



Shoalcoast Community Legal Centre Inc

Legal Advice & Advocacy

ABN 85 989 128 796

20 April 2011

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

Dear Secretary,

We are writing to express our support for the changes to the *Family Law Act 1975* proposed in the draft *Family Law Amendment (Family Violence and Other Measures) Bill 2010*.

We strongly support the Federal Government's moves to provide better protections for people who have experienced family violence within the family law system and believe that the proposed amendments are essential to place safety and protection of children and family members at the forefront of the *Family Law Act*.

Shoalcoast Community Legal Centre regularly provides Family Law and family violence advice, information, case work and legal education to residents of the Shoalhaven, Eurobodalla and Bega Valley local government areas. Our Centre participates in the Legal Partnership Project, providing Family Law advice, information and assistance to the Nowra Family Relationship Centre. In addition, we have recently expanded our service with the creation of the South East NSW Women's Legal Service. As such, we are committed to protecting the rights of individuals within the family law process, particularly women and children experiencing family violence.

Proposed Family Violence Amendments

Definition of *family violence*

We support the broadening of the definition of "family violence", the removal of the objective test of 'reasonableness' and the broadening of the category of family members.

We are concerned however, that the list of behaviours in the definition is exhaustive or 'over-inclusive'¹. We recommend a definition with a non-exhaustive list of examples of family violence (such as that found in the Victorian *Family Violence Prevention Act 2008*, or that proposed in the Australian Law Reform Commission's and New South Wales Law Reform Commission's report on Family Violence²) whereby other types of family violence can be taken into consideration on a case by case basis.

¹ Richard Chisholm, *Submission on Exposure Draft, family Law Amendment (Family Violence) Bill 2010*, p9

² *Family Violence-A National Legal Response, Final Report*, ALRC Report 114 NSWLRC Report 128, October 2010, p55

In addition, we support the suggestion that the predominant aggressor be recognised in the *Family Law Act*. This would put in place a safe guard to prevent the victim's behaviour of resistance being labelled as *family violence*. It would also assist in preventing the perpetrator from mutualising the victim's behaviour with that of the perpetrator's and thereby attempting to negate the actual family violence experienced by the victim and the child/ren.

Rights of the Child

We support the reference to the Convention on the Rights of the Child in section 60B of the *Family Law Act*. Whilst we acknowledge that this could lead to protracted and complex proceedings with unrepresented litigants³, we agree that the benefits include spotlighting the Convention and “[u]nderlining the importance of hearing the voices of children, and increasing the number of appointments of independent children’s representatives...”⁴

Definition of *abuse* in relation to a child

Again we are concerned that the definition of *family violence* is exhaustive and will be applied narrowly and will not capture all the forms of abuse a child may be exposed to. We refer to the growing number of social science reports that have identified the various forms of family violence and the impact of that violence on children, both before and after separation.

In addition, we would like the provisions to make it clear that *exposure* to family violence is exposure *caused by the behaviour of the perpetrator* and not by the victim's inability to remove themselves and the children from the violent behaviour.

Further, the long term impact of family violence on the victim's capacity to parent, is not adequately addressed in the best interests of the child considerations. We refer to the Women's Legal Services draft position paper⁵

3.6.6 *Further, the impact on the capacity of a caregiver to parent, who is victim of family violence (eg. because of post traumatic stress and the other impacts of family violence), is not addressed in the proposed changes. It is imperative that the complex and far-reaching impact of family violence on a caregiver and the children is addressed in the considerations of the best interests factors, particularly the primary considerations. A failure to do this will lessen the impact of the broadening of the definition of family violence and child abuse and will not achieve the Federal Government's aim of improving the safety of children and not tolerating family violence and child abuse.*

3.6.7 *WLSA also argues that children's exposure to family violence and child abuse cannot be isolated from the experience of family violence on their caregivers:*

...family violence towards a parent may affect the ability of the victim to parent effectively⁶

3.6.8 *Protection of children's caregivers who are victims must also be a priority and not artificially treated as a distinct issue from protection of their children, with different outcomes.*

³ As expressed by Chisholm, op.cit. p 18

⁴ Ibid.

