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WOMEN'S LEGAL SERVICES AUSTRALIA (WLSA)

SUBMISSION ON THE

FAMILY LAW AMENDMENT (FAMILY VIOLENCE & OTHER MEASURES) BILL 2011

29 APRIL 2011

To the Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600
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INTRODUCTION

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 and other professionals on family law and family violence matters.

We have a particular interest in ensuring that women experiencing family violence are adequately protected in the family law process, including the needs of children living with family violence. We also aim 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.

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 the system to properly recognise and effectively deal with the complexity and dynamic of family violence and its impact on parents and children.

Background

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.

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.

The 2011 Bill is the Federal Government's response to the problems identified in the reports and the findings in the social science research. This submission is WLSA's response to the 2011 Bill.

SUMMARY

In 2009 the National Council to Reduce Violence Against Women and their Children stated that the "…biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence is being a woman."[1] In 2003, an overwhelming 74.7% of parenting cases decided in the Family Law Court contained 'allegations of family violence and more than 50% of the cases in federal family courts contained allegations of family violence and/or child abuse (AGD vol 1). It is therefore clear that a core function of the family law system is responding to family violence and child abuse. Therefore legislative and system responses should be developed and reformed to reflect this reality.

We strongly support the Federal Government's response to provide better protections for people who have experienced family violence within the family law system. We believe that the proposed amendment will improve the situation for the victims of family violence.

Additionally, we support the following amendments:

- taking children's rights into account;
- broadening the definition of child abuse and family violence;
- prioritising family violence when considering what is in the best interests of the child;
- amending the friendly parent provision; and
- repealing provisions about costs orders relating to false allegations or denials of violence.

However we believe that there are a number of changes needed immediately which will significantly enhance the effectiveness of the amendments and provide better protections for victims of family violence. We urge the Federal Government to consider amendments to:

- the need to clearly prioritise the safety of children above all else;
- 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 & significant time arrangements; and
- the "one size fits all" approach in which it is assumed that equal time and substantial & significant time arrangements are best for children.

[1] National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children*, 2009-2021 (2009), p. 26.

THE BILL

There have been several devastating media reports highlighting the need to adequately and fully respond to family violence and child abuse in all its forms and in particular when those cases enter into the family law system. A key litmus test for any legislative and systemic response to family violence and child abuse is the extent to which it can pick up on the most vulnerable and yet least obvious cases and offer adequate protection to the victims at any entry or exit point into the system. It is through this lens and criteria that we seek to analyse the real effectiveness of these amendments.

Taking children's rights into account

The 2011 Bill would include the International Convention on the Rights of the Child as an additional object and principle in children's matters under Part VII of the *Family Law Act*. While we are uncertain about how it will operate in practice, we commend this inclusion as a way to further highlight the needs and rights of children as a key focus of this legislation.

Broader definition and understanding of family violence

The proposed broadening of the definition of "family violence" in the proposed s.4AB is welcome. It closely aligns with the definition of family violence in Victorian family violence legislation (*Family Violence Protection Act 2008*) and the recommendations proposed by the ALRC/NSWLRC report.[2]

The proposed definition includes a clear statement of what constitutes family violence in proposed section 4AB(1):

Violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful.

In proposed section 4AB(2), there is a list of examples of behaviours that may constitute family violence, including physical abuse, sexual abuse, coercion, intimidation, harassment, domination, control, torment, damage to property, threats, including, economic and financial abuse.

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.

[2] ALRC Report 114, NSWLRC Report 128, p. 55

The definition has changed from that included in the Exposure Draft Bill by:

- including a clear statement of what constitutes family violence, including that family violence includes elements of coercion, control or fear;
- clarifying that the list of behaviour is a non-exhaustive list of examples; and
- removing "threats of suicide" and "causing death" from the list of examples (see comments below).

In general, the new definition is a stronger definition than that included in the Exposure Draft Bill as it recognises the significance of coercion and control by perpetrators, as well as the victim's fear, and does not limit the kinds of behaviour that can constitute family violence.

Issues with the definition of family violence

The definition in the 2011 Bill does not pick up all of the elements of the ALRC/NSWLRC definition. In particular, it does not include "exposure to family violence" as a form of "family violence" nor does it make it clear that this applies only to behaviour by the perpetrator of violence. See our comments in the discussion below about the issues with the definition child abuse and exposure to family violence.

Broader definition and understanding of child abuse

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.

