Redfern Legal Centre and Sydney Women's Domestic Violence Court Advocacy Service

Joint Submission to Senate Committee on Legal and Constitutional Affairs In Support Of FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE and OTHER MEASURES) BILL 2011

Redfern Legal Centre (RLC) and Sydney Women's Domestic Violence Court Advocacy Service (Sydney WDVCAS) have prepared this submission in support of the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.*

RLC and Sydney WDVCAS submit that there is an urgent need for change in response to a strong body of evidence[1] that suggests the 2006[2] amendments to the *Family Law Act* 1975 have failed to keep victims of family violence and their children safe. Sydney WDVCAS case files provide further evidence that shared care can be unsafe and inappropriate for young children in situations of high conflict. We believe the expeditious implementation of the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* will greatly assist in protecting the rights and interests of children while continuing to support the concept of shared parental responsibility and shared care where safe.

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RLC and Sydney WDVCAS are well placed to comment on the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.* The Sydney WDVCAS is a service provided by RLC (a community Legal Centre) and funded by Legal Aid NSW through the Women's Domestic Violence Court Advocacy Program (WDVCAP). The Sydney WDVCAS operates at the Downing Centre (central Sydney), Balmain, Newtown and Waverley Local Courts in the Sydney metropolitan region. In the period 1 January 2010 to 31 December 2010, the Sydney WDVCAS provided services to female clients in 1,943 domestic and family violence related matters, and 36% of these clients had children under the age of 16 years.

RLC and Sydney WDVCAS have an interest in ensuring that women and children experiencing domestic and family violence are adequately protected in the family law process, and in particular that Aboriginal and Torres Strait Islander women, culturally and linguistically diverse women, women with disabilities and women in regional and remote areas are not disadvantaged by the process.

[1] Professor Richard Chisholm (2009) Family Courts Violence Review; Australian Institute of Family Studies (2009) Evaluation of the 2006 family law reforms; Australian and NSW Law Reform Commissions Report 114 (2010) Family Violence – A National Legal Response: Dr Lesley Laing, Faculty of Education and Social Work, University of Sydney (2010) No way to live: Women's experiences of negotiating the family law system in the context of domestic violence.

[2] *Family Law Amendment (Shared Parental Responsibility) Act* 2006.

RLC and Sydney WDVCAS have been actively involved in domestic and family violence law and policy reform for many years, and have advocated for changes to domestic and family violence legislation and family law processes. Sydney WDVCAS is a member of the NSW Attorney General's Apprehended Domestic Violence Legal Issues Coordinating Committee (AVLICC), participates in state-wide domestic violence focus groups and forums, and writes law reform submissions on domestic violence and family law.

We support the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* and provide the following comments on some aspects of the proposed amendments.

A broadened definition of 'family violence'

We strongly support the proposed broadening of the definition of 'family violence'[3] pursuant to the recommendations made in the Australian Law Reform Commission and New South Wales Law Reform Commission report, Family Violence – A National Legal Response.[4] We believe that the definition contained in the *Family Law Act* 1975 is too narrow and does not reflect current understanding of what constitutes domestic and family violence. We are pleased to note the proposed list of behaviours is non-exhaustive and recognises a broad range of behaviours, including coercion and control.

Children exposed to family violence

We also support the inclusion in the definition of family violence of a list of examples of situations that may constitute a child being exposed to family violence,[5] but recommend that the legislation make clear that it applies to **exposure by the person who perpetrates family violence** in order to avoid the unintended consequence that a victim of violence may be found to have exposed the child to violence by their inability to remove the child from the violence.

Case study

Sarah is a young mother with two small children who lived on a property outside a small country town. She reported she had been abused both physically and emotionally by her partner since the birth of her first child. She was unable to escape her partner's violence because of her geographic isolation and she believed the threats he made to ensure she would not leave him, including threats to harm her children and her younger brother, who has an intellectual disability. Sarah was also deprived of money, including the means to feed and clothe her children adequately, and she was completely isolated from family, friends and support services. The physical violence to Sarah included regular assaults in front of her children. After an assault that left Sarah hospitalised with a broken arm and an injury to her eye, she was eventually provided with support to escape with her children to a refuge in Sydney. In the context of the Family Court proceedings, Sarah reported she felt she was either being

[3] Section 4AB *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*.
[4] ALRC Report 114 (2010), chapter 5.
[5] Section 4AB(2) *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*.

accused of exaggerating the violence against her or else criticised for not acting earlier to stop 'exposing' her children to violence.

Removal of the objective test of 'reasonableness'

We support the proposal to remove the objective test of 'reasonableness'[6] to be replaced with a subjective test based on the victim's actual state of mind. We are of the view that the requirement for a person to 'reasonably fear' for their safety or wellbeing imposes a significant evidentiary burden on those who are already vulnerable, and gives little weight to the history or context of abuse.

Case study

Clare reported that her husband had controlled all aspects of her life throughout a seventeen-year marriage, by the use of threats, intimidation, financial abuse and tormenting behaviour. Clare was completely isolated from her sisters and mother by her husband's behaviour, and was not allowed any opportunities to befriend others. Clare had not been permitted to work or study throughout the marriage, and at the age of forty-two, she had no qualifications, skills, nor any confidence that she could support herself and the children if she left the marriage. There was evidence that Clare's mental and physical health had suffered over the period of her marriage but she felt the parenting orders made in the Family Court completely disregarded the abuse against her. Clare said she felt that she was made to feel her fears were unreasonable in the context of the Family Court, especially since the abuse against her had occurred over many years and had not been physical.

