Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Assoc. Professor Helen Rhoades and Professor John Dewar
University of Melbourne
6th April 2011

SUBMISSION TO THE SENATE INQUIRY INTO THE FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011

Assoc. Professor Helen Rhoades & Professor John Dewar
University of Melbourne

INTRODUCTION

The Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 ('the Family Violence Bill') represents an important step in addressing a number of the problems identified by the recent research evaluations of Part VII of the Family Law Act. The provisions of the Family Violence Bill seek to respond to evidence that the current family law system does not deal adequately with issues of family violence and child abuse, and discourages families affected by violence from seeking the assistance of legal advisers and the courts.

In particular, we applaud the government's decision to repeal of the existing section 60CC(3)(c). Professor Chisholm's review suggests that this consideration, sometimes known as the 'friendly parent' provision, has operated as a disincentive to the disclosure of family violence. The reported cases also indicate that its interpretation by the courts has failed to support mothers who act to protect children by refusing to facilitate contact with an abusive parent (see for example, *Partington and Cade (No 2)* [2009] FamCAFC 230).

We also welcome the proposed section 60CC(3)(c). Consideration of matters such as the extent to which a parent has taken the opportunity to send time with a child, which were formerly located in section 60CC(4), are an important part of the decisional process and their inclusion in the main part of the 'additional best interests' checklist is a positive step.

We also applaud the revised definition of *family violence*, which provides a general characterisation of the relevant behavior followed by a non-exhaustive list of examples of the ways in which that behavior can be manifested as recommended by the Family Law Council (2009) and the Australian and NSW Law Reform Commissions (2010).

This submission also supports the enactment of proposed section 67ZBA, which will require parties who allege child abuse or family violence to file a relevant Notice of Child Abuse or Family Violence with the court, given the failure of the present rules to achieve this result, and

proposed sections 60CH and 60CI, which aim to improve the range of information available to the family courts about child protection matters under State and Territory child welfare laws.

Whilst we support the aims and substance of other aspects of the Bill, we believe that the government's response to the research evaluations of the family law system could be strengthened. This submission addresses two aspects of the Family Violence Bill, namely, the proposed change to section 60CC(2) of the best interests checklist (Item 17), and the proposed adviser's obligations in section 60D (Item 22). We also believe that several additional amendments and complementary initiatives are needed to enhance the workability and effectiveness of the Government's response to the issue of family violence and the problems associated with interpretation of the existing Part VII framework.

SUMMARY OF RECOMMENDATIONS

It is submitted that the Government should:

Best interests factors

- Remove the demarcation between the two tiers of 'best interests' factors in section 60CC to create a single list of matters in which the safety of children is listed as the first consideration and given priority;
- Remove the presumption of equal shared parental responsibility from the Act;
- Amend sub-section 60CC(3)(f) to require the courts to consider the impact of family violence and the possibility of future contact with the perpetrator on the victim's capacity to parent when considering this factor; and
- Add to the checklist of best interests factors in section 60CC a requirement to consider 'the nature and level of conflict between the parents'.

Obligations and guidance for advisers and judicial officers

- Consider a less complicated formulation of the proposed obligations in section 60D, which requires advisers to inform clients that the child's safety and wellbeing should be their highest priority when settling parenting arrangements;
- Consider providing guidance in the legislation about the kinds of care arrangements that are appropriate and not appropriate for children when protection from harm is needed. Alternatively, if the Government considers that such guidance should not be provided in the legislation itself (but rather, for example, by way of professional development for advisers and judicial officers), remove the current guidance in sections 63DA and 65DAA regarding shared care arrangements from the Act;
- Develop and disseminate a 'common knowledge base' regarding family violence and children's developmental needs, supported by a comprehensive and broad-based risk assessment framework, for use by advisers and the courts.

Community education

- Institute a public education campaign to accompany the introduction of the Bill.

An explanation of these recommendations, which draws on the recent research reports, is set out below. A list of the relevant research is provided at the end of the submission.

