Law Council
OF AUSTRALIA

6 May 2011

Ms Julie Dennett
Committee Secretary
Senate Legal and Constitutional Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Ms Dennett

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

1. This submission is made on behalf of the Family Law Section of the Law Council of Australia.

2. The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council). The Family Law Section, with a membership of approximately 2500 practicing family lawyers throughout Australia, is the largest of the Law Council's specialist Sections.

3. Members of the Family Law Section represent couples – both married and de facto - and their children in respect of all issues arising from relationship breakdown from the very beginning of the process of separation through to finalisation of financial and family arrangements. In the course of that process, family lawyers draw on a wide range of dispute resolution options and community based resources to help individual families.

4. The Explanatory Memorandum supporting the Bill provides that its purpose '...is to provide better protection for children and families at risk of violence and abuse.' The Family Law Section strongly supports this position. However, the Section is concerned about the statutory interpretation of a number of the amendments proposed in the Bill (and these are discussed below).

Item 1 - Definition of abuse

5. Subpara (d) of the definition refers to 'serious neglect of the child'. The word 'neglect' is not defined and the Explanatory Memorandum notes that its ordinary meaning is to be applied. However, it is qualified by the preceding word 'serious' if it is to amount to 'abuse' which introduces a difficult task for a court to differentiate between that which amounts to mere neglect and that which amounts to serious neglect as to be 'abuse'. Further, the use of the phrase 'serious neglect' is

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

different to use of the term 'neglect' which appears in 60CC(2)(b), 60D(1)(b)(ii) [as inserted by Item 22 of the Bill], 69ZN(5)(a) [as amended by Item 37 of the Bill], and 69ZQ(1)(i) [as amended by Item 38 of the Bill].

6. Given that the new definition of 'abuse' in relation to a child encompasses assault, exposure to family violence and serious neglect, it is difficult to understand why the court is directed to examine 'abuse, neglect or family violence' by *inter alia* 60CC(2)(b), 60D(1)(b)(ii), 69ZN(5)(a), and 69ZQ(1)(i). Given the broad definition of 'abuse' the court should in each case seemingly only have to take into account 'abuse and family violence' and the word 'neglect' (which is at odds with the phrase 'serious neglect' in the definition of 'abuse' and so contradictory) omitted.

7. The Family Law Section **recommends** that the word 'neglect' be omitted from 60CC(2)(b), 60D(1)(b)(ii), 69ZN(5)(a), and 69ZQ(1)(i) and any other like provisions.

8. The Family Law Section is concerned about the use of the word 'serious' before the phrase 'psychological harm' in subpara (c). Why should it be serious? How much psychological harm is acceptable? Removal of the word 'serious' would not affect the intent of the provision, as it would still be necessary to show that there was harm caused by family violence, and that should be enough to amount to abuse of a child.

9. The Family Law Section **recommends** that the word 'serious' be deleted from the proposed subpara (c) of the definition of 'abuse'.

10. The Family Law Section is concerned that the expression 'causing the child to suffer', may:

    - Cause difficulties in the presentation of evidence as it may be difficult if not impossible to prove that a child or children have been 'caused' the requisite harm by the acts complained of; and
    - Lead to Courts having jurisdiction being unable or unwilling to make findings necessary, thus defeating the purpose of the amendment; and
    - Lead to prolongation of pleadings and the evidence necessarily required to be adduced in an attempt to so prove or attempt to prove the causal link.

11. The Family Law Section **recommends** that use of the expression 'causing the child to suffer' in proposed subpara (c) of the definition of 'abuse' be reconsidered.

Items 3 and 8 - Definition of family violence

12. Item 3 of the Bill repeals the current definition of family violence in the FLA. Item 8 of the Bill inserts a new definition of 'family violence' in section 4AB. A non exhaustive list of examples is provided by subpara 4AB(2).

13. Three of the examples contain what might be described as broadly framed scenarios that expand the concept of 'family violence' beyond that which has traditionally been its focus. The concern is that this expansion may lead the resources of the court being subsumed into an examination of incidents in individual matters which do not constitute a long term pattern of controlling or coercive behaviour.

14. Subpara 4AB(2)(g) relates to financial autonomy. The Family Law Section is concerned about what constitutes 'financial autonomy'; how do you establish the hypothetical proof 'that he or she would otherwise have had' financial autonomy were it not for the conduct; and what amounts to an 'unreasonable' as distinct from a reasonable denial, are all problematic concepts that may take up an enormous amount of court time and resources. Despite the concept of reasonableness, the provision may lead to retrospective examination in a way which may not be the intent of the legislation. Further, even in relationships which are not violent, no one has the 'financial autonomy' that they would otherwise have had if finances are shared. Consultation and negotiation reasonably undertaken preclude autonomy, which by definition allows unilateral action. Financial control or coercion may be a feature of abusive relationships and certainly should be included in the definition. The Family Law Section is concerned that the drafting of this provision may not produce the intended result.

