore difficult to separate these experiences.³

The Family Law Act distinguishes between 'family violence' and abuse of a child. The same conduct in relation to a child however, may constitute both family violence and child abuse.⁴

Further, family violence towards a parent may affect the ability of the victim to parent effectively⁵

3.7. Best interests of the child

The 2010 Bill retains the two primary considerations:

- (a) the benefit of the child of having a meaningful relationship with both of the child's parents, and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The proposed change is that where there is a conflict between the two provisions, greater weight is to be given to consideration (b).

² ALRC Report 114 Vol. 2, p. 895

³ ALRC Report 114 Vol 2, p. 895

⁴ ALRC Report 114 Vol. 1, p. 265

⁵ ALRC Report 114 Vol. p.895

3.8. Issues with proposed change to primary considerations

3.8.1. Whilst the proposed amendments to the best interests of the child factors are commended, the proposed changes do not go far enough to ensure the protection of children who are victims of family violence, nor the protection of children exposed to family violence. Further, it creates an additional third tier of best interests that increases the existing complexity involved in judicial decision making. The task of advising clients is even more onerous and the lay-person's capacity to understand how the law applies to their case is not simplified.

3.8.2. WLSA recommends:

3.8.2.1. there should be no primary considerations at all but one list of factors for consideration, where

- the safety of children is listed as the first consideration and given priority;
- that the meaningful relationship be listed as one of the many factors;
- that the courts should weigh up all of the factors in the list depending on the circumstances of each individual case, and

3.8.2.2. secondly, if the primary considerations are to be retained that there should only be one primary consideration that is about the safety of children.

3.8.2.3. If neither of those options are accepted, WLSA's third option is to support the change proposed in the 2010 Bill giving weight to safety in the two primary considerations and the wording of the proposed section 60CC(2A) should read as:

In applying the considerations set out in subsection (2), the court is to give greater weight to the considerations set out in paragraph (2)(b).

3.8.2.4. In all cases greater weight should be given to issues of prioritising the safety of children.

3.8.3. In addition to the recognition of the *Convention on the Rights of the Child*, the best interest of the child factors contained in section 60CC should also contain reference to the importance of the primary carer relationship. In cases where children have been exposed to family violence, the impact of this violence and their additional vulnerabilities makes it essential that the importance of the primary carer in those circumstances is taken into account.

3.9. Friendly Parent Provision

The removal of the friendly parent provision (sections 60CC(3)(c) and (k) and section

60CC(4)) is supported. The removal of these sections from 60CC considerations recognizes the fact that the friendly parent provision has had undesirable consequences in discouraging women who are victims of family violence from acting to protect their children from violence and from disclosing that violence to the family law courts.

3.10. False Allegations Provision-Costs

The changes proposed to the section 117AB of the *Family Law Act* are welcomed. As indicated in the Chisholm Report (see Attachment 1), section 117AB needs to be repealed because it carried with it:

...the suggestion that the system is suspicious of those who allege violence and which does not significantly change the ordinary law of costs under section 117⁶

Section 117 is already sufficient to deal with any false allegations or denials of violence.

3.11. Equal shared parental responsibility; equal time; substantial and significant time

WLSA welcomes the proposed amendments and the intention to place safety and protection of children and family members at the forefront of the *Family Law Act*. However all of the commissioned reports referred to in Attachment 1, highlight the misinterpretation and confusion by the community and advisers about the shared parenting changes introduced in 2006. It is imperative that the 2010 Bill include changes to address these concerns.

3.12. Equal Shared Parental Responsibility

3.12.1. There should be no presumption of ESPR. While the presumption is meant to be rebutted by family violence the issue is that family violence may not be given its due weight to negate the presumption, especially at an interim stage. WLSA's alternative proposal is that if the ESPR presumption remains, it should not apply at an interim stage if the matters cannot be properly determined.

3.12.2. If the court is not properly resourced to have risk assessments and other risk screening measures from the outset, and it cannot properly determine allegations of family violence and/or abuse, there should not be a presumption. The presumption has increased the possibility of placing families and children at significant risk of harm, especially as orders made at an interim stage can last for up to 2 years.

⁶ Chisholm, R. "*Family Courts Violence Review*" 2009, p. 118.

3.12.3. As matters are not able to be dealt with fully at an interim stage, there should be no presumption about shared responsibility for decision-making and reference should only be made to the best interests of child and the circumstances of each case.

3.12.4. WLSA recommends:

- remove the presumption of ESPR
- remove “equal” and only have a reference to “shared parental responsibility”
- if the presumption is retained, exclude the application of the presumption at interim stages

3.13. Equal Time or Substantial and Significant Time

3.13.1. Section 65DAA states that if ESPR is ordered, then the court is mandated to consider equal time or substantial and significant time if it is in the best interests of the child and it is workable.