COMMENTS ON THE FAMILY VIOLENCE BILL

1. The best interests of the child

The 'checklist' of best interests factors is central to the decision-making process in contested children's cases. Judicial officers in these cases are required to consider each of the relevant matters in sub-sections 60CC(2), (3) and (presently) (4) when determining the best interests of the child. Traditionally, the checklist has comprised a selection of matters that reflect the research literature about children's developmental needs (Bordow, 1994). In 2006, this approach was modified to create a two-tiered list, with two factors (the importance of children having a meaningful relationship with both parents, and the need to protect children from harm) elevated to 'primary considerations'. The recent research reports indicate that this division has complicated the decision-making process, making the law more time-consuming for judges to apply and more difficult for lay people to understand (Kaspiew et al, 2009: 335-336; Chisholm, 2009: 125, 127). It has also led to the development of practices in which parental involvement with children has been emphasised at the expense of protection for family members (Kaspiew et al, 2009: 235), and contributed to misperceptions of the law, including an assumption that there are 'two basic types of case', namely 'the ordinary case, and the case involving violence or abuse' (Chisholm, 2009: 9, 128).

Item 17 of the Family Violence Bill seeks to address these problems. Whilst we support this initiative, our view is that the proposed insertion of sub-section 60CC(2A) will not be adequate to challenge the present misperceptions of the law (especially the impression that there are 'two basic types of case'), and may add a further level of complexity to the process of decision-making and advice-giving. **In our view, the Government's aims would be better achieved by removing the demarcation between the two tiers of factors in section 60CC to create a single list of matters in which the safety of children is listed as the first consideration and given priority**.

Further, we note that the elevation of the requirement to consider the benefit to the child of a meaningful relationship with both parents is not the only cause of the tendency for family violence to be given inadequate consideration. The recent evaluations of the 2006 reforms indicate that the presumption in favour of shared parental responsibility has also contributed to this pattern, creating expectations and demands for shared time by fathers which have placed pressure on mothers to agree to 'unsafe arrangements' (Kaspiew et al, 2009: 246). In recognition of this dynamic, **we recommend that the presumption of equal shared parental responsibility be removed from the Family Law Act**.

Further, we recommend that sub-section 60CC(3)(f) be amended to include a requirement to consider the impact of family violence and the possibility of future contact with the perpetrator on the victim's capacity to parent. There is now abundant research evidence that family violence may impair the parenting capacity of a person who has been the victim of violence in the home, necessitating measures to support the victim parent's security following separation (Holt et al, 2008; Humphreys & Thiara, 2010). It is therefore imperative, in order to enhance the safety of children, that the courts have regard to this issue when considering future parenting arrangements (see for eg, *Bieganski* (1993) 16 Fam LR 353).

We also note that the Family Violence Bill is limited to addressing those aspects of the research evidence that deal specifically with harm to children caused by (exposure to) family violence or parental child abuse. In our view, the Government's objective of ensuring that children's best interests are met requires a further factor be inserted into the best interests checklist to reflect the research findings that children's exposure to high ongoing parental conflict is also damaging to child wellbeing, particularly when children are young (McIntosh et al, 2010: 10-11; Social Policy Research Centre, 2010: xiii). In light of this evidence, **we recommend that the Government include an additional sub-section in section 60CC which requires the courts to consider 'the nature and level of conflict between the parents'**.

2. ***Adviser's obligations regarding the best interests of the child***

The Family Violence Bill proposes a new set of obligations for advisers concerning the best interests of the child: **Item 22**. We support the aim of this proposal, which will require legal practitioners and family dispute resolution practitioners, among others, to encourage clients to prioritise the child's safety from (physical or psychological) harm when this is not consistent with the child having a meaningful relationship with both parents. However, for the reasons given above in relation to subsection 60CC(2A), we are concerned that the proposed 3-step approach to this advice is overly complicated and likely to confuse clients. As noted above, a central message of the recent evaluations of the Family Law Act was that advisers have found the 2006 reforms 'complex and difficult to apply', and that their key principles are 'hard for lay people to understand' (Kaspiew et al, 2009: 335-336). The research indicates that this complexity has made it more difficult for advisers, especially legal practitioners, to achieve developmentally appropriate arrangements for children's care. **In our view, a less complicated formulation of the proposed obligation, which requires advisers to inform clients that the child's safety should be their highest priority when settling parenting arrangements, is preferable**.