There is a new s.4AB(3) 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". Section 4AB(4) gives examples in a non-exhaustive list.

The proposed definition of "exposed to family violence" links directly to the best interests of the child's primary considerations in s.60CC(2):

- the benefit to the child of having a meaningful relationship with both of the child's 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.

Issues with the definition of child abuse

"Child abuse" and "exposure to violence" is a form of family violence

By retaining separate definitions of "family violence" and "child abuse", the 2011 Bill does not recognise that "child abuse", including "exposure to family violence", is itself a form of "family violence. As the ALRC/NSWLRC Report states:

> *Child abuse is an element of family violence and family violence and 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 effectively.*[5]

"Child abuse", particularly "exposure to family violence," should be included within the definition of "family violence". This is the approach taken by the ALRC/NSWLRC recommended definition, but it has not been picked up in the 2011 Bill definition.

"Exposure to violence" should be clearly limited to exposure by the perpetrator

The proposed definition of exposure should make it clear that it applies to 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.

This approach is supported by the ALRC/NSWLRC Report, which recommended a definition of "family violence" that includes "behaviour *by the person using the violence* that causes a child to be exposed to the effects of behaviour referred to in [the paragraphs] above" (emphasis added). This element of the ALRC/NSWLRC definition is not included in the proposed definition in the 2011 Bill.

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[3] ALRC Report 114 Vol 2, p. 895

[4] ALRC Report 114 Vol. 1, p. 265

[5] ALRC Report 114 Vol. p.895

Issues with the definition of "exposure to family violence"

WLSA is concerned that the list of examples of what constitutes "exposure to family violence" is limited too narrowly to specific incidents or events of physical violence (or threats 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".

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). As stated in the ALRC/NSWLRC report released at the end of 2010:

> *…the dynamics of violence in the home are complex and often difficult for those on the "outside" to understand …family violence cannot be understood as separate incidents. Any one "incident" is in actuality just a small part of a complex pattern of control & cannot be adequately understood nor its gravity measured in isolation from that background. At the centre is disempowerment and degradation*.[6]

WLSA recommends that the definition of "exposure" to family violence include a specific reference to all the forms of family violence as defined in proposed ss.4AB(1) and (2) that would be inserted by the 2011 Bill. This is supported by the ALRC/NSWLRC recommended definition, which includes a reference to all aspects of behaviour defined as "family violence". This will create clarity, consistency and ease in application for judicial officers and other professionals in the system.

The caregiver must be protected

The impact on the capacity of a family violence caregiver to parent, (e.g. 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 interest's factors. 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.

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:

[6] ALRC Report, n.5, p.832

…family violence towards a parent may affect the ability of the victim to parent effectively.[7]

Protection of the caregiver provides better protection for the child as the two roles are interlinked and thus cannot be artificially treated as a distinct issue from protection of their children, with different outcomes. Caregiver protection must therefore be given priority.

CONSIDERATIONS IN DETERMINING THE BEST INTERESTS OF THE CHILD

The 2011 Bill would retain the two primary considerations for determining the best interests of the child:

- the benefit of the child of having a meaningful relationship with both of the child's 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.

The proposed change states that where there is an inconsistency between the two
Provisions above, greater weight is to be given to the second consideration (protection from harm).

Issues with the proposed change to the primary considerations

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.

WLSA recommends several options, in order of preference.
Preference 1
There should be no primary considerations at all but one list of factors for consideration:

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

[7] ALRC Report 114 Vol. 2, p. 895

Preference 2
If primary considerations are retained, there should only be one primary consideration which should be "the safety and protection of children."

Preference 3
If neither of those options are accepted, at a minimum, the proposed section 60CC(2A) should be redrafted as follows:

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).
That would ensure that in all cases, greater weight should be given to issues of prioritising the safety and protection of children.

The primary consideration relating to protecting children from future harm should include reference to the relevance of past family violence and its impact. Whilst past family violence may inform consideration of future harm to children under the existing law, 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 considering their safety.

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. Where children have been exposed to family violence, the impact of this violence on children makes it essential that the primary carers role in those circumstances is taken into account in ensuring the children are properly cared for.

Other considerations: friendly parent provision

The 2011 Bill proposes to remove the aspects of the "friendly parent" provisions (sections 60CC(3)(c) and (k) and section 60CC(4)(b)) that require the court to consider the willingness and ability of the child's parents to facilitate a relationship with the other parent, and the extent to which they have done this.