Removal of the 'friendly parent' provision

We strongly support the repeal of the provision which requires the Family Court to consider the attitude or conduct exhibited by one parent towards the other in facilitating a child's relationship with both parents.[7] We believe this provision has deterred victims of violence from making appropriate disclosures, and we agree with the recommendation made by Justice Chisholm that an amendment be made to this provision because parents sometimes need to take action to protect children from risk.

We agree with Justice Chisholm's statement:

> While the message sent by the 'friendly parent' provision is perfectly appropriate in many situations, it needs to be qualified in some circumstances, such as cases involving some forms of violence and abuse. In such cases, the appropriate message might be that the parent needs first to make sure the children are safe. There may still be a need to try and preserve some benefit from the children's relationship with the other parent, but it should not compromise the children's safety.[8]

[6] Section 4AB(1) *Family Law Amendment Legislation (Family Violence and Other Measures) Bill 2011.*

[7] Section 60CC(3)(c) *Family Law Act* 1975.

[8] Chisholm, Richard, Family Courts Violence Review, 2009 at 102.

Many of our clients with Family Court matters report they feel under pressure to agree to unsafe arrangements for children, and are reluctant to disclose violence and abuse for fear of being labelled an alienating or unfriendly parent under this provision. Some clients also report they have been told by their family law solicitors to remain silent or risk losing time with their children and a costs order being made against them if they raise the issue of violence and abuse by their ex-partner.

Dr Lesley Laing's comprehensive research, which explored the experiences of women as they navigated the family law system following their separation from a violent relationship, reflected the experiences of many of our clients:

> From many sources, the women reported that they received the strong message not to raise allegations of abuse or violence in the Family Courts...whatever the letter of the law, the message that the women had received was that it was dangerous to raise issues of violence and abuse. This placed them in a difficult position in attempting to ensure their children's safety from continued abuse and exposure to domestic violence, because they feared that failure to 'prove' allegations could lead to the children being in greater danger of abuse'.[9]

Case study

Sheilagh made representations to police requesting they withdraw an application made by them in the local court for a restraining order protecting her from her former husband. Sheilagh said she still held grave fears for her safety, but felt pressured by her family law solicitor to minimise the violence or else be seen as making false accusations and suffer the consequences. Sheilagh told us 'I am being forced into making arrangements for my fourteen-month-old son to spend time with a man with whom I, an adult, have been unable to negotiate my own safety'.

Removal of the requirement for family violence orders to have been final or contested

We agree with the proposed removal of the provision which requires the Family Court to take into consideration only final or contested family violence orders.[10] We support a provision that requires the court to have regard to any family violence order made, and give appropriate weight to orders, including interim and non-contested orders.

In our experience, local court magistrates are often reluctant to make final orders in family violence matters where clients have concurrent or pending Family Court parenting matters, and prefer instead to make an interim order (or no order at all) until after the Family Court matter is finalised.

[9] Laing, Lesley, No way to live: Women's experiences of negotiating the family law system in the context of domestic violence, Faculty of Education and Social Work, University of Sydney, 2010 at 11.
[10] Section 60CC(3)(k) *Family Law Act* 1975.

Removal of the provision relating to costs and 'knowingly' false evidence

We support the proposed removal of the section which deals with 'knowingly' false evidence[11] in the provisions that deal with costs. We agree with Justice Chisholm when he states that the provision carries with it 'the suggestion that the system is suspicious of those who allege violence'[12] and we agree that the provisions of section 117 of the *Family Law Act* 1975 are already sufficient to deal with the issue of costs and false allegations or false denials of domestic violence.

Our clients report that this provision, together with the 'friendly parent' provision, makes it difficult to raise their safety concerns in parenting proceedings for fear of not being believed and being accused of making false allegations, then subsequently having a costs order made against them.

A further recommendation: education and training on family violence

The Australian and New South Wales Law Reform Commissions Report[13] made the following recommendations regarding education and training on family violence:

Recommendation 16–8 Australian courts and judicial education bodies should provide education and training, and prepare material in bench books, to assist judicial officers in state and territory courts better to understand and exercise their jurisdiction under the *Family Law Act 1975* (Cth). This material should include guidance on resolving inconsistencies between orders under the *Family Law Act* and protection orders to ensure the safety of victims of family violence.

Recommendation 16–9 Australian, state and territory governments should collaborate to provide training to practitioners involved in protection order proceedings on state and territory courts' jurisdiction under the *Family Law Act 1975* (Cth).

RLC and Sydney WDVCAS recommend that an additional amendment to the *Family Law Act* 1975 require judicial officers, family law practitioners, family dispute resolution practitioners and family consultants undertake comprehensive and regular training on the dynamics of family violence and the impact of violence on children. Dr Lesley Laing's research highlighted the failings of the family law system in this regard:

> In contrast to the emphasis on the importance of fathering – in the absence of attention to the quality of this fathering – the beliefs about mothers that the women encountered from professionals were predominantly negative. For example the women commonly encountered the belief that mothers fabricate abuse both in the family law system and when they attempted to use other services to protect themselves and their children[14]...The women were dismayed that many professionals that they encountered had very limited understanding

[11] Section 117AB *Family Law Act* 1975.
[12] Chisholm 2009 at 118.
[13] ALRC Report 114 (2010) Chapter 16.
[14] Laing 2010 at 10.

> of the tactics employed by their abusers and of the abuser's ability to manipulate and deceive them.[15]

Sydney WDVCAS clients report they often