



Women's **Legal Service**  
**T A S M A N I A**

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

*Per email: [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)*

28 April 2011

Dear Sir, Madam,

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

The Women's Legal Service Tasmania applauds the Government's proposed changes contained in the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* to better meet the needs of children and victims of family violence.

Our Service provides free confidential legal advice to the women of Tasmania in person or on our telephone advice line. We also organise and present community legal education seminars and we are actively involved in raising awareness of legal issues facing the women of Tasmania and bringing these to the attention of the relevant legislative bodies or organisations.

Our purpose is to empower women to have full access to the legal system, thereby encouraging women to take greater control of their own lives.

Through the work we do, we are acutely aware of the issues that women face when dealing with separation from a partner, arrangements for children and family violence. As such, we believe the Bill is a step in the right direction. However, we wish to highlight further changes and amendments which will ensure that the Government's aim of protecting victims of family violence and their children is achieved. We therefore enclose our submission for your consideration.

If you have any questions about the contents of this submission or our Service please do not hesitate to contact us.

Yours sincerely,  
Women's Legal Service Tasmania

Pauline van Adrichem  
Solicitor



# Submission

*To Senate Standing Committees on Legal and Constitutional  
Affairs*

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

<i>Prepared by:</i>	<i>Women's Legal Service Tasmania</i>
<i>Address:</i>	<i>PO Box 707</i>
	<i>North Hobart TAS 7002</i>
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## Submission

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

#### 1. Redefining Abuse

We support the broadening of the definition of abuse, however, we have concerns about the wording of proposed section 4 (1)(c).

The term serious psychological harm may be used to narrow the instances where psychological harm due to exposure to family violence is severe enough to satisfy the definition of child abuse. Research has clearly shown the detrimental effects family violence has on children.

To prevent the scenario where a judicial officer has to assess whether exposure to family violence leads to serious psychological harm or merely psychological harm that is not serious enough we suggest that the word serious is removed from section 4(1)(c).

This ensures that the child safety stays at the forefront of any judicial decision-making regarding children's arrangements and highlights to the person using the violence the effects their behaviour has on the children.

#### 2. Redefining Family Violence

We support the broadening of the definition of "family violence" and it being a subjective test rather than an objective test.

We strongly support the general definition identifying that family violence is perpetrated to coerce or control or instil fear. The list of examples of what can constitute family violence covers physical, as well as financial and emotional family violence and it is not limited to those specific examples. We strongly support this approach.

One concern, which we hold, is that as an unfortunate consequence from broadening the definition of family violence there could be an increase in claims of mutual family violence.

In our experience, there have been instances where after periods of abuse the victim lashes out and defends herself against the perpetrator. The perpetrator then uses these actions to their advantage by alleging that they are the victim not the predominant perpetrator of the family violence.

One way to address this concern is for appropriate risk assessment mechanisms need to be in place for the Court to identify the predominant perpetrator and the victim. This will also ensure that the victim is not further victimised by the family court process.

### 3. Definition of exposed

We support including a definition for the word “exposed” in relation to family violence.

We note that the list of examples under s4AB(4) in the Bill appear to be limited to exposure to physical violence and not the other more controlling and coercive forms of family violence identified in the new proposed definition of family violence.

To prevent this section being interpreted too narrowly we suggest that the definition specifically refers back to the examples listed in the family violence definition and examples (see S4AB(1) and (2) in the Bill).

### 4. Family violence definition, child abuse and exposure

Looking at the proposed changes to the definition of family violence, child abuse and exposure to family violence as whole a notable omission appears.

The ALRC/LRC<sup>1</sup> recommended that the definition of family violence should include “exposure to family violence” as a form of family violence. However, it is incredibly important that the legislation needs to make it clear that a child is exposed to family violence by the behaviour of the person using the violence not the failure by a victim parent to protect the child from the exposure.

Children living in families where family violence is being perpetrated, whether the child actually witnesses it or not, has detrimental effects on the child’s development.

The ALRC/LRC report<sup>2</sup> points out the following finding from the National Council to Reduce Violence against Women and their Children:

“Children do not need to be physically present when violence occurs to suffer negative consequences. Living in an environment where violence occurs is extremely damaging to children and there is little difference in outcomes for children whether they see the violence or not.”<sup>3</sup>

We submit that including exposure to family violence as an example of family violence will further highlight the insidious nature of family violence. It will also emphasize to the person using the violence the effect they are having on the psychological and emotional wellbeing of their children and the victim parent.

The failure of the victim parent to protect the child from exposure to family violence should not be dealt with punitively. Appropriate support needs to be provided to the victim parent and their children to ensure their safety and wellbeing, as well as specific perpetrator programs for the person using the violence.

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<sup>1</sup> ALRC Final Report 114/NSWLRC Final Report 128, *Family Violence – a National Legal Response*, (2010) at 5.206

<sup>2</sup> Ibid at 5.209

<sup>3</sup> 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), 40



## 5. Determining a child's best interests

The attempt in the Bill to address the inconsistency between the two primary considerations adds further complexity and confusion to an already complicated system.

One of the aims of this legislation is to promote children's safety. We suggest that the most simple way of achieving this is by having no primary considerations at all, and instead there should be one list of considerations that is to be used to determine what arrangement is in the best interests of the children where the child's safety is given priority.

The child's right to a meaningful relationship with both parents should be one of the many factors that the Court considers to establish what is in the best interests of the children.