The 2011 Bill retains the elements in section 60CC(4)(a) and (c) that require the court to consider each parent's participation in decision-making about the child, spending time with and communicating with the child, and maintaining the child. These requirements are included in the 2011 Bill in proposed section 60CC(3)(c) and (ca).

The proposed amendments in the 2011 Bill are different to those included in the Exposure Draft Bill, which repealed all of section 60CC(4).

The removal of the requirement to consider facilitation of the relationships is supported. It recognises 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 due to the adverse inference of other provisions (costs orders and false allegations provisions).

The retention of elements of the friendly parent provision may be useful as they expressly require the court to consider parents' participation in their children's lives. However, WLSA is concerned that the provisions could also be used against a mother in a case involving family violence, where the mother limits the other parent's participation to protect the child. These proposed provisions could still be used to bring in arguments about failure to facilitate a relationship, despite consideration of facilitation having been removed from the Act.

Other considerations: family violence orders

The 2011 Bill would amend section 60CC(3)(k) to require the court to consider any family violence order that applies to the child or a member of the child's family, and not just final or contested orders (as is the case currently).

WLSA supports this change. Family courts should consider orders that have been granted through a legal process to protect the lives of people who have experienced violence.

False Allegations Provision-Costs

The changes proposed to the section 117AB of the *Family Law Act* are welcome. 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 117[8].6

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

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 reports commissioned by the Attorney General highlight the misinterpretation and confusion

[8] Chisholm, R. "*Family Courts Violence Review*" 2009, p. 118.

by the community and advisers about the shared parenting changes introduced in 2006. It is therefore imperative that the 2011 Bill include changes to address these concerns.

EQUAL SHARED PARENTAL RESPONSIBILITY

There should be no presumption of equal shared parental responsibility. The presumption is meant to be rebutted by family violence. However, the issue is that family violence may not be given its due weight to be able to negate the presumption, especially at an interim stage, where the family violence allegations are unlikely to be considered or tested. WLSA's alternative proposal is that if the equal shared parental responsibility presumption remains, it **should not apply at an interim stage** if the matters cannot be properly determined.

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 or the risks to children and other family members, 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.

In particular the emphasis on shared care by the legislative prescriptions and community perceptions ignores the negative impact on children of shared care and high conflict has been well established.[9] Rhoades (2009) states in describing the research of McIntosh and Long (2007) and McIntosh and Chisholm (2007):

> *…data suggest the reforms have been successful in producing an increase in "substantially shared care arrangements" since the legislation came into force. At the same time, however, the research indicated that a significant number of these arrangements are characterized by intense parental conflict, and that shared care of children is a key variable affecting poor emotional outcomes for children.*[10]

There should therefore 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.**

WLSA recommends the following options:

- removing the presumption of equal shared parental responsibility;

[9] Dewar, J., *Can the centre hold?: Reflections on two decades of family law reform in Australia*, Australian Journal of Family Law (2010), vol. 24 (2), p.142

[10] WLSA Submission to AIFS, 24 August 2009.

- removing the term "equal" and only have a reference to "shared parental responsibility" to reduce the unintended confusion and undue focus on the 'equality' of parents rights and responsibilities; and
- if the presumption is retained, excluding the application of the presumption at interim stages

Equal Time or Substantial and Significant Time

Section 65DAA states that if equal shared parental responsibility 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. Even though the law states that equal shared parental responsibility 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.

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.

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.

WLSA supports Professor Chisholm's recommendation[11] that the best 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.

Additionally, if shared time remains, this should not apply in matters involving very young children (infants under 3 years old) or matters involving high parental conflict or family violence, unless there are exceptional circumstances. This is supported by the social science research in *Post-separation parenting arrangements and developmental outcomes for infants by* McIntosh, J., Smyth, B., Kelaher, M., Wills, Y. and Long, C., May 2010.

[11] Chisholm, R. "*Family Courts Violence Review*" 2009, p.13, Recommendation 3.4 (1)

WLSA recommends:

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

ALLEGATIONS OF FAMILY VIOLENCE, MANDATORY NOTIFICATIONS AND INTERVENTIONS

The obligation of parties and their representatives to inform the court about family violence is supported. The extension of the court's obligations to actively inquire into the existence of abuse or family violence is also supported.

The proposed repeal of s.117AB is welcomed. As indicated in the Chisholm report, s.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 117."[12] Section 117 is sufficient to deal with any false allegations or denials of violence.