15. The Family Law Section **recommends** that further clarity is required as to the intent and purpose of the subpara 4AB(2)(g) in the proposed definition of 'family violence'.

16. Subpara 4AB(2)(h) relates to unreasonable 'withholding financial support'. By its terms, the satisfaction of its conditions effectively require that a court embark on a retrospective maintenance hearing, where it must be established as to the nature and quantum of the needs of the person, that those needs were reasonable and necessary, that they were dependent on the other spouse and could not support themself for a reason, and that the other spouse then had the capacity to meet the payments needed but unreasonably failed to do so.

17. The Family Law Section **recommends** that further clarity is required as to the intent and purpose of subpara 4AB(2)(h) in the proposed definition of 'family violence'.

18. Subpara 4AB(2)(i) relates to preventing a person from making or keeping connections with 'family, friends or culture'. It is not clear if a single incident of this is sufficient or it must be a consistent pattern of behavior. Insofar as it relates to connections with family, it involves a court in potentially trying to unravel, many years after the fact, the reason why a husband or wife, as the case may be, did not permit their respective partner's mother, father, siblings into the home or why they did not ever attend family functions on one side of the family. It opens a Pandora 's Box of memories and family alignments of dubious origin and motivation.

19. The Family Law Section **recommends** that further clarity is required as to the intent and purpose of subpara 4AB(2)(i) in the proposed definition of 'family violence'.

20. The Family Law Section notes that the expanded definition of 'family violence' will also impact on the operation of two of the key features of the 2006 reforms, namely the presumption of equal shared parental responsibility and the requirement to attend pre-filing family dispute resolution in parenting cases, as illustrated below:

    - Section 61DA(2) provides that the presumption of equal shared parental responsibility does <u>not</u> apply if "*there are reasonable grounds to believe that a*

parent of the child (or a person who lives with a parent of the child) has engaged in ... family violence".

- Sub-Sections 60I (9) (b) (iii) and (iv) remove the requirement for pre-action Family Dispute Resolution where "*there has been family violence*" and where "*there is a risk of family violence".*

Items 34 and 46 – Court to take prompt action

21. Item 34 of the Bill introduces *inter alia* a new section 67ZBB into the FLA which requires the court to take prompt action in relation to allegations of child abuse or family violence (this provision replaces the existing obligation on the court under section 60K of the FLA which will be repealed). The availability of judicial resources to deal with interim hearings varies considerably from region to region and in some places there can be a delay of weeks or even months, which is unacceptable. The courts already struggle to meet the requirements of s60K and this situation will only get worse with the introduction of s67ZBB. It is the view of the Family Law Section that the courts will not be able to meet the requirements of s67ZBB unless the Government commits significant further resources. It is vital that the Government adequately resource the court system so that appropriate and timely protection is available for children and families.

22. Section 67Z of the FLA currently provides that if a party to proceedings alleges that a child to whom the proceedings relate has been abused or is at risk of being abused the party must file a notice in the 'prescribed form' (a Form 4). If such a notice is filed, the court must, under section 60K, take prompt action in relation to the allegation.

23. The Bill and Explanatory Memorandum are not clear on the interaction between the new section 67ZBB and the repealed 60K. Item 46 of the Bill provides that section 60K continues to apply in relation to certain documents. However, if, prior to the commencement of the amendments, a party has already filed a notice (Form 4) under 60K will they also be required to file a notice under the new section 67ZBB. Similarly, do the amendments also mean that, at least for a finite time, there will be two systems running in the court ie one under the continued 60K provisions and one under the new 67ZBB provisions.

24. The Family Law Section **recommends** that the Bill provide greater clarity on the interaction between the repealed section 60K and the new section 6ZBB.

Item 38 – court's general duties

25. Item 38 of the Bill inserts a new subpara 69ZQ(1)(aa), which requires a court to ask certain questions relating to whether a party considers there are situations of or risks of abuse, neglect or family violence.

26. It is not clear how this paragraph interacts with subsections 69Z(2) and 69ZBA(2), which should by that stage of the proceedings, have already obligated the party in question to have filed Notices in the prescribed form with the court about those matters in any event. Further, the use of the word 'considers' may be perceived as seeking an opinion from the party rather than a statement of fact as to whether there has been violence, or threats of violence.

27. The Family Law Section **recommends** that further clarity is required in relation to the interaction of the proposed subpara 69ZQ(1)(aa) and subsections 69Z(2) and 69ZBA(2). The expression 'the party considers that' should also be deleted from the proposed subpara 69ZQ(1)(aa).

