AASW Queensland Branch submission to the Parliament of the Commonwealth of Australia House of Representatives regarding Family Law Legislation Amendment (Family Violence and Other Measures) Bill, 2011.

29 April 2011

The Australian Association of Social Workers (AASW) Queensland Branch welcomes the opportunity to comment on the Amendment Bill. The AASW has made submissions in response to the Family Violence – Improving Legal Frameworks Discussion Paper and to the Attorney-General's Department in relation to the public consultation of the Family Violence Bill.

The AASW represents over 6000 Social Workers across Australia. Social Workers are employed in several fields including family violence services, the Family and Children's Courts, in child protection services, specialist mental health and therapeutic counselling services. Social Work is a key profession in working with children, young people, parents and families who experience domestic and family violence and child abuse and neglect in a number of capacities including Family Dispute Resolution.

The AASW commends the Government for the significant changes to legislation proposed in the Bill and their commitment to better supporting the safety, needs and rights of victims of violence which importantly includes children. Our view is that the rights, safety and wellbeing of the child must be paramount in any decision-making where there is family violence. However, we also recognise that victims are usually powerless in violent relationships and a greater understanding of the complexities

involved in domestic and family violent relationships is essential to avoid unintended consequences of legislation, which may, for example, place the victim and the children at risk of an increase of violence and in some instances, an even greater risk of homicide. When there is evidence of ongoing violence the court should act to protect both the victim parent and the children from further violence and take steps to ensure the perpetrator is held accountable for the violence. The AASW recommends that substantiated allegations of violence are treated seriously and those making these allegations are not penalised for doing so. We support the Women's Legal Services Australia campaign and endorse the recommendation that making the primary carer safe increases children's safety and wellbeing.

Section 4AB (1)

The AASW support the current examples listed as they include a wide range of controlling and coercive behaviours commonly reported by victims of violence, however, it is important to include an additional point (k) any threatening or intimidating behaviour that causes the family member to live in constant fear. This additional point is likely to cover the important terrorising tactics for example driving recklessly in a car and other tactics that are used by some perpetrators to ensure the victim is constantly terrified.

Section 4(3) and 4(4)

The new draft legislation has recognised the importance of the impact of violence on children as per section 4(3). However, our concern with the list of potential situations and examples is that this does not differentiate between being exposed to violence as a result of the primary aggressor. This distinction is critical as it is our concern that if the victim defends themselves against the primary aggressor then it may be argued the victim also acted in ways to expose a child or children to family violence. This takes the onus away from the perpetrator of the violence who is responsible for the harm inflicted. The unintended consequences of this current definition would be that victims are

deemed to have caused harm to their children because they were victims of violence and were taking reasonable steps to protect themselves. Furthermore, the draft would create a number of challenges for Aboriginal and Torres Strait Islander communities where family violence remains an ongoing issue. The complexity involved in such communities and the importance of wider family and community relationships would potentially mean that under sections 4(3) and (4) it is the children and victims of violence that are further re victimised. We strongly recommend that this needs to be changed to clearly articulate the notion of primary aggressor and in so doing, act to protect the rights of the victims from further victimisation.

The 2010 Bill did not address the complexity of the *Family Law Act* having definitions of "family violence" and "child abuse". Our view is that the lack of clarity and inconsistency in this terminology and meanings continues in the proposed changes. As the ALRC/LRC Report stated:

"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. 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. Further, family violence towards a parent may affect the ability of the victim to parent effectively".

Proposed changes to primary considerations regarding best interests of the child

The AASW supports the position that in making a determination about the best interests of a child, there should be no primary considerations at all but one list of factors for consideration, where:

- the safety of children is listed as the first consideration and given priority;
- that the meaningful relationship be listed as one of the many factors;
- that the courts should weigh up all of the factors in the list depending on the circumstances of each individual case.

Should the primary considerations be retained, our position is that there should only be one primary consideration that is about the safety and wellbeing of children.

Should neither option be accepted, we support the suggested wording provided by the WLSA as a third option that gives greatest weight to safety in the two primary considerations and the wording of the proposed section 60CC(2A) should read as:
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).

Importantly, key is that the safety and wellbeing of the child needs to always be the priority in any family law cases.

Section 60CC(3)(c)

Concern is identified with regard to potential unintended consequences in relation to the question of consideration of each parent's efforts to participate in decision making, communication, and spending time with the child. Where a parent, who is the victim of violence, has been denied the opportunity to spend time with this can prevent the parent victim from having contact with children, being able to communicate and involved in decision making. Examples of this situation include where the violent parent has managed to obtain primary care of the children and denies contact. We recognise that in such situations, the parent who is the victim of violence is in a powerless position as the cycle of control and coercion continue to be perpetuated by the violent parent. This then can create unfair and unintended consequences as the victim is deemed to have 'failed' in their duties as a parent, without consideration of the complexity of the situation. Our members have numerous examples where the

perpetrator of violence has repeatedly refused contact leaving the victim unable to maintain a relationship with the children.