⁵ Women's Legal Services Australia, *Family Law Amendment (Family Violence) Bill 2010*, Position Paper, 2010

⁶ ALRC Report 114 Vol. 2, p. 895

3.6.9 *The 2010 Bill does not rectify the complexity of the Family Law Act having definitions of “family violence” and “child abuse”. The lack of clarity and inconsistency in this terminology and meanings continues in the proposed changes. As the ALRC/LRC Report states:*

Child abuse is an element of family violence and family violence may be an important factor in child neglect. For the victims it is therefore difficult to separate these experiences.⁷

The Family Law Act distinguishes between ‘family violence’ and abuse of a child. The same conduct in relation to a child however, may constitute both family violence and child abuse.⁸

Further, family violence towards a parent may affect the ability of the victim to parent effectively⁹

Best interests of the child

Whilst we support the proposal that where any inconsistency exists in applying subsection 60CC(2) considerations, greater weight be given to the need to protect the child from harm, we would go further and suggest that safety of the child be listed as the only primary consideration, or be given priority amongst one of a list of considerations.

In addition, and pursuant to social science research (for example research regarding attachment), we support the proposal that greater importance be placed on the relationship a child has with the primary carer. As already mentioned above, we support the inclusion of consideration about the impact of family violence on the primary carer when determining the best interests of the child.

Other amendments

We commend the removal of the *friendly parent* provision and the proposed repeal of s117AB, both of which have been disincentives to disclosure.

The former provision has also, for the unrepresented applicant or respondent, resulted in live with orders in favour of the other parent. For example,

Further changes that are needed

Whilst we applaud the proposed changes, we believe other provisions under Part VII also need amending or repealing to better serve the paramount consideration of the child/ren’s best interests when making a parenting order. We urge you to consider:

The presumption of equal shared parental responsibility

⁷ ALRC Report 114 Vol 2, p. 895

⁸ ALRC Report 114 Vol. 1, p. 265

⁹ ALRC Report 114 Vol. p.895

Unless and until all relevant Courts and judicial officers are able to adequately recognise all forms of family violence and appropriate risk assessment and screening measures are put in place, this presumption poses a threat to the welfare and safety of children and flies in the face of the best interests of the child consideration.

Time and again, as legal advisors, we reluctantly advise vulnerable clients (who have experienced family violence) that despite their acute concerns for the welfare of their children, or despite their faith that a parenting order will provide certainty and the protection their child/ren have a right to, that unless they are able to rebut the presumption of equal shared parental responsibility, they may end up with orders that do not address significant risk of harm issues for both the child/ren and the client. At times our advice may be to 'do nothing'; to wait for the perpetrator to initiate parenting proceedings in the hope he will not or that enough time will have elapsed in the interim that it will be easier to convince the Court that it is in the child/ren's best interests to remain with the client and have limited, or supervised, or no time with the perpetrator. This does not provide the assurance that those primary carers are seeking for the welfare of their child/ren.

We suggest that this presumption need not be enshrined in legislation. The presumption is not an issue for the large number of separating parents where acrimony, 'toxicity', or insidious coercion and control do not exist. For the small percentage of intractable cases that the Courts must deal with, the inherent risks associated with the application of this presumption outweigh the inherent benefits.

We strongly support the repeal of this presumption.

Equal time/substantial and significant time arrangements

We support the proposal that the provisions in relation to equal time and substantial and significant time be repealed and in place of this, best interests of the child factors apply on a case by case basis.

Conclusion

We urge the Federal Government to act now in response to the evidence-based research commissioned in the past 18 months and to the promises made to address the serious problem of family violence in the family law system.

There are aspects of the *Family Law Act* that need immediate change that have not been addressed in the *Family Law Amendment (Family Violence) Bill 2010*. These include:

- the *presumption* of equal shared parental responsibility,
- the *concept* of equal shared parental responsibility,
- the *link* between equal shared parental responsibility and equal time or substantial and significant time arrangements, and
- the assumption that the latter arrangements are in the best interests of all children, the "*one size fits all*" assumption.

We strongly recommend that this Bill pass expeditiously with our suggested amendments.

Yours faithfully,
Shoalcoast ~~Community~~ Legal Centre Inc.

Barry Penfold
Principal Solicitor