

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
PO BOX 6100, Parliament House
Canberra, ACT, 2600
By Email: legcon.sen@aph.gov.au

26 July 2011

Dear Committee Secretary,

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

We are a rural, regional and remote community legal service in Gippsland Victoria providing (amongst other things) family law and family violence information, advice, and casework to members of the Gippsland community. We have a particular interest in assisting victims of family violence (often women and children) and write to express our support for the changes to Family Law System proposed by the Family Law Amendment (Family Violence) Bill 2011 and to advocate for further changes.

We believe that the Family Law System is currently failing to adequately protect women and children from family violence.

We have read the Women's Legal Services Australia ('WLSA') Position Paper: Family Law Amendment (Family Violence) Bill 2010, 14 December 2010 and their Updated Position Paper to your Committee of 12 April 2011, and support their comments and recommendations.

Part 1: The proposed changes

Best interest considerations – prioritising protection: s 60CC(2)

We strongly support the proposed amendment that when determining children's best interests, protecting children from harm takes priority over their right to a meaningful relationship with both parents, where these two considerations are in conflict.

Nonetheless, we support the recommendation by WLSA that a better approach is to remove the distinction between primary and secondary considerations and to entirely avoid the three tier approach proposed in the current Bill by having one list of best interest factors, of which children's safety takes priority.¹

Children's safety and wellbeing must always take priority. The Family Law Act needs to allow and equip parents and other significant family members, advisers and the courts to weigh up

¹ Women's Legal Services Australia, Updated Position Paper 12 April 2011 on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 to inform Senate Submissions, pages 7-8.

all the considerations and make an agreement or order that is appropriate in each case, recognising that every child is different and every child's needs are different. We believe that a three tier approach will add to the confusion currently experienced by families, children and advisors when trying to evaluate the effects of violence and abuse on children against their other rights and needs.

We are concerned that women are currently reluctant to flee relationships with men who commit family violence and abuse children for fear that the legal system will force them to facilitate a relationship between the abuser and their children, often on an unsupervised basis. We read with interest the account of Helen Cummings in her book "Blood Vows, A Haunting Memoir of Marriage and Murder" and see parallels between her story, the concerns she raises and the concerns voiced by some of our most vulnerable clients.

Definition of family violence: s 4

We commend the expanded definition of family violence. We support removing the requirement that a person must experience 'reasonable' apprehension or fear. We see this as an important step forward in recognising that family violence takes many forms, can be both subtle and overt, and that different people experience and respond to violence in different ways.

However we agree with a number of the recommendations raised by WLSA regarding the separation of the definition of "family violence" and "child abuse".²

We note with interest the current edition of the Trends and Issues in Crime and Justice paper, (No 419, June 2011) released by the Australian Institute of Criminology which states that an "increased awareness of children's exposure to domestic violence as a form of child abuse" is needed together with an understanding that "children's exposure to domestic violence often co-occurs alongside other types of violence within families".³ It further states that a change to community attitudes towards family violence is needed. This current Bill goes some way towards challenging community attitudes towards family violence. To strengthen the commitment to children's best interests, highlighting the coexistence of family violence and child abuse, would send a message to the community that family violence hurts children and is totally unacceptable.

We therefore agree with WLSA that child abuse must be recognised as a form of family violence.

Definition of abuse: s 4

We welcome the expanded definition of child abuse to include causing serious psychological harm, exposure to or experiencing family violence and serious neglect however we note as above that child abuse should also be included within the definition of family violence.

² As above, page 5.

³ Australian Institute of Criminology, Trends & Issues in Crime and Criminal Justice, No. 419, June 2011, page 6.

Definition of exposure to family violence: s 4

We welcome the inclusion of a definition of 'exposure to family violence'. We believe this sends a message to the community that exposure to family violence is a form of violence that must be taken seriously.

However, we note comments by the WLSA that this definition focuses on physical violence and threats.⁴ A better approach is for this definition to reflect the new definition of family violence, to reinforce that family violence takes many forms and that a child's exposure to family violence can be considered child abuse. This should however protect victims (often mothers) from allegations of exposing children to family violence by failing to flee or 'failing to protect'.

'Friendly parent provisions' s 60CC(3)(c), (4) and (4A)

We support the full removal of the 'friendly parent provisions' and note that the current Bill has retained some elements of these provisions.

We believe these provisions operate to unfairly discourage victims of family violence from taking action to protect themselves and their children, and from disclosing such information to the Family Law Courts. We have some concerns that the elements retained in the provision will adversely affect victims of family violence where they are acting protectively for their children.