In addition to the repeal of the s.117AB, clear policy direction from the government is required to shift attitudinal factors which may continue to affect the disclosure of violence and abuse, the nature and extent of any disclosures and the accuracy of evidence used to support court decisions. In particular Laing 2010[13] discusses the "climate of disbelief"[14] of (and allegations of 'alienation' by) mothers seeking to protect their children and the focus on the father/child relationship with almost total disregard for:

- the mother/child relationship;
- responsibilities of fatherhood, and
- accountability for violence and abuse.

1. The findings of Laing in her research are consistent with the experiences of WLSA. WLSA hope that observations such as those made by Laing 2010 become the exception rather than a common occurrence for many victims of family violence who are navigating their way through the family law system:

> *Some women's concerns for the safety of their children resulted in their being labeled as "anxious". Their anxiety, rather than the risk posed by the perpetrator to the children then became the focus of attention*[15]

[12] Above, n. 27, p.117

[13] Above, n. 22, pp. 43, 44, 47-51, 80

[14] Above, n. 22, p. 92

[15] Above, n. 22, p. 66

OTHER MEASURES

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 as part of our mandatory professional development requirements (for instance as part of the yearly CPD points for lawyers). It is essential that the government and family law courts and relevant professional bodies mandate this requirement. As the ALRC/NSWLRC stated:

proper 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 children.[16]

RISK ASSESSMENT FRAMEWORK

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.

With over 50% of parenting matters in the family law courts involving serious allegations of family violence and/or child abuse,[17] the core business of the family law system is responding to family violence and child abuse. Consequently, legislative and systems responses should be reformed to reflect this and any agency that comes into contact with families after separation as part of the family law system should be heightened to the risks of violence and abuse.

The family law courts need to implement systems at the initial stages of application to identify and comprehensively explore issues of family violence and child abuse. The role (and number) of family consultants should also be expanded to allow for assessment of all children matters where there have been allegations of family violence and child abuse to inform case management. Early identification and thorough risk assessment of family violence and child abuse will contribute to ensuring that the matter proceeds through the most appropriate court division and ensuring less adversarial and earlier resolution of issues.

[16] ALRC Report 114, NSWLRC Report 128, p. 575

[17] Moloney, L et al (2007), *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A pre reform explanatory study*, Research Report No 5, AIFS, Canberra.

Clear guidelines about how to comprehensively assess for risk where family violence and child abuse is a factor will also need to be developed. The guidelines will need to include competency standards and processes with regards to family violence for all family consultants, family report writers, independent children's lawyers, other solicitors, Legal Aid and all other players in the family law system that parties and their children may come into contact with. The guidelines would need to fit within a whole of system approach.

In addition to the legislative and procedural changes in the courts required to improve responses to family violence and a risk of harm, there is a need for an underpinning (and written) risk assessment framework to assist all State and Commonwealth agencies that play a role in the family law system to identify family violence. Risk identification would assist agencies to ensure that appropriate referrals can be made and safety planning undertaken for women and their children when necessary. The overarching risk assessment framework and the importance of preserving safety must be imbedded in all Government policy underpinning the family law system.

Risk identification undertaken by all players in the family law system (as part of the overarching framework and policy) needs to be supported by a more comprehensive risk assessment.

In an integrated system, the role of risk assessment should be undertaken by the agencies holding the expertise in relation to issues of violence. These services have workers whose role is to work directly with women who are victims of violence. Assessment of safety is their core business and this role is not blurred, as it may be in other agencies, by a focus on legal proceeding/determining disputes (courts), dispute resolution and 'compromise' (family relationship centres and dispute resolution practitioners), advising their client (lawyers). In the case where a man (and/or father) is the victim of violence there would need to be an appropriate men's service to undertake this role.

The risk assessment undertaken by a specialist service would need to be made available at least to the family dispute resolution practitioner and court (where the matter preceded this) for the purpose of informing appropriate processes. Risk assessment is a continuous process and risk may change over time. The system must allow for this. Consideration should also be given to how information from a risk assessment could become part of the legal process (without the need for it to be subpoenaed). Changes to the legislation would need to be considered. Information contained in a risk assessment in the hands of a perpetrator may place a victim of violence in serious danger. Any legislative or systems changes must ensure the victim would not be placed at risk in this way.

Until the family law system is more integrated across the country, consideration should be given to improving collaboration between lawyers, family violence service providers, the courts and family dispute resolution practitioners to ensure that better use can be made of

the skills of family violence workers in relation to the assessment of risk, and that these skills inform the role and systems of risk identification and responses to violence amongst all players in the family law system. Skilled family violence workers are also well placed to provide expert family violence reports to the court.

