14 April 2011

Committee Secretary
Senate Legal and Constitutional Committees
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Dear Committee Secretary,

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

The Women's Legal Centre (ACT & Region) thanks the Committee for the opportunity to make a submission on changes to the *Family Law Act* proposed in the draft *Family Law Amendment (Family Violence) Bill* 2010.

The Women's Legal Centre (ACT and Region) Inc (the WLC), is a Community Legal Centre accredited by the National Association of Community Legal Centres. The Centre has been operating in Canberra since 1996. The main areas in which we provide advice are family law, domestic violence, and employment and discrimination law. Our client group includes disadvantaged women, such as those from culturally and linguistically diverse communities, Aboriginal and Torres Strait Islander women, women with disabilities, and women living in poverty. Around half of the women seeking assistance from the Centre in family law matters have experienced family violence.

The WLC strongly supports the Federal Government's moves to provide better protections for people who have experienced family violence within the family law system. The proposed amendments are an essential first step to place safety and protection of children and family members at the forefront of the *Family Law Act*.

Based on our (anecdotal) experience with clients since the 2006 amendments, the WLC submits that there are further amendments to the Family Law Act which are necessary to implement the intentions of the Federal Government in an understandable and consistent way. We set out our views about further reform at the end of our submission.

Redefining 'Family Violence'

1. The WLC supports the broadened definition of family violence which aligns more closely with the recommendation made by the ALRC/NSWLRC report[1].

[1] ALRC Final Report 114 / NSWLRC Final Report 128 Family Violence – a National Legal Response, October 2010

2. However, as this is an opportunity for the Federal Government to make a statement about family violence, we submit that the definition should recognise that "exposure to family violence" is a form of family violence.

3. The broader definition of child abuse does include a child being exposed to family violence. It is important for the *Family Law Act* to recognise that the same conduct in relation to a child may constitute both family violence and child abuse.[2]

Definition of Child Abuse

4. The WLC supports the proposed broadening of the definition of child abuse. In particular, we welcome the inclusion of "exposure to family violence" in the definition of abuse.

5. For consistency, the WLC supports the view that the definition of exposure to family violence should include a specific reference to all the forms of family violence as defined in the proposed ss 4AB(1) and (2) in the 2011 Bill.

6. The WLC is concerned about the evidentiary burden imposed by the requirement to link exposure to family violence with serious psychological harm in the child. The impacts of exposure to family violence upon children is well documented.[3]

7. There is an associated concern that mothers who are unable to remove their children from situations of family violence (for the many reasons which are well documented in literature about family violence) will be implicated in abuse of the children. The ALRC/NSWLRC Report suggests that the more appropriate wording would be "behaviour by the person using the violence that causes the child to be exposed to family violence".

Prioritising the Safety of Children

Convention on the Rights of the Child

8. The WLC supports the incorporation of the Convention on the Rights of the Child into the Objects of Part VII. Notwithstanding that the practical effects of the amendment are unpredictable, it is important that the Australian Government's commitment to develop and undertake actions and policies to promote the best interests of children should be included in legislation that has such a profound impact upon children.

9. Article 12 of the Convention is of particular relevance:

    1. *States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.*
    2. *For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child,*

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[2] ALRC Report 114, vol 1, p 265

[3] See Brown, T & Alexander, R Child Abuse and Family Law Allen & Unwin, 2007)

either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

As a consequence, it is important that the family law system is properly resourced by way of, for example, funding for family report writers and Independent Children's Lawyers so that there is meaningful application of the provisions of the Convention for the individual children involved.

Prioritising Safety in the Two Primary Considerations

10. The WLC submits that the introduction of primary and additional considerations in the 2006 amendments have unnecessarily complicated the legislative pathway to determine the best interests of the child. In our submission the proposed statement of priority in s60CC(2A) effectively introduces a third level of considerations, further complicating the process of determination.

11. The WLC submits that there should be a single list of considerations, to include safety of children as the first consideration and given priority. Promotion of a meaningful relationship would be included in the list of factors the Court is to consider with the Court to determine the appropriate weight to be given to each factor.

12. If the notion of primary and additional considerations is to remain, the WLC supports there being a single primary consideration of protecting the child from harm.

Bringing Evidence of Violence and Abuse to Court

13. Whilst it is important to heighten the requirement to bring evidence of violence and abuse to Court, the experience to date has been that Notices of Child Abuse or Family Violence are not widely used[4].

14. The WLC supports as an alternative the proposal that in each parenting case the Court must conduct a risk identification and assessment. It may be that this information is better gathered by some other agency in the family law pathways network and shared with the Courts. In most cases the parties will have had contact with other agencies which are likely to have conducted their own risk assessment. It is the WLC's submission that focussing resources on streamlining the risk identification and assessment process will add to better overall case management and may avoid the perception that family violence was considered to be of little relevance in making decisions about parenting.

