

Council of Single Mothers and their Children

Committee Secretary
Senate Legal and Constitutional Committees
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29th April 2011

To whom it may concern,

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

The Council of Single Mothers and their Children (Vic) (CSMC) is a state-wide community organisation run for and by single mothers and their children, providing telephone support and counselling, referral, advice and emergency relief to single mothers throughout Victoria. CSMC is well recognised as a source of expert advice on issues of relevance to single mothers. Our expertise is grounded in the concerns expressed to us by single mothers calling our telephone contact line.

CSMC welcomes the ***Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*** as an important step towards creating safety for women and children who are escaping violent and abusive family situations. We have received an enormous number of calls since the introduction of the 2006 Family Law Amendments from women whose families are suffering under these laws. In particular they are reporting an increased risk of harm for them and their children. The proposed amendments will go some way towards increasing safety for women and children involved in the Family Law system and we support all the amendments proposed in the Bill being accepted by the Federal Government.

The ***Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*** is a valuable, and necessary, first step to rectify some of the problems in the current Family Law Act. CSMC particularly supports the proposed amendments that:

- take children's rights into account;
- give greater emphasis to protecting children from harm;
- broaden the definitions of abuse and violence; and
- remove the disincentives for the disclosure of abuse and violence.

Children deserve to be protected from harm, and this must be a fundamental priority of the Family Law system. Protection from harm must be the sole primary consideration in determining the best

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interests of a child. Adult victims of violence and abuse are also entitled to expect that this system will act to protect them from violence and abuse.

Further amendments to the Family Law system will be required before it is able to best protect these vulnerable family members. CSMC recommends in our attached submission further changes to the legislation to ensure that Australia's family law system is best able to protect women and children from harm, and to ensure that children have the safety and security they need to flourish.

Yours sincerely

Jane Stanley
Executive Officer

**Family Law Legislation Amendment (Family Violence and
Other Measures) Bill 2011**
Council of Single Mothers and their Children Inc. (Victoria) - Response

1. PRIORITISING THE SAFETY OF CHILDREN

1.1 Convention on the Rights of the Child

Section 60B(4) of the Family Law Legislation Amendment (Family Violence and Other Measures) Bill ('the Bill') would include the International Convention on the Rights of the Child as an additional object and principle in children's matters under Part VII of the Family Law Act. The effect is that decision makers, including family courts, must take account of the Convention of the Rights of the Child when dealing with matters in relation to children under Part VII of the Act.

CSMC Response. CSMC supports this inclusion.

Particular Articles in the *Convention on the Rights of the Child* support the need for further amendments to the Family Violence Bill and will be referred to throughout this submission.

1.2 Prioritising safety in the two primary considerations

The 2011 Bill retains the two primary considerations for determining the best interests of the child:
(a) the benefit of the child of having a meaningful relationship with both of the child's parents,
and
(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Section 60 CC (2A) proposes a change so that where there is an inconsistency between applying the two provisions, greater weight is to be given to consideration (b).

CSMC Response. CSMC commends the amendment in placing increased emphasis on the need to protect children from harm. However, the proposed amendments have limitations in that they:

- do not go far enough to protect children; and
- create an additional layer of complexity.

In cases involving abuse and violence it is imperative that the primary consideration of protecting children from harm is given greater weight than the benefit to the child of having a meaningful relationship with both parents. CSMC's experience supports the research that has demonstrated that where there is a conflict under the current *Family Law Act* between the two primary considerations, the greater emphasis has been placed on the child having a meaningful relationship with each parent. We have heard numerous accounts from women that the safety of their children has been jeopardised by these decisions. This has placed many children, and women, at risk of ongoing harm.

CSMC recommends that this proposed amendment goes further and applies a single primary consideration, that of protecting a child from harm. Applying the proposed test to 'give greater weight' to protection from harm may result in greater complexity in decision making, and continue the existing tension between the two primary considerations.

Elevating protection from harm to the sole primary consideration makes explicit that a child's safety is the priority.

CSMC also recommends that if children are deemed to be in need of protection from harm, then a thorough investigation into suitable forms of contact with the abusive party (eg supported supervised contact with an independent third party), if any, must follow. This is supported by Articles 9.4, 19.1 and 39 of the *Convention on the Rights of the Child*¹. The onus must then be on the abusive parent to demonstrate that circumstances have changed and abuse will no longer occur, before any contact is allowed at a later time.

1.3 Strengthening Adviser Obligations

Section 60 D introduces new obligations on advisers to encourage parents to consider the child's best interest as the paramount consideration. They would also require parents to prioritise protecting the child from harm where family violence and abuse are concerns

CSMC Response. CSMC welcomes this amendment that adviser obligations should require them to prioritise the safety of children from violence and abuse.