Research undertaken on the collaboration between lawyers and family dispute resolution practitioners speaks about the benefits of improved collaboration.[18] Incidentally the research indicates that, amongst those practitioners surveyed, lawyers identified the existence of violence at much lower rates than family dispute resolution practitioners. Given the role that lawyers play in assisting their client to 'identify the issues'; it is critical that lawyers take a full history of the relationship, including the violence and abuse, to identify patterns and risk. Lawyers would benefit from collaborating with family violence workers to assist them in this work.

To conclude a risk assessment framework requires:

- Risk assessment to occur at a number of entry points within the family violence system;
- Access to family violence services;
- Disclosure of family violence during family law proceedings;
- Access to legal advice;
- Access to prompt and effective police services; and
- Most importantly risk assessment is an ongoing process.[19]

A federal family law risk assessment framework should be consistent with state and territory risk assessment and management frameworks to ensure greater integration with the family violence system. This point is why it is crucial that there is a common understanding of the nature and dynamics of family violence.

INTERIM HEARINGS

In our experience, decisions made at interim hearings tend to prioritise contact with both parents over the safety of the child and mother. The lack of court time and resources allocated to interim hearings means that family violence issues cannot be assessed comprehensively.

Our greatest concern with interim hearing decision relates to delay – both before and after hearings. There can be considerable delays before an interim hearing is heard, and interim

[18] H Rhoades, H Astor et al, Enhancing Interprofessional Relationships in a Changing Family Law System. Final Report May 2008, Melbourne University.

[19] Above, n.5, p.300

orders are often in place for considerable lengths of time due to court workloads. As such, these orders are 'interim' in name only. As the interim orders are in place for extended periods of time, the failure to consider fully family violence issues at interim hearings can leave women and children in considerable danger.

The delays may also contribute to the orders made, as a decision-maker may be reluctant to make no-contact orders because the lengthy delays will mean that the interim orders have a significant impact on the final orders. If delays were reduced, a no-contact or limited contact order would prejudice the final orders less, and interim decision-makers might be more willing to err on the side of safety.

ADEQUATE FUNDING AND RESOURCES

The issue of family violence cannot be adequately addressed without looking at the issue of lack of resources – for court processes, support services and legal assistance – as all of these things are a major contributor to the failure of the court system to adequately protect victims of violence.

The application and effect of merit tests on access to justice should be reviewed. In our view, in determining eligibility for legal aid, better consideration needs to be given to the capacity of the party to self represent. This is because of the impact of violence on women's self esteem as well as the other impediments to self-representing against a violent partner in an adversarial system.

Another example of the increasing difficulty in accessing legal aid is that legal aid policies require that applications for variations be 'imperative'. This creates problems for our clients who may have children who do not want to spend time with the other parent. Often the children have very good reasons for not wanting to spend time with the other parent but because of the legal hurdles required to justify no-contact orders when making applications to the courts, they are forced to spend time with the other parent. We hear of many examples where children, despite attempts by their mothers to encourage positive relationships, are dragged kicking and screaming to see the other parent. In these circumstances, because of the likely consequences it they do not, women feel that they have no choice but to take their children to handovers. These kinds of experiences re-victimise women and children and cause further psychological trauma to both the children and women. In many cases there is little prospect of a successful application for variation without access to legal representation and legislative change.

The obstacles created by lack of adequate funding or resources is compounded for Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds for whom English may not be their first language and women living with disabilities. These groups of women face many barriers including significant difficulties in

gaining access to qualified and culturally appropriate interpreters. Many of the changes proposed in this consultation paper to increase the effectiveness of the system's responsiveness to protecting victims of family violence will not be possible for these women without addressing obstacles that impact on their access to justice.

The issue of lack of resources is further intensified by the movement of the family law courts to a user pays systems can pose significant barriers to allowing victims of family violence access to the courts particularly women from disadvantaged groups and from lower socio-economic backgrounds. Whilst the non-negotiable fee of $60.00 may seem relatively small, for many women who are victims of family violence, they often have important competing demands on their limited financial resources. The fact that Legal Aid does not cover these costs may create significant impediments in ensuring that those cases that should go to court do so in a timely manner.

REFERENCE MATERIAL

1. AIFS, *Evaluation of the 2006 Family Law Reforms*, 2009, Canberra.
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