15. It is important that the Courts are properly resourced to consider family violence and child abuse issues. The AIFS Report 2009 identifies systemic issues which impact upon the adequacy with which the system can deal with

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[4] "There is clear and consistent evidence that Form 4s are often not filed in circumstances where the law (by way of the Family Law Rules 2004) requires them to be." Professor R Chisholm, *Family Courts Violence Review* (27 November 2009) at p 72.

family violence and child abuse, in particular inadequate time (lack of judicial and forensic capacity) to scrutinise allegations[5].

Removing Disincentives to Disclosing Violence

16. As has been widely reported[6], the experience of the WLC is that the "friendly parent provision" inhibited reporting of family violence. The WLC supports the removal of the "friendly parent" provision and the redrafted section 60CC(3)(c) and (ca).

Other matters

17. We believe that there are a number of changes needed immediately that have not been addressed in the Bill. We urge you to consider amendments to:

    a. The presumption of equal shared parental responsibility;

    b. The link between equal shared parental responsibility and equal time/substantial and significant time arrangements;

    c. The "one size fits all" approach in which it is assumed that equal time and substantial and significant time arrangements are best for children.

Presumption of equal shared parental responsibility

18. It is the WLC's experience that since the 2006 reforms there has been a widespread community misperception that there is a presumption about the children spending equal time with each parent. This lack of understanding is discussed in the AIFS Report:

    "*It was suggested that these provisions strengthened the tendency for the implications of family violence not to be given adequate consideration. These provisions were said to have had an impact on expectations with fathers asserting a right to shared time even where there had been violence, placing mothers in a defensive position. It was suggested that the fear created by the possibility of the application of the presumption and the consequent application of the provisions relating to equal time or substantial and significant time contributed to women agreeing at times to unsafe arrangements.*"[7]

The link between equal shared parental responsibility and equal time/substantial and significant time arrangements

19. Notwithstanding, the fact that the presumption should not operate where there is family violence and/or child abuse, there are reports that many

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[5] Australian Institute of Family Studies, Evaluation of 2006 Family Law Reforms (December 2009) ["the AIFS report"] at pp 246-7

[6] See pp104-105 of Professor R Chisholm, *Family Courts Violence Review* (27 November 2009)

[7] At pp 245-6

women make agreements for their children notwithstanding their concerns about the child's safety.[8]

20. The WLC submits that the message should be a focus on children's safety and dealing with the parental conflict rather than setting up uncertainty around implementation of the presumption; and consequent negotiation of arrangements that are not in the children's interests.

The "one size fits all" approach in which it is assumed that equal time and substantial and significant time arrangements are best for children.

21. From the findings of the Social Policy Research Centre UNSW, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* (May 2010) it becomes clearer that it is not the care arrangements themselves that makes the difference to children's reported wellbeing but other factors such as the parents relationship, whether the arrangement was imposed by a court, equitable sharing of financial resources through child support and parents sharing decisions rather than the amount of time the children spend with each parent. [9]

22. Recent social science research has emphasised the need to consider the child's age, developmental stage, relationship with caregivers, the capacity of the parents to work together in the child's interests as well as the more practical aspects of any parenting arrangements. All of this mitigates against a legislative obligation to consider any particular type of care arrangement.[10]

Training and Education

23. The Reports commissioned since 2008 have provided many valuable insights into the operation of the family law pathways and the family law systems.

24. One matter of concern is the lack of understanding about the dynamics of family violence. The AIFS Report, 2009 states:

> "*A substantial proportion of practitioner participants asserted that family violence was minimised - in the sense of not being given adequate consideration - in the family law system for reasons that largely reflected a lack of understanding of the issues its raises. A variety of factors were said to be connected with this, including a failure on the part of some professionals to*

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[8] AIFS Report, 2009 This may have led to the situation where parents with safety concerns were no less likely than other parents to indicate that they had shared care-time arrangements (fathers 22-23%; mothers 11-12%). In other words, around one in four fathers and one in ten mothers with shared-care arrangements indicated that they held safety concerns as a result of ongoing contact.": AIFS Report, 2009 at p 233

[9] see page xiii.

[10] See, for example, the collected reports of Jennifer McIntosh *et al* prepared for the Attorney General's Department, Post-separation parenting arrangements and developmental outcomes for infants and children (May 2010)

appreciate that nature of family violence, particularly its more subtle manifestations, such as emotional abuse and ***controlling behaviour***."[11]

25. In our submission there are three ways in which the government can address this concern:

    a. By supporting victims of family violence as they navigate the family law pathways, through an awareness of the dynamics of family violence ; and

    b. By having a streamlined risk identification and assessment process; and

    c. By having in place an ongoing training and education program for judicial officers, Court staff and others involved in the family law system specifically dealing with family violence and the impact upon children and parenting arrangements.

If you would like to discuss any aspect of this submission, please contact Rhonda Payget, at the Women's Legal Centre in Canberra on

Yours sincerely,

Rhonda Payget
Principal Solicitor
Women's Legal Centre (ACT & Region)

[11] AIFS Report, 2009, at p 246 [our emphasis]