Item 45 – proceedings instituted on or before commencement

28. Item 45 of the Bill provides that most of the amendments proposed in the Bill will apply to proceedings whether instituted before, on or after commencement. The extent to which this will impact on existing proceedings is not clear. What happens if additional evidence is necessary? What happens to part-heard matters, reserved judgments, or appeals? It is expected that the retrospective application of the amendments will result in increased costs to litigants, as well as placing additional pressure on the already limited resources of the courts. It is the view of the Family Law Section that the amendments should not impose additional requirements or costs on parties whose proceedings are already underway. The Family Law Section refers the Committee to the following submissions by counsel for the Attorney-General in *Wallace & Stelzer [2011] FamCA 54*:

> *To the extent that item 8A(3) can be read so as to impose an additional requirement for a binding agreement which did not apply at the time the agreement was made, the Attorney-General submits that this was not the Parliament's intention and that the provisions should not be interpreted to produce such an incongruous result.*

29. The Family Law Section **recommends** that the amendments proposed in the Bill take effect from proclamation.

General comments

30. The Explanatory Memorandum provides that the Bill responds to reports received by the Government into the 2006 family law reforms and how the family law system deals with family violence, including the *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies; *Family Courts Violence Review* by the Hon Professor Richard Chisholm AM; and *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* by the Family Law Council. It is the view of the Family Law Section that the Bill responds only in part to the range of important issues raised in those reports. Further work is still to be done.

31. The Family Law Section would be happy to continue working with the Government in this very important area of law reform.

32. The Family Law Section strongly agrees with the Government's position that the safety of children is of critical importance and that family violence and child abuse are unacceptable.

33. While the following issues are outside the Committee's terms of inquiry they are nonetheless a very big part of any response to child abuse and family violence.

34. Family violence is acknowledged in the FLA (and research reports) as profoundly affecting children and families. The language of the FLA and its concerns is not reflected in the resources provided to the courts to realistically deal with violence

and its effects. From the basic issue of feeling and being safe at court, to the resources available to investigate allegations and risk, and access to services to support victims of violence, the system is under-funded. The proposed amendments will only increase the complexity of litigation and overwhelm an already under resourced court system. The issue of family violence cannot be addressed in a way which assists Australian families and children without proper and consistent funding.

Contact Centres

35. In cases of violence in which the victim has a genuine and often well founded fear of meeting the perpetrator, Contact Centres are an invaluable resource for both changeover and the supervision of time. These centres however are few and far between and significantly under resourced.

36. Centres in many cities have lengthy waiting lists to provide 'supervised time' – in some regions the waiting period is in excess of 6 months. Even if parties do wait that long and then have 'supervised time', the centres may only be able to offer two hours per fortnight. Supervision of changeover can also be limited to weekends, at certain times, not on weekdays and often not on public holidays.

37. For litigants who face allegations of violence which they deny and which may not be true or well founded, the under resourcing of Contact Centres also adversely affects them. In the event an order for 'supervised time' is made, such litigants may be waiting months to see their children and then only two hours per fortnight.

38. Contact Centres have a vital role in assisting families when there has been family violence and assisting the courts if there are allegations as yet untested of violence. At an interim stage in court proceedings before findings can be made Contact Centres are necessary to protect children and parents from the risk of harm. The centres can also serve to *protect the accused* from further allegations of violence or abusive behaviour. Contact Centres need to be available and properly resourced. At present they are not.

Independent Children's Lawyers and Legal Aid Funding

39. Independent Children's Lawyers (ICL) safeguard the interests of the children they represent. In cases in which violence is a risk, the ICL can and should collect information, ensure the child's voice is heard and provide an independent view of any proposed order. The lack of funding for ICL's in all cases, and particularly if violence is alleged, means the court is not properly assisted in assessing the risk of family violence or protecting children from such risk as it is obliged to do under section 60CG of the Act.

Safety at Court

40. Spaces need to be provided in which victims of family violence can be sure they are safe. Court buildings, especially on circuit or in regional centres, may not have such spaces or easy access to them. Out of hours access to a police station can also be problematic in regional centres.

41. The Australian Federal Police no longer have a presence in Family Court buildings so if there is violence, threats or risk, there is no one to assist. Security staff

screen people entering court buildings but do not otherwise protect litigants. The Australian Federal Police have withdrawn their services to the court and have not been replaced by trained security personnel. There have been instances of lawyers having to intervene to protect clients at their own peril. The existence of a 'duress button' is of little comfort if practitioners and litigants do not know where these are located and upon it being pressed, there is no consistent or professional response. Litigants in this jurisdiction are often under enormous emotional and psychological stress. They may have a history of violent and unpredictable behaviour known to and feared by the other side. Practitioners need to be able to guarantee client safety and the court ought to be able to provide trained people who can do so. This unfortunately is not the case.

42. Family Reports are now often out-sourced to external Family Consultants. This is universally the case in the Federal Magistrates' Court in which most cases are heard. External Family Consultants who operate in private offices do not necessarily have any security at their premises. As single experts, all the correspondence such Consultants send or receive is read by both parties. The date, time and place of appointments is therefore known and can present a real security risk to victims of violence and to children.

The Family Law Section would be happy to discuss these comments further with the Senate Committee.

Yours sincerely

Bill Grant
Secretary-General