Our experiences have been that there is much complexity involved in determining how well a parent has fulfilled their parenting obligations. Social work experience has shown that victims of violence often do not have contact with their child for fear of experiencing further violence and the fear of the children continuing to be affected and victimised as a result. In addition is the added dimension of the impact on the victim's extended family who may also be affected by the violence. This is a prominent issue in family dispute resolution cases were the perpetrator has the children living with them and the victim is coerced, through no fault of their own, to agree to terms just to see the child. As information from Family Dispute Resolution cannot be handed up to the court for confidentiality reasons, the court never sees the 'real' situation, which in turn is used against the victim.

Friendly Parent Provision

We commend the removal of the Friendly Parent Provision.

Equal shared parenting

We welcome the commitment to place the needs of children and their safety and wellbeing ahead of any imperative for shared parenting. However, we remain concerned that continuing to operate from a 'shared parenting' perspective brings with it unintended consequences. There is a significant body of evidence that has been highlighted by previous reviews such as the Chisholm report and substantial ALRC review of the Family Violence Legislation, showing that equal parenting provisions have resulted in an assumption of 50.50 parenting, usually at the detriment of the child. As with the Women's Legal Service Australia, we recommend that:

- the presumption of ESPR be removed

- "equal" and only have a reference to "shared parental responsibility", be removed
- if the presumption is retained, the application of the presumption at interim stages be excluded.

We support Professor Chisholm's recommendation that the best interest factors include the following provision:

"In considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case" (2009, p. 13).

General comments

The AASW would recommend that due consideration be given to the amount of evidence now available that indicates the level violence frequently increases upon separation and that contact handover points are times where the victim parent and children are exposed to this increased violence. In particular, for those victim parents who have state or territory personal protection orders in place and contact handover are the only times where the parties are legally allowed to be in the vicinity of each other. Exposure to violence at the point of handover should be a consideration in matters where violence is a feature and steps taken to ensure that there is accountability for the violence that does not penalise the victim or further expose the children to ongoing violence.

The AASW is aware that many lawyers pressure victims not to continue with allegations of violence and this silences many experiences of violence that the court should be taking into account. It is our experience that victims have been pressured to agree to orders that contribute to children's ongoing exposure to threats, intimidation and abuse with little recourse, thus increasing the risk of ongoing

health and mental health issues. It is the AASW's position that allegations of violence be taken seriously and ongoing violence is dealt with in ways that do not penalise the victim and children.

The AASW has concerns that prioritising the safety of children only in cases where "there is inconsistency" between achieving a safe outcome and the meaningful relationship will not achieve the desired outcome. It is our view that should the perpetrator demonstrate "an inconsistency" in the ability to keep the children and the victim parent safe, then there needs to be consequences limiting contact until there can be proof they can maintain a safe environment for all concerned. To date it appears that there are little or no incentives for behaving in a non-violent way and more to be gained for the perpetrator to continue with violence in the post separation environment.

The AASW has consistently argued strongly for more culturally appropriate and accessible services and we again recommend that the new legislation pays particular attention to this.

The AASW believes it is essential that Federal, State and Territory governments should ensure the immediate and regular review of protocols between Family courts, Children's courts and child protection agencies for the exchange of information to avoid duplication in the hearing of cases. A key element of this is that early decisions are made about which is the most appropriate court to hear the case, as was recommended by the ALRC and NSW Law Reform Commission final report, recommendation 19-5. This recommendation works to lessen the negative impact on the child/children involved and therefore, we would argue that this needs to be part of any legislative changes.

The AASW highlighted in our submission to ALRC/NSW Law Reform Commission in 2010, as did the ALRC/NSW Law Reform Commission final report, that there is a significant problem with the current siloed and fragmented system which continues to exist. If we are to stop children and other victims of

domestic violence falling through the cracks, we need to actively support greater coordination and collaboration between the statutory bodies involved. The ALRC and NSW Law Reform Commission final report, recommendation 20-2 proposed that State and Territory law enforcement, child protection and other relevant agencies, develop protocols that provide for consultation about law enforcement responses when allegations of abuse or neglect of a child for whom the police have care and protection concerns are being investigated by police. Our view is that this needs to be included in the amended family law legislation.

Furthermore, a consistent theme identified by AASW members has been around the sufficiency of specialist training and education of the relevant personnel involved with family law cases. As with the Women's Legal Service Australia, we recommend that it is essential that judicial officers, family consultants, family dispute resolution practitioners and all advisors in the family law system (including lawyers and judges) undertake comprehensive and regular training on the dynamics of family violence. The 2010 Bill does not provide for this training. It is essential that the Government and family law courts and relevant professional bodies mandate this requirement. As the ALRC/NSWLRC (2011) stated:

"(p)roper appreciation and understanding of the nature and dynamics of family violence and the overlapping legal framework is fundamental in practice to ensuring the safety of victims and their children" (p. 575).

Thank you for the opportunity to be part of this critical reform process and we again congratulate the Commonwealth Government for its work in this regard. We welcome the opportunity to contribute further to the dialogue and review of this important legislation and to achieving a greater level of integration and collaboration in relation to family violence.

Chisholm, R. (2009). Family Courts Violence Review.