3. ***The courts' duty to ask parties about violence in child-related hearings***

Under the Family Violence Bill, a new section 69ZQ(1)(aa) will require judicial officers to ask parties if they believe there is a risk of the child being exposed to family violence, and if they have any concerns for their own safety. The proposed section gives effect to Principle 3 of the

Principles for Conducting Child-Related Proceedings. We support this initiative, which seeks to enhance the range of information available to the family courts when crafting care arrangements for children. However, we are concerned that this process will only be effective if judicial officers are familiar with the dynamics of family violence and skilled at using this knowledge to inform their practice.

Many women who have experienced violence in the home may not identify their experience as family violence, and/or are fearful of disclosing their experience to court personnel (Sera Women's Shelter et al, 2006), and the recent evaluations suggest that some judicial officers, particularly Federal Magistrates who do not have a family law background, do not have a well developed understanding of family violence (Kaspiew et al, 2009: 247, 315-19). Our concerns are that without specific training of judicial officers, non-disclosure may continue to occur, and that a mutualising approach to the parties' responses to the proposed questioning may play out. This potential is likely to be exacerbated in proceedings in the Federal Magistrates Court, where busy duty lists place considerable time pressures on the ability of Federal Magistrates to engage directly with the parties. **We believe it will be critical to the success of this initiative for it to be supported by a dedicated training and professional development program for judicial officers**, as recommended by the Australian and New South Wales Law Reform Commissions, the Chisholm Report and the National Council to Reduce Violence against Women and their Children (ALRC /NSWLRC Report, 2010: Chapters 30 and 31; Chisholm, 2009: Recommendations 2.1 and 4.3; National Council to Reduce Violence, 2009: Recommendation 4.4).

4. Implications for parenting arrangements of prioritising protection from harm

As noted, we welcome the proposed initiatives on family violence, which are designed to address the problems with the law and process revealed in the evaluations and other reports. However, we note the absence of any proposed guidance for advisers and the courts similar to that contained in sections 63DA(2) and 65DAA regarding the kinds of care arrangement that should be considered and the kinds of arrangement that are not appropriate when protection from harm is a priority. Our concern here is that the proposed sections 60CC(2A) and 60D will not be sufficient of themselves to change the pattern of inappropriate shared care arrangements that are currently being made in circumstances where a parent has safety concerns for a child. In fact, there may be a heightened risk that inappropriate shared care orders will be made in circumstances that fall short of meeting the definition of family violence but where other factors, such as ongoing parental conflict, might negatively affect the child's healthy development. The research reports revealed that although a shared care arrangement is not conducive to positive child wellbeing when a parent has safety concerns for the child or where a child is young and the parents cannot co-parent (McIntosh et al, 2007: 19), parents in these situations were no less likely than other parents to have a shared time arrangement (Kaspiew et al, 2009: 233). In light of this evidence, **we recommend that advisers, courts and parents be given some research-based guidance about the circumstances in which shared care arrangements are not conducive to children's wellbeing and the kinds of care arrangements**

that are needed when a parent has safety concerns for themselves or the child. Alternatively, if the Government considers that such guidance should not be provided in the legislation itself (but rather, for example, by way of professional development for advisers and judicial officers), our view is that the present guidance in sections 63DA and 65DAA to consider shared care-time arrangements whenever the presumption of equal shared parental responsibility applies should also be removed from the Act.

5. *A 'common knowledge base' and improved risk assessment tools*

Whilst we strongly support the introduction of the Family Violence Bill (subject to the comments above), we agree with the Attorney-General that legislative reform alone will not achieve the necessary attitudinal and practice changes within the family law system. We applaud the Government's work on developing 'a common risk identification framework for family violence' for use across the broader family law system to help address domestic and family violence (Attorney-General, Launch of Family Violence Bill, 24 March 2011). As the ALRC/NSWLRC stated, a proper understanding of the nature and dynamics of family violence 'is fundamental in practice to ensuring the safety of victims and their children' (ALRC/NSWLRC, 2010: 575).