3.13.2. Even though the law states that ESPR only relates to parental responsibility (decision making about long term matters) and does not include a presumption about the amount of time spent with the child, it has been misinterpreted by the community as relating to time and the starting point of negotiations as being equal time.

3.13.3. The word ‘equal’ is inappropriate when determining what arrangements are best for children, including decision-making under parental responsibility. We recommend the term “shared parental responsibility” be used and that there be no link between shared parental responsibility and the time children spend with their parents. Further, the legislative emphasis on equal time, and significant and substantial time, contributes to the silencing of victims of violence.

3.13.4. WLSA recommends that the provisions in relation to equal time and substantial and significant time be repealed. The judiciary, advisors and family dispute resolution practitioners should only need to consider what arrangements are best for children based on an assessment of the best interests factors in the circumstances of individual cases.

3.13.5. WLSA supports Professor Chisholm’s recommendation⁷ that the best

⁷ Chisholm, R. “*Family Courts Violence Review*” 2009, p.13, Recommendation 3.4 (1)

interests factors include the following provision:

In considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case

3.13.6. Additionally, if shared time remains, this should not apply in matters involving very young children (eg. under 3) or matters involving high parental conflict or family violence, unless there are exceptional circumstances. This is supported by the social science research referred to in Attachment 1.

3.13.7. WLSA recommends:

- repeal the reference to time considerations
- remove the link between time considerations and parental responsibility
- remove the requirement on the court to consider any particular arrangement for time children spend with their parents.

3.14. Risk assessment

In addition to changes to the law, there needs to be a well-resourced and comprehensive risk assessment framework implemented in all parts of the family law system. This framework must interact with and be complemented by the State governments and all government agencies. The 2010 Bill does not deal with this crucial requirement and implementation of the proposed changes without it will not achieve effective protection of women and children in family law.

3.15. Training on family violence and child abuse

It is imperative that judicial officers, family consultants, family dispute resolution practitioners and all advisors in the family law system (including lawyers) undertake comprehensive and regular training on the dynamics of family violence. The 2010 Bill does not provide for this training. It is essential that the Government and family law courts and relevant professional bodies mandate this requirement. As the ALRC/LRC stated:

(p)roper appreciation and understanding of the nature and dynamics of family violence and the overlapping legal framework is fundamental in practice to ensuring the safety of victims and their children⁸

4. CONCLUSION

⁸ ALRC Report 114, NSWLRC Report 128, p. 575

WOMEN'S LEGAL SERVICES AUSTRALIA

WLSA welcomes many of the changes proposed in the 2010 Bill. There are some issues about the content of particular provisions in the 2010 Bill that need clarifying and expanding. However, there are many areas that need immediate change that have not been addressed in the 2010 Bill including:

- the presumption of equal shared parental responsibility
- the concept of equal shared parental responsibility
- the link between equal shared parental responsibility and equal time/substantial and significant time arrangements
- the assumption that equal time and substantial and significant time arrangements are best for children ie. a “one size fits all” approach

These issues have been discussed in this Position Paper. If you would like to discuss any aspect of this paper, please contact:

Prepared by and on behalf of WOMEN'S LEGAL SERVICES AUSTRALIA

WLSA Law Reform Coordinator, Zita Adut Deng Ngor:

(08) 8231 8929 or wlsa@clc.net.au. (SA)

WLSA Co-convenor, Dianne Hamey:

(02) 8745 6900 or Dianne_Hamey@clc.net.au (NSW)

WLSA Committee Member, Katrina Finn:

(07) 3392 0644 Katrina_Finn@clc.net.au (QLD)

WLSA Committee Member, Zione Walker-Nthenda

(03) 9642 0877 zione@womenslegal.org.au (VIC)

WLSA Committee Member, Rhonda Payget

(02) 6257 4377 rpayget@womenslegalact.org (ACT)

WLSA Committee Member, Heidi Guldaek (WA)

(08) 9272 8855 heidi@wlcwa.org.au

ATTACHMENT 1

BACKGROUND INFORMATION

In the last 20 years there have been two major changes in family law as they relate to children:

- *Family Law Reform Act 1995 (Cth)*
- *Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)*

Family Law Reform Act 1995 (Cth) (“1995 Act”)

The 1995 Act removed the notions of guardianship, custody and access and introduced:

- joint and several parental responsibility
- residence orders (where a child lives)
- contact orders (who a child sees/communicates with)
- specific issues orders (eg. about education, day to day responsibility for decisions)
- the notion of the “right” of a child to know both parents and to have contact with both parents

The child’s best interests continued to be the paramount consideration in making decisions about parenting orders.

Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (“2006 Act”)

The 2006 Act amendments introduced significant changes in the law and processes to be applied in resolving disputes about children under the *Family Law Act 1975*. Some of the key changes were:

- a presumption of equal shared parental responsibility when making a parenting order
 - the presumption does not apply if there are reasonable grounds to believe there has been abuse of the child or family violence
- introduction of two further “Objects”:
 - ensuring children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child
 - protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence

WOMEN'S LEGAL SERVICES AUSTRALIA

- a mandatory requirement for the court to consider equal time or substantial and significant time arrangements, where it makes an order for equal shared responsibility
 - providing these arrangements are in the best interests of the child and are reasonably practicable
- a tow-tier checklist of best interests factors
 - primary considerations
 - the benefit to the child of having meaningful relationship with both parents, and
 - the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence
 - additional considerations
 - these include the provisions from the earlier legislation, and
 - include a limitation of when state restraining orders can be taken into account (ie, must be final or contested interim orders), and
 - included a “friendly parent” provision which requires the court to take into account the willingness of each parent to facilitate a close relationship with the other parent
- obligations on advisors to tell the parents they could consider an equal time or substantial and significant time arrangement; parenting plan option
- introduction of costs orders for “false allegations or statements”
- requirement to attend family dispute resolution and obtain a certificate before commencing court proceedings about parenting matters
 - exceptions to this requirement included urgency; concerns about family violence or child abuse
- provisions introduced that attempted to resolve inconsistencies between state restraining orders and family law orders
- changes to provisions about breaches of parenting orders
- roll-out of federally funded Family Relationship Centres around the country
- The child’s best interests continued to be the paramount consideration in making parenting orders.

Inquiries and reports following the 2006 Act

Three inquiries were commissioned by the Federal Government to report on the reforms introduced by the 2006 Act and how the family law system deals with violence:

- *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies)
- *Family Courts Violence Review* (Professor Richard Chisholm, AM)
- *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (Family Law Council)

These reports were each released in late 2010. They clearly identified that there are significant problems in how family law and its' processes respond to cases of family violence and that significant changes are needed.

Additionally, the Australian Law Reform Commission and NSW Law Reform Commission jointly conducted an inquiry into the interaction of the states' family/domestic violence and the interaction of state family violence/domestic violence and child protection laws with the Federal family law. This included recommendations for changes to better protect the safety of women and children. The report, *Family Violence-A National Legal Response*, October 2010 ("ALRC/LRC report"), was released in November 2010.

The imperative for change in this area has been reinforced by recent social science research, commissioned by the Federal Government, on family violence, shared care and the developmental needs of children. Examples are:

- *Family Violence and Family Law in Australia: the Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-1996*⁹
- *Shared Care Parenting Arrangements since the 2006 Family Law Reforms*¹⁰
- *Post-separation parenting arrangements and developmental outcomes for infants and children*¹¹

Other relevant social science research is also significant, such as:

- *No Way to Live: Women's experiences of negotiating the family law system in the context of domestic violence*¹²

⁹ Bagshaw D; Wendt S; Campbell A; McInnes E; Tinning B; Batagol B; Sifris A; Tyson D; Baker J and Fernandez A. P. 2010, *Family Violence and Family Law in Australia: the Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-1996*, Monash University, University of NSW and James Cook University.

¹⁰ Social Policy Research Centre of the University of NSW, May 2010

¹¹ McIntosh, J., Smyth, B., Kelaher, M., Wills, Y. and Long, C., May 2010

¹² Laing, L., University of Sydney, June 2010

Some findings in the social science research about shared care

Many of the social science reports published acknowledged that:

- children who had rigid parenting schedules expressed the greatest level of unhappiness;¹³
- children who felt they had some say in the arrangements were happiest with the arrangements than those who had not;¹⁴
- children who were not happy with the share arrangements pointed to the difficulties of living unsupervised with the parent who was unpredictable or violent and frustrated that their safety concerns had not been listened to;¹⁵
- detrimental outcomes were identified for infants under the age of two. They had higher irritability than infants in primary residence arrangements;¹⁶
- that forced ceasing of breast-feeding to align with shared care arrangements occurred despite the knowledge that breastfeed during infant contributes to positive development outcomes, as well as to good nutrition and health,¹⁷ and
- it was not unusual for shared care as 'agreed' to between parents (following mediation) to revert to those arrangements in place prior to the mediation which was typically the mother's residence as the primary residence.¹⁸

¹³ See footnote no. 10, p.124

¹⁴ See footnote no.9, p.176

¹⁵ See footnote no. 9, p.176

¹⁶ See footnote no. 11, p.16

¹⁷ Baxter and Smith, 2009, *Breastfeeding and infants' time use*, Australian Institute of Family Studies p.xi

¹⁸ See footnote no. 11, p.16