2. REDEFINING FAMILY VIOLENCE

Section 4AB of the Bill proposes a new definition of 'family violence', including an over arching statement that defines it as "Violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member) or causes the family member to be fearful", followed by a broadened list of the types of behaviour that constitute family violence. The proposed definition recognises that family violence can take the form of physical assault, harassment, emotional manipulation, financial abuse and threatening behaviour.

CSMC Response. CSMC welcomes the expanded and stronger definition of family violence, including the over arching statement that encompasses coercion and control. The removal of the highly subjective requirement in the current legislation regarding 'reasonable fear' is likewise a positive change.

We strongly support the inclusion in this Bill of an explicit statement that the definition of family violence is not limited to the behaviours listed. This recognises that family violence may take other forms and cannot be limited to specific examples.

3. IDENTIFYING ABUSE OF A CHILD

Section 4 (1) of the Bill proposes a new definition of ‘abuse’ in relation to a child for the purposes of the Act. It expands the existing definition to include the forms of abuse recognised in State and Territory laws such as physical abuse or non accidental physical injury, sexual abuse and exploitation, psychological abuse (including where this is caused by exposure to family violence) and neglect.

CSMC Response. CSMC supports expanding the existing definition to include the forms of abuse recognised in State and Territory laws. This definition will enable the Family Court to better identify the presence of abuse and will also assist in facilitating better communication between the Family Court and State and Territory child welfare authorities, delivering better outcomes for children.

CSMC is concerned that the list of examples of what constitutes “exposure to family violence” in s4AB(4) is limited narrowly to specific incidents or events of physical violence (or threats of physical violence) inflicted on a family member. This definition of exposure to family violence fails to recognise the broader impact on children just from living in a family environment where their parent is the victim of family violence.

CSMC recommends that the definition of “exposure” to family violence include a specific reference to all the forms of family violence as defined in proposed ss.4AB(1) and (2).

CSMC further recommends that the definition of ‘exposure to abuse’ be clarified to ensure that responsibility for this exposure lies with the perpetrator of the abuse. The definition must prevent the situation where a victim of violence and abuse is then considered responsible for not protecting children from exposure to this 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.

4. REMOVING DISINCENTIVES TO DISCLOSING VIOLENCE

4.1 Disclosure should not make a parent ‘unfriendly’

Section 60 CC (3) (c) of the Bill would remove the ‘friendly parent’ provisions of the Family Law Act, that require the court to consider the willingness and ability of the child’s parents to facilitate a relationship with the other parent, and the extent to which they have done this. In contrast with the Exposure Draft, the Bill retains the provisions that require the court to consider each parent’s participation in decision-making about the child, spending time with and communicating with the child, and maintaining of the child.

CSMC Response. CSMC strongly supports this amendment to remove the ‘friendly parent’ provisions of the Family Law Act. We have heard numerous accounts from women who have been specifically advised not to disclose violence and abuse during family law proceedings due to this provision. Not only has this provision acted as a disincentive to reporting family violence, it has enabled the continuation of abuse and denied women and children the protection they need. It

also created the opportunity for the controlling behaviours of abusers to be construed by the courts as ‘friendly parenting’.

The retention of elements of the friendly parent provision (requiring the court to consider each parent’s participation in the life of the child) may be useful in considering cases involving family violence, as they expressly require the court to consider parents’ participation in their children’s lives. However, we are concerned that these provisions could also be used against a mother in a case involving family violence, where the mother limits the other parent’s participation to protect the child and the proposed provisions are used to bring in arguments about failure to facilitate a relationship, despite consideration of facilitation having been removed from the Act.

CSMC recommends that this provision be amended to ensure that this cannot occur.

4.2 Cost orders

Section 117AB of the Family Violence Bill would remove the mandatory cost order provision in section 117AB of the Family Law Act.

CSMC Response CSMC strongly supports the removal of the mandatory cost order provision in the Family Law Act. There are already sufficient provisions in the Family Law Act (s.117) to order costs against a party.

The mandatory provision acts as a strong disincentive to reporting family violence. It is also prejudicial against victims of family violence, implying that false accusations are more common than false denials of abuse because there is no reciprocal mandatory order for false *denials* of family violence.

As indicated in the Chisholm Report¹, section 117AB needs to be repealed because it carried with it: “...the suggestion that the system is suspicious of those who allege violence and which does not significantly change the ordinary law of costs under section 117.”

4.3 Courts must ask about family violence and abuse

Section 69 ZQ proposes that courts which are dealing with applications for parenting orders should inquire about past or future risk or previous experience of the children concerned in relation to child abuse and family violence.

