

Human Rights Committee

Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

May 2011

Submission by the NSW Young Lawyers Human Rights Committee

Contact:

Daniel Petrushnko
President, NSW Young Lawyers
Level 6, 170 Phillip Street
Sydney NSW 2000

Alison Ewart
Chair, NSW Young Lawyers Human Rights Committee
Level 6, 170 Phillip Street
Sydney NSW 2000

Authors:

NSW Young Lawyers Human Rights Committee
Liz Snell (Submissions Co-ordinator)
Christina Nguyen (Women and Children's Working Group Co-ordinator)

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1. The NSW Young Lawyers Human Rights Committee ('HRC') is grateful for the opportunity to provide a submission to the Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011. We express our support for the changes to the *Family Law Act* proposed in the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011. However, we recommend that further changes be made to the Bill to ensure that the family law system does not jeopardise the safety of women and children.
2. NSW Young Lawyers is made up of law students and legal practitioners who are in their first 5 years of practice or under the age of 36. The HRC of the NSW Young Lawyers is concerned with a range of human rights issues both in Australia and abroad and aims to raise awareness and provide education to the legal profession and the wider community on these issues.
3. The HRC includes a Women and Children's working group ('working group') which focuses upon issues that relate to women and children's human rights, including protection from family violence. The working group is involved in projects that raise awareness and initiate change about issues that aim to empower women and children.
4. The working group has been active in raising awareness about the prevalence of domestic violence in Australia and the need to challenge attitudes and behaviours about violence against women and children. To this end the working group has held White Ribbon Day events over the past few years and invited speakers to discuss the positive roles men can play to end violence against women and how domestic violence impacts upon migrants living in Australia respectively.
5. The working group has also participated in Amnesty International's roundtable forum about violence against women to discuss the National Plan to Reduce Violence against Women and their Children. The working group has also drafted submissions about the difficulty for women to leave violent partners due to a lack of appropriate alternative housing.¹
6. The HRC acknowledges the expertise of Women's Legal Services Australia ('WLSA') in working with women and children in the area of family violence. We have read and fully endorse WLSA's submission to this inquiry.

Key amendments we support

7. The HRC welcomes the government's decision to introduce the Family Law Legislation Amendment (Family Violence and Other Measures) Bill

¹ Young Lawyers Human Rights Committee, Submission to the National Human Rights Consultation at 43-46.

2011 in response to the evidence-based reviews about family violence which took place in 2010.²

8. We strongly support the measures proposed in the Bill to provide better protections for people who have experienced family violence within the family law system and believe that the proposed amendments are essential to placing the safety and protection of children and family members at the forefront of the *Family Law Act*.
9. In particular the HRC welcomes:
 - Broadening the definition of 'family violence' to include elements of coercion and control, a wider range of behaviour and removing the objective test of 'reasonableness' so that family violence can be properly considered whenever the victim actually fears for their safety;
 - A broader definition and understanding of child abuse that includes exposure to violence;
 - Prioritising family violence when considering what is in the best interests of the child;
 - Removing the 'friendly parent provision';
 - Repealing section 117AB about costs orders relating to false allegations or denials of violence - Section 117 is already sufficient to deal with any false allegations or denials of violence;
 - The explicit reference to give effect to the *Convention on the Rights of the Child* as an object of Part VII of *Family Law Act*, thus taking child's rights into account.

Additional amendments required

10. While acknowledging this Bill is an important start in providing better protection from family violence, particularly for children, the HRC submits that more can and should be done.

Definitions

11. The HRC notes that the definition of family violence in the 2011 Bill does not pick up all of the elements of the Australian Law Reform Commission's ('ALRC') and NSW Law Reform Commission's ('NSW LRC') 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.

² The Hon Robert McClelland, Launch of Family Violence Bill, 24 March 2011 accessed on 1 May 2011 at: http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2011_FirstQuarter_24March2011-LaunchofFamilyViolenceBill

12. The proposed definition of exposure should make it clear that it applies to exposure by the person who perpetrates family violence. This is in line with the ALRC/NSW LRC recommendation in the 2010 inquiry into family violence.³ This is important because it should avoid any 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.

Safety of the child must be paramount

13. The safety and protection of children should be prioritised above all else. Its priority should not be subject to proving an inconsistency with other considerations.
14. The distinction between primary and additional considerations in assessing the best interests of children is unnecessarily complex and can be confusing. This is particularly the case when the benefit of a meaningful relationship with both parents is in direct conflict with protecting the child from harm. The distinction between primary and additional considerations in assessing the best interests of children should therefore be removed.
15. In the single list of best interest factors to consider, the safety and protection of children should be listed as the first consideration and given priority.
16. The meaningful relationship factor should be listed as one of many best interest factors to consider.
17. Noting that one size does not fit all families, the courts should weigh up all of the factors in the child's best interest list depending on the circumstances of each individual case.
18. If primary considerations are retained, the safety and protection of children should be the only primary consideration.