However, research of professional practices in the system suggests that many legal practitioners do not routinely ask clients about family violence in first interviews (Parkinson, Webster & Cashmore, 2010), and that some have a poor understanding of the dynamics and impact of family violence (Kaspiew et al, 2009: 246-47). In order to address these issues, **we support the recommendations of the Family Law Council for the development and dissemination of a 'common knowledge base' regarding family violence and its impact on child and adult wellbeing, to support the Government's risk assessment framework** (Family Law Council, 2009: Recommendations 2-4). In recognition of the research of children's development, we also recommend that the risk assessment framework should extend beyond screening for family violence and child abuse and enable the courts and other agencies in the family law system to identify the broader range of risk factors associated with children's safety and wellbeing.

6. *An education campaign to accompany the introduction of the Bill*

A key theme of the AIFS evaluation report was that many people who sought assistance from the family law system's services came to the service with an inaccurate understanding of the law. Surveys of service sector personnel revealed that on first seeking assistance, clients of both legal and family dispute resolution services 'failed to understand the distinction between the concepts of equal shared parental responsibility and time', and that many parents, particularly fathers, 'had an expectation of equal care-time arrangements' (Kaspiew et al, 2009: 207, 210). The research found that these misunderstandings of the law had led to unrealistic instructions from clients, impeding the ability of service sector professionals, especially lawyers, to achieve developmentally appropriate care arrangements for children (Kaspiew et al, 2009: 215). As noted above, our view is that the Government's proposed approach to prioritising safety from

harm (by enacting a new section 60CC(2A) and new advisers' obligations regarding the best interests of the child in section 60D) may further complicate the legislation, creating added confusion for clients. **We believe a public education campaign to accompany the introduction of the Family Violence Bill is warranted to educate the wider community about the new provisions and to correct the present misunderstandings of the Family Law Act.**

REFERENCES

- ALRC and NSWLRC, *Family Violence – A National Legal Response* (October 2010).
- Bordow, S., 'Defended Custody Cases in the Family Court of Australia: Factors Influencing the Outcome' (1994) 8 *Australian Journal of Family Law* 252.
- Bromfield, L., Lamont, A., Parker, R. and Horsfall, B., *Issues of safety and wellbeing of children in families with multiple and complex problems* (National Child Protection Clearinghouse, Issues Paper No. 33, 2010).
- Chisholm, R., *Family Courts Violence Review* (November 2009).
- Chisholm, R., 'Legislating about family violence: the Family Law Amendment (Family Violence) Bill 2010' (2010) 24 *Australian Journal of Family Law* 283.
- Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (December 2009).
- Holt, S., Buckley, H., and Whelan, S., 'The impact of exposure to domestic violence on children and young people: A review of the literature' (2008) 32 *Child Abuse and Neglect* 797.
- Humphreys, C. and Thiara, R., 'Readiness to change: mother-child relationship and domestic violence intervention' (2010) 40 *British Journal of Social Work*.
- Kaspiew, R., Gray, M., Weston, R., Moloney, L., Hand, K. and Qu, L., *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies: December 2009).
- McIntosh, J., Smyth, B., Kelaher, M., Wells, Y. and Long, C., *Post-separation parenting arrangements and developmental outcomes for infants and children: Collected reports* (May 2010).
- McIntosh, J. and Long, C., *The Child Responsive Program Operating with the Less Adversarial Trial: A Follow Up Study of Parent and Child Outcomes*, Report to the Family Court of Australia (2007).
- National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009).
- Parkinson, P., Webster and Cashmore, 'Lawyers' Interviews with Clients about Family Violence' (2010) 33(3) *UNSW Law Journal*.
- Perry, B., 'Violence and childhood: How persisting fear can alter the developing child's brain', in Schetky & Benedek (eds.), *Textbook of child and adolescent forensic psychiatry* (American Psychiatric Press Inc., 2001), 221-238.
- Sera's Women's Shelter, North Queensland Domestic Violence Resource Service and the North Queensland Combined Women's Services, *Dragonfly Whispers: The experiences of women who have lived with domestic violence and their journey through the Family Court* (May 2006).
- Social Policy Research Centre, University of NSW, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* (May 2010).