CSMC Response. CSMC supports this amendment and recommends additional steps be included to facilitate disclosures of violence. Victims of family violence are often reluctant to share their experiences. While some may be more likely to disclose if asked directly, others may still find this difficult.

¹ Chisholm, Prof. R (2009) **Family Courts Violence Review**.

In playing an active role in drawing out family violence and abuse concerns the Family Court must adopt screening and risk assessment procedures for every family member, including children, involved with the Family Court. Personnel undertaking this role must have comprehensive training and experience in the areas of family violence and abuse. Risk should be assessed on the basis of these screenings as well as the disclosed experiences of the parties involved.

5. BRINGING EVIDENCE OF VIOLENCE AND ABUSE TO COURT

5.1 Requiring parties to disclose family violence

Section 67ZBA of the Family Violence Bill 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.

CSMC Response. CSMC supports this amendment, particularly the inclusion of the requirement that legal practitioners file a *Notice of Child Abuse or Family Violence* with the court when they are aware of Family Violence.

We are concerned however that those parties without legal representation who make allegations of violence may not be aware of their responsibilities to file this Notice. All court staff must be appropriately trained in Family Violence screening and risk assessment procedures as well as asking family members if violence is involved. Based upon the responses to these staff would then need to inform parties of their requirement to report and staff must be made available to assist in writing and filing this Notice.

5.2 Requiring parties to disclose involvement of child welfare authorities

Sections 60CH and 60CI propose new provisions that would impose obligations on parties to proceedings to tell the court if a care order under a child welfare law is in place for the child and if the child is or has been the subject of a notification to or investigation by a child welfare authority. The provisions would allow other people to tell the court that same information.

CSMC Response. CSMC welcomes the intention of these amendments to ensure the Family Court is aware of past and present circumstances of a child which may be relevant to the child's welfare and best interests. CSMC recommends that if such care orders, notifications or investigations are made known to the Family Court, child welfare authorities must then be required to make available to the Family Court copies of files and orders pertaining to the child. Similarly children's representatives and child welfare authorities need to be required to give information to the Family Court.

CSMC further recommends that where concerns of violence are raised in the Family Court a full investigation and risk assessment be undertaken with child protective services. Article 19.2 of the *Convention on the Rights of the Child*ⁱⁱ supports the provision for increased cooperation and communication between State Child Protection Services and the Family Court.

6. IMMUNITY FROM COSTS ORDERS FOR STATE AND TERRITORY CHILD WELFARE AUTHORITIES

Section 91B would amend section 117 of the Family Law Act to provide immunity from cost orders to child welfare authorities and officers of the State, Territory or Commonwealth who intervene to become a party to proceedings under the Family Law Act at the request of the court where the officers act in good faith in relation to the proceedings.

CSMC Response. CSMC supports this amendment which will enhance transparency and co-operation between State and Territory child welfare authorities and the Family Court. Improved communication and information sharing will result in better informed decisions about a child's best interests and protection from harm.

ADDITIONAL RECOMMENDATIONS FROM CSMC FOR FAMILY LAW LEGISLATIVE CHANGE

CSMC welcomes the proposed amendments and the intention to place safety and protection of children and family members at the forefront of the *Family Law Act*. However recent research and reports², highlight the misinterpretation and confusion by the community and advisers about the shared parenting changes introduced in 2006. At CSMC we hear regularly of the ramifications on children of this misunderstanding, including:

- children having to spend significant amounts of time unsupervised with an abusive and/or neglectful parent;
- mothers losing primary care of their child because they have disclosed violence;
- children having to spend equal time with parents who live hundreds of kilometers apart, despite the disruption this causes to the school and social lives; and
- women who have been forced to cease breast feeding infants to comply with the requirements of equal or substantial care arrangements.

It is imperative that the 2011 Bill includes changes to address these concerns.

1. Equal Shared Parental Responsibility

The presumption of equal shared parental responsibility continues to be problematic. While it is meant to be rebuttable in situations where domestic violence is occurring, this does not always happen.

CSMC recommends that the presumption of equal shared parental responsibility provisions be removed from the *Family Law Act*. Risk assessment and screening for family violence is not yet

² Chisholm, Prof. R. (2009) **Family Courts Violence Review**; Australian Institute of Family Studies (2009) **Evaluation of the 2006 Family Law Reforms**; Family Law Council (2009) **Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues**.

sufficiently sophisticated to ensure that all victims of violence and abuse are identified. The presumption of equal shared parental responsibility is therefore likely to be inappropriately applied in cases involving family violence, regardless of the intention that it will not be.

A child's best interests should not be assumed to be served by one particular arrangement, rather determined in reference to the particular needs and circumstances of the child. At a minimum the term 'equal' should be removed so there is only a reference to 'shared parental responsibility'.