Protection of the caregiver

19. The impact on the capacity of a caregiver who is victim of family violence to parent (eg. because of post traumatic stress and the other impacts of family violence) is not addressed in the proposed amendments. It is vitally important 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. Failure to do this will lessen the impact of broadening the definition of family violence and child abuse. The HRC submits it will also likely undermine the Government's message that "child abuse and family violence are unacceptable".⁴

³ ALRC/NSWLRC, Family Violence – A National Legal Response, Vol 1 at 242, paragraph 5.206

And at 246, Recommendation 5.1, accessed on 1 May 2011 at:

http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf

⁴ Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011, Explanatory Memorandum at 2 accessed on 2 May 2011 at:

20. There is a need to protect the primary caregiver in order to protect children's safety. Protection of children's caregivers who are victims of violence must not be artificially treated as a distinct issue from protection of their children, with different outcomes.

Remove presumptions

21. The HRC submits there should be no presumptions in family law – every family should be treated as unique and individual circumstances should always be considered. This means that there should be no presumption of equal shared parental responsibility and the courts should not be required to start from any particular care arrangement.
22. While the presumption of equal shared parental responsibility is intended to be rebutted by family violence, as WLSA notes, family violence may not be given its due weight to negate the presumption, especially at an interim stage.⁵ The HRC supports WLSA's alternative proposal that if the equal shared parental responsibility presumption remains, it should not apply at an interim stage if the matters cannot be properly determined.
23. The law states that equal shared parental responsibility only relates to parental responsibility, that is, decision making about long term matters and does not include a presumption about the amount of time spent with the child. However, the term "equal" has been misinterpreted and misunderstood by the community as relating to time and the starting point of negotiations as being equal time.
24. The HRC submits the word 'equal' is inappropriate when determining what arrangements are best for children, including decision-making under parental responsibility. The HRC recommends that 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.
25. The HRC further 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.

Adequate risk assessment

26. 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 2011 Bill does not deal with this crucial requirement and implementation of the proposed changes without it will not achieve

http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4562_ems_50eceb32-d839-4777-8940-b615a6cbc8ab/upload_pdf/353701.pdf;fileType%3Dapplication%2Fpdf

⁵ Women's Legal Services Australia, *Submission on the Family Law Amendment (Family Violence & Other Measures) Bill 2011*, at 12.

effective protection of women and children in family law.

Universal Periodic Review recommendations

27. Australia was reviewed by its peers before the United Nations Human Rights Council in its Universal Periodic Review ('UPR') appearance in January 2011. We refer to Recommendation 86.72 of the Draft Report of the Working Group ('UPR Report') which called for the strengthening of efforts to combat family violence against women and children.⁶ While we acknowledge our recommendations and the amendments proposed in the Bill should strengthen efforts to combat family violence, this alone is insufficient. Adequate funding is required to ensure access to justice, in particular in the form of culturally appropriate services and translating services.
28. We refer to Recommendation 86.92 of the UPR Report which called for an increase in provision of legal advice to Indigenous peoples, particularly Indigenous women and the need for appropriate translation services. We strongly recommend this be implemented.

Filing fees

29. As of 1 November 2010, there was a change to court filing fees in the Federal Magistrates Court or Family Court which the HRC considers is in need of review. While previously applicants could seek a waiver or exemption on the grounds of financial hardship, now they can only seek, in certain circumstances, a reduction to \$60 in general family law matters. No reduction is available in regard to the filing of Consent Orders and therefore a flat fee of \$80 applies.
30. For someone on a Centrelink benefit or in financial hardship \$60 or \$80 in the case of Consent Orders is a significant amount of money.
31. Furthermore, it would be very concerning if there are family law matters which are not suitable for mediation due to issues of abuse and family violence that do not reach the courts because of the financial barrier of the client being unable to pay the filing fee.
32. This runs contrary to the purpose of the Bill in which "the safety of children is of critical importance" and "sends a clear message that family violence and child abuse are unacceptable."⁷ The HRC calls for an immediate review of these filing fees.

Conclusion

33. Based on the evidence presented in numerous research reports over the last few years, the HRC strongly recommends the amendments suggested in this submission be supported and that the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

⁶ United Nations Human Rights Council, *Draft Report of the Working Group on the Universal Periodic Review – Australia*, UN Doc. A/HRC/WG.6/10/L.8 at 86.72 (31 January 2011) accessed on 3 May 2011 at <http://www.un.org.au/files/files/Draft%20report%20of%20the%20Working%20Group%20on%20the%20Universal%20Periodic%20Review%20-%20Australia.pdf>.

⁷ Note 4.

be passed expeditiously.

34. Should you have any questions about this submission, please contact Mr Daniel Petrushnko, President, NSW Young Lawyers, on 02 9229 7333 or president@younglawyers.com.au or Ms Alison Ewart, Chair, NSW Young Lawyers Human Rights Committee, on (02) 9926 0270 or hrc.chair@nswyounglawyers.com.au