Cost provision: s 117AB

We support the removal of s 117AB, directing the Court to order a party to pay the costs of another party where they have made false allegations or denials of family violence. We believe this provision operates as a disincentive to vulnerable parties disclosing information about family violence. Family Law Courts have a broad power to make cost orders and we believe this is adequate to deal with false allegations or denials of family violence.

Convention on the Rights of the Child: s 60B

We commend the inclusion of a reference to the Convention on the Rights of the Child. We believe the Convention provides a strong grounding for developing a child centred approach to the Family Law system.

Best interest considerations – family violence orders: s 60CC(3)(k)

In considering the best interests of the child, we support the expansion of s 60CC(3)(k) to include not only the existence of final or contested family violence orders, but any family violence order that applies to the child or a member of the child's family however we

⁴ Women's Legal Services Australia, Updated Position Paper 12 April 2011 on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 to Inform Senate Submissions, page 6.

acknowledge that such orders constitute only one part of the evidence submitted to court regarding family violence.

Adviser's obligations: s 60D

We support the increased obligations on advisers to explain the best interests principle, and the Court's priority to protect children from harm. We believe this sends a strong and direct message to the community about prioritising children's safety.

Immunity from Costs Orders for State and Territory Child Welfare Authorities: s 60CH and s 60CI

A family court will in some situations invite a State or Territory child welfare authority to become a party to family law proceedings. Previously, in many instances the relevant authority would decline the court's request to intervene in proceedings. Thus, it is important to ensure that requests are not refused in fear of a cost order being made against the agency or its employees/agents.

Information about whether a child is or has been the subject of a care order under child welfare legislation is crucial in assisting the family courts to make decisions about children, including a decision to allow the relevant child welfare authority to protect the child from harm.

Family courts need to take a number of considerations into account when making an order in relation to a child which will include information about whether a child is the subject of child protection proceedings or is or has been the subject of a notification, investigation, inquiry, assessment or report by a child welfare authority.

We support these new provisions.

Courts must ask about family violence and abuse s 69ZQ(1)(a)

We believe that victims of family violence are often reluctant to share their experiences but are more likely to do so if asked directly. Courts can play an active role in drawing out family violence and abuse concerns, and ensuring that child welfare authorities receive early notice of allegations of child abuse.

The proposed new section s 69ZQ(1)(a) provides that there should be an emphasis on future and past violence and abuse. Evidence of long term serious abuse should be considered in these cases and not ignored. We support this new provision and recommend that the court should consider extensive history of family violence in deciding whether a party is at risk of being subjected to family violence in the future.

Requiring parties to disclose family violence s 67ZBA

The new inserted s 67ZBA would require parties to proceedings who allege family violence to file a Notice of Child Abuse or Family Violence with the court. Once reporting occurs, the

court would be required to act promptly to ensure that the issues are dealt with expeditiously. We support the insertion of this new provision.

Part 2: Further Changes that are Needed

We support the proposed amendments but believe that further changes are needed.

We support WLSA's recommendations that Equal Shared Parental Responsibility ('ESPR') should be removed.⁵ There should not be a presumption of ESPR, ESPR is not appropriate in all cases. Each case should be decided on its own facts. If shared time is to remain, this should not apply to very young children or families where there is high parental conflict or family violence.

Secondly, WLSA recommend that the Act provide for the implementation of family violence training across the sector, for judicial officers, family consultants, dispute resolution practitioners and advisors.⁶ We support this recommendation, and further suggest that training could occur in consultation with the established Family Law Pathways Networks or the Integrated Family Violence Networks.

Thirdly, we support WLSA's recommendation that the Act provide for a comprehensive and well resourced family violence risk assessment framework at all stages of the family law system.⁷

Finally, we support the inclusion of child abuse within the definition of family violence.

Conclusion

We commend efforts made in the amendments proposed in the Family Law Legislation Amendment (Family Law and Other Measures) Bill 2011 and look forward to working with the newly amended Family Law Act. We strongly recommend you take this opportunity to consider further changes to the Family Law Act to maximise the law's ability to promote the best interest's of children.

Yours faithfully,
(...)

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⁵ As above, page 10.

⁶ As above, page 12.

⁷ As above, pages 11-12.

Bibliography

Women's Legal Services Australia, *Updated Position Paper 12 April 2011 on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 to inform Senate Submissions*.

Richard Chisholm, *Senate Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*, 13 April 2011

Australian Government, Australian Institute of Criminology, *Trends and Issues in Crime and Criminal Justice*, No. 419, June 2011

Helen Cummings, *Blood Vows: A Haunting Memoir of Marriage and Murder*, 2011, Five Mile Press Pty Limited