



Top End Women's Legal Service Inc.

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

By Facsimile: (02) 6277 5794

Dear Committee Secretary

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

Top End Women's Legal Service Inc (TEWLS) thanks you for the opportunity to make a submission on the changes to the *Family Law Act* ('the Act') proposed in the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* ('the Bill').

We note that we previously provided a submission to the Commonwealth Attorney-General's Department in relation to the *Exposure Draft on the Family Law Amendment (Family Violence) Bill 2010*.

Who we are

TEWLS is a community legal centre funded by the Commonwealth Attorney-General's Department to provide referrals, legal advice, casework, law reform and community legal education to women in the Top End of the Northern Territory. TEWLS is a member of the National Association of Community Legal Centres and Women's Legal Services Australia. TEWLS was established in 1996 following recommendation by the Australian Law Reform Commission for the establishment of a network of women's legal services to meet the particular legal needs of women, which were not being met by traditional legal services.

TEWLS provides assistance in a number of areas of law including domestic violence, sexual assault, family law, crimes compensation, housing and discrimination. We have a number of project areas which target particularly vulnerable women, including Aboriginal and Torres Strait Islander women, women from refugee and migrant backgrounds and women in prison and immigration detention.

As the only women's legal service in Darwin, we are frequently accessed by women who are more comfortable sharing their stories with other women. We are also accessed by many women who fall in the gap between qualifying for Legal Aid and being in a position to afford a private lawyer. Unfortunately, our small size means that we are unable to represent a large number of these women, especially in matters requiring complex family law assistance.

Whilst we rarely provide court representation in family law proceedings, we provide assistance, advice and support to many women dealing with family violence, separation and parenting, often working closely with the NT Legal Aid Commission and the Domestic Violence Legal Service. We therefore feel that we are well placed to comment on the above Bill.

Supported amendments

We support the Government's moves to provide greater safety from family violence within the family law system. In particular, we strongly support the following:

- The addition of the *Convention on the Rights of the Child* as an object and underlying principle of Part VII of the Act. This is an important move in creating a culture within the family law system that prioritises the internationally recognised rights of the child in matters where a child's interests are concerned.
- Removing the requirement for "reasonableness" in the definition of "family violence". This will allow for family violence to be properly acknowledged whenever a victim actually fears for their safety, without the additional burden of having to convince those outside of the relationship that the fear is "reasonable".
- Broadening the definition of "family violence" to include a general statement that provides an overarching characterisation of family violence, together with a non-exhaustive list of behaviours that might be considered to demonstrate family violence. We believe that this general statement will protect victims from attempts by a perpetrator to label the victim's actions of resistance or self-defence as examples of violence or of mutual violence. This is done by characterising family violence as behaviour that coerces, controls, dominates or creates fear in the victim.
- Broadening the definition and understanding on "child abuse" to include exposure to family violence and psychological harm. This is an important acknowledgement of the emotional impact that witnessing family violence, in all its forms, can have on children and is critical to the protection of children from harm.
- Amending the 'friendly parent' provision to remove the facilitation aspects. The new s 60CC(3)(c) takes into account each parent's efforts to contribute to the upbringing of the child, taking into account matters such as spending time with the child, participating in decision making about the child and paying child support. We believe these are appropriate considerations for the court in the context of determining the best interests of the child.
- Requiring the court to consider any family violence order in determining the best interests of the child. Currently, the court is only required to consider final or contested family violence orders. TEWLS believes any order made through the courts to protect the lives of family members who have experienced family violence should be considered by the family court in relation to parenting arrangements.
- Repeal of the costs provision for false allegations. TEWLS believes that section 117 of the Act provides an appropriate avenue to deal with any false allegations or denials of family violence.

Suggested amendments

Definition of family violence

The Act must recognise that the same behavior in relation to a child may constitute both family violence and child abuse.¹ To that end, the definition of “family violence” should explicitly recognise that “child abuse”, particularly “exposure to family violence”, is a form of family violence, which applies only to the person perpetrating the violence, not the victim of the violence.