2. Equal Time or Substantial and Significant Time

Currently, if the presumption of 'equal shared parental responsibility' is applied then the court must consider equal time or substantial and significant time. While the law states that this only relates to parental responsibility and does not include a presumption about the amount of time spent with the child, it has been misinterpreted by the community, and many advisors, as relating to time and the starting point of negotiations as being equal time.

CSMC has heard numerous accounts where this misinterpretation has resulted in decisions regarding a child's care arrangements that are detrimental to the wellbeing of the child (see examples above).

CSMC recommends that the word 'equal' be removed and provisions around equal time and substantial and significant time be repealed. The word 'equal' presumes a particular outcome. Care arrangements that are truly in the best interests of the child must be determined on the circumstances of children's individual cases.

CSMC further recommends that there be no prescribed connection between time spent with parents and parental responsibility. Again, a child's best interests should be determined in relation to the particular needs and circumstances of the child, not by a particular prescribed arrangement. The connection presumes a standard desirable outcome suitable for all families rather than judging each case by the information available for individual children. A responsibility for the wellbeing of children can still be maintained and can exist independently from contact with the child. Depending on children's individual circumstances length of time spent with each parent may necessarily vary while both parents equally share responsibility. In other cases, parents may spend time with children but have no responsibility.

3. Shared Care

CSMC further recommends that a child's need for stability also be considered in determining the best interests of children.

- It is not only in cases involving family violence that the 'twin pillars' of Family Law (the two primary considerations of protecting a child from harm and having a meaningful relationship with each parent) may be contradictory. The best interests of children are also served by having the consistency and continuity of their care maintained, *particularly* in

situations of family separation where many other disruptions such as changing schools or moving house may be unavoidable.

- Care arrangements, including time spent living between different residences, should reflect the overall care patterns for each child pre and post separation to maintain a supportive and familiar environment. This would be in the best interests of children in both the long and short term and would better reflect children's needs, which should be considered above notions of parents 'rights'.
- Equal shared parenting time has been demonstrated to be workable only for a minority of children, and under very specific, favourable conditions. For other children this type of arrangement denies them the stability needed for their development, and can cause disruption of their social and activity networks. The long term effects of this on children are of great concern. Living between two houses has been shown to be generally less stable and more upsetting for many children and at best is often short lived³ [McIntosh et al, 2010, pp.12-13], particularly for young children. It is concerning that the right to spend time with both parents is often given more weight than a child's right to a primary residence and continuity of care in their upbringing.
- Article 9.1 of the *Convention on the Rights of the Child*ⁱⁱⁱ supports the right of a child to a stable and permanent residence where possible.

CSMC recommends that in deciding care arrangements, the best interests of children considerations should include the child's need to have a primary home, and the continuation of previous patterns of care, equal to the child's right to a relationship with both parents. Both of these considerations should always be secondary to protection from harm.

4. Risk assessment

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 effective protection of women and children in family law.

5. Training on family violence and child abuse

It is imperative that judicial officers, family consultants, family dispute resolution practitioners and all advisors in the family law system (including lawyers) undertake comprehensive and regular training on the dynamics of family violence. It is essential that the Government and family law courts and relevant professional bodies mandate this requirement.

³ McIntosh, J., Smyth, B. et al (2010), **Post-separation parenting arrangements and developmental outcomes for infants and children**, Family Transitions, Vic.

6. Views of Children

CSMC recommends that amendments be included to ensure the views of children are heard and considered by the Family Court. This is supported by Articles 9.2 and 12 of the *Convention on the Rights of the Child*^{iv}. Decisions made regarding the care and residency of children will affect their long term wellbeing and it is concerning that the views of children are rarely given weight in the Family Court. While acknowledging that children may not always be in the best position to make decisions in their best interests they must be heard and acknowledged as interested parties in proceedings.

United Nations, **Convention on the Rights of the Child**, Australian Treaty Series, Canberra, 1991. Accessed at: <http://www.austlii.edu.au/au/other/dfat/treaties/1991/4.html> on 13 January 2011.

ⁱ Article 9: Convention on the Rights of the Child

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family *unless the provision of the information would be detrimental to the well-being of the child* (our emphasis). States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 19: Convention on the Rights of the Child

1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 39: Convention on the Rights of the Child

States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

ⁱⁱ Article 19: Convention on the Rights of the Child

1. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement.

ⁱⁱⁱ Article 9: Convention on the Rights of the Child

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

^{iv} Article 9: Convention on the Rights of the Child

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2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given are [sic] opportunity to participate in the proceedings and make their views known.

Article 12: Convention on the Rights of the Child

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