If there is to be a primary consideration, it should be about the safety of the children.

If neither of the above suggestions are accepted we do support the proposed amendment. However, we suggest that the wording of proposed section 60CC(2A) should be drafted 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)."

This wording firmly puts the focus on child safety, and will need to be considered at all times when children's arrangements are being made, not merely where there is an inconsistency.

## 6. Friendly parent provision and cost orders for false allegations

The Bill attempts to remove the problematic aspects of the friendly parent provision (s60CC(3)(c) and (k) and s60CC(4)(b)). This includes the consideration of each parent's ability to facilitate a meaningful relationship between the child and the other parent. Furthermore, the repeal of s117AB, which specifically dealt with the Court's ability to order costs where false allegations were made, is strongly supported.

We strongly support the removal of these sections because it recognises the undesirable consequences they have produced. It discouraged victim parents from acting to protect their children out of fear of being viewed as an unfriendly parent. The specific costs order section for making false allegations further perpetuates this.

Family violence generally happens behind closed doors. How does a victim parent prove that her/his partner is committing family violence? If there are bruises or regular reports to police it becomes easier to support such claims. However, family violence, in our experience, is still very much under reported.

The combination of not wanting to be an unfriendly parent and a fear of a cost order for making false allegations where you are unsure as to how to "prove" family violence has led to children and victim parents continuing to live in a family arrangement defined by family violence.

The proposed amendment retains part of the friendly parent provision and relate to each parent's participation in decision making about the child, spending time and communicating with the child and maintaining of the child. These considerations will require the parties to disclose their participation in their children's lives and may assist in disclosure of family violence.

If, for instance, a parent were to say that they would have liked to spend time with the child, but the other parent would not facilitate this, the other parent would need to explain why time was not arranged. The reason could be fear of family violence. However, this may also be a backdoor way of re-introducing problematic aspects of the friendly parent provision such as a parent's ability to facilitate a meaningful relationship between the child and the other parent.

With the history of the friendly parent provision leading to undesirable family arrangements we suggest the total removal of all aspects of the friendly parent provision.

With respect to costs orders, s117 of the *Family Law Act (Cth) 1975* still provides the court with the power to make costs orders where parties where the Court deems is appropriate. This power can be used for example where a party was clearly making false allegations.

## **Additional matters**

### **7. Equal Shared Parental Responsibility**

We submit that the concept of "equal shared parental responsibility" should be amended to shared parental responsibility.

The effect of including the word equal results in parents assuming they have a right to 50% input in major long-term decisions. It takes the focus away from what is in the best interests of the children and can result in further conflict between the parents in deciding what school a child should attend for example.

We submit that amending "equal shared parental responsibility" to shared parental responsibility will put the focus on the child and not the parents "right" to a 50% say in the child's life.

### **8. The consideration of equal time and substantial and significant time**

We submit that the considerations with respect to equal time and substantial and significant time should be repealed from the Act. It appears that as a consequence of the 2006 Amendments to the *Family Law Act 1975* there is a misconception in the community that leads parents to believe that they have a right to spend equal amounts of time with their children.

Equal time is being used as a starting point instead of looking at best interests of the children as the paramount principle in deciding what parenting arrangement is suitable. Parents speak in terms of their right to spend equal time with their children instead of the child's right to have a meaningful relationship with their parents.

This misconception can lead to further conflict or harm when it becomes apparent that equal time is not in the best interests of the children or parents entering, by consent, into these types



of arrangements because they do not feel they can pursue it through the court system and are therefore potentially exposing the children to further abuse or family violence.

In our experience, we have identified a trend that parents are arguing for equal time to reduce their child support liability not because they wish to spend more time with their children.

We submit that arrangements in the best interests of the children should be made based on the best interests factors and looking at the safety and practicality of various arrangements for the children. This brings the focus back on what is in the best interests of the children not on a misinformed assumption that parents have a right to equal time.

## **9. Additional s60CC factors**

We submit that in conjunction with the broadening of the definition of family violence further principles should be introduced in section 60CC.

Victims of family violence and their children who may have been exposed to family violence have different needs than families where there is no family violence.

Family violence can affect the ability of a victim of this violence to be able to parent effectively. The children who are exposed to this violence have additional needs and vulnerabilities that need to be considered when making parenting arrangements.

We emphasise that family violence is a pattern of behaviour not just one or several separate incidents, and it can escalate over time. In making arrangements that are in the best interests of the children the Court needs to consider the impact of past exposure to family violence on the children and the victim, particularly where the victim is the primary caregiver, and take into consideration whether a child can heal from the exposure to the family violence by spending time with the perpetrator. Additionally, the Court should consider how the children spending time with the perpetrator could affect the parenting ability of the primary caregiver.

By identifying the importance of the role of the primary caregiver who, in our experience, is generally the victim of family violence, may assist in preventing the victim suffering further victimisation by the family law system and most importantly result in arrangements that are in the best interests of the children. Therefore, we suggest that in order to further protect the victim and children who have been exposed to family violence the role of the primary caregiver should be included in the best interests principles and consideration should be given to the past incidences of family violence.

*For further information please contact us:*



*Women's Legal Service*  
**T A S M A N I A**

*Women's Legal Service Tasmania*  
*PO Box 707 North Hobart TAS 7002*  
*Tel: (03) 6231 9466*  
*Facsimile: (03) 6231 9566*  
*Email: [admin@womenslegaltas.org.au](mailto:admin@womenslegaltas.org.au)*