TEWLS also believes that economic abuse should be expressly recognised as a type of behaviour within the definition of family violence, as recommended by the ALRC/NSWLRC Report. The definition of economic abuse should include a non-exhaustive list of examples of economic abuse, such as coercing a partner to claim Centrelink benefits, preventing a partner from looking for or remaining in work and ‘humbugging’, which refers to the practice in indigenous communities whereby money is demanded from family members often through the use of manipulative tactics.²

Definition of child abuse

Whilst we welcome the broadening of the definition of child abuse, TEWLS is concerned that the specific incidents listed as examples of when a child is exposed to family violence may result in the meaning of the phrase “experiences effects of family violence” being restricted through statutory implication. Having a list of specific examples that relate only to physical forms of family violence ignores the serious and detrimental impact that other forms of family violence (such as emotional abuse and living in an environment of constant threat and hyper-vigilance) can have on a child’s wellbeing and development. We therefore submit that the definition of “exposure to family violence” should include a specific reference to all forms of family violence as defined in the proposed s 4AB in the Bill.

As stated above in relation to the definition of family violence, the legislation must make it clear that the relevant “exposure” is by the person who perpetrates the violence so as to protect victim parents who are not able to remove their children from situations of family violence.³

Best interests of the child

Whilst we commend the protection of children from harm being prioritised in the best interests of the child factors, we believe that the result of the proposed amendments to s 60CC is to proscribe a three-tiered hierarchy of best interest factors, which is unnecessarily complicated and incomprehensible to the lay person.

TEWLS believes that protection of children from harm should be the first and only priority in a single list of best interest factors. Within that single list, the promotion of a meaningful relationship with both parents would be included, along with the factors currently listed as ‘secondary’. The court should be left to determine the appropriate weight to accord each consideration based on the circumstances of each family. The court must however, be directed to place the protection of children from harm at the forefront of its deliberations, without having to first determine whether there is inconsistency.

¹ Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), p.265

² ALRC/ NSWLRC Report, at [5.181] – [5.183]

³ ALRC/NSWLRC Report

In light of such situations, TEWLS argues that it is in the best interests of children for the courts to view relocation cases involving allegations of family violence more sympathetically and with explicit reference to the best interests of the child factors.

We also believe that courts should be required to proactively consider the possibility of transferring family court proceedings to the jurisdiction where the victim of family violence has relocated. This would help avoid situations where a perpetrator further disempowers and degrades the victim by dragging out family court proceedings in a jurisdiction where the victim is isolated from family support structures, with limited resources, including secure housing, to care for the children. It may also serve to minimise the disruption to children's lives where the victim has moved away with the children.

As is well documented, escaping a violent relationship is often the first step in a very long road to recovery. Further, the victim of the violence is often at risk of exacerbated levels of violence immediately after their departure, making the move to leave the relationship even more significant. If courts are to continue ordering victims of family violence and their children to return to violent environments, then suitable and proactive mechanisms need to be in place to deal with this. Such mechanisms must include increased funding for specialist family violence services, particularly those providing crisis and longer term accommodation.

Education and training

TEWLS is concerned that the dynamics and complexities of family violence are not properly understood or appreciated by those engaged in the family law system, particularly more subtle forms of family violence, such as psychological abuse, social isolation and economic abuse, in which the perpetrator exerts considerable control and domination over the victim.

Comprehensive and regular education and training on the impact of family violence on victims, children and the negotiation of parenting arrangements is essential for those engaged in the family law system, including the judiciary.

Further matters

Women's Legal Services Australia (WLSA) has provided a detailed submission to the Committee dated 29 April 2011. As a member of WLSA, TEWLS strongly supports that submission. We note that the WLSA submission makes recommendations in relation to a number of issues that have not been addressed by the Bill, including:

- the presumption of equal shared parental responsibility;
- the link between equal shared parental responsibility and equal time or substantial and significant time arrangements; and
- the 'one size fits all' approach that assumes that equal time or substantial and significant time arrangements are in the best interests of the children.

Whilst it is beyond the scope of our own submission, TEWLS believes the recommendations made by the WLSA submission in relation to the matters listed above are important both to make the legislation more comprehensible and accessible to the community and for ensuring the safety of women and children in the family law system.

We also note the recommendations made by the WLSA submission in relation to a risk assessment framework and encourage the Committee to carefully consider the need for a well-resourced and comprehensive risk assessment framework in all parts of the family law system.

Conclusion

TEWLS commends and supports the Federal Government's efforts to provide better protection for children and victims of family violence going through the family law system. To that end, we believe that the proposed amendments contained in the Bill are essential, however we believe the Bill can be strengthened with the recommendations made in this submission and the submission of WLSA.

TEWLS would welcome any opportunity to discuss this submission or provide further input into the development of legislation or programs to address family violence.

Yours sincerely,

Nicki Petrou
Managing Solicitor
Top End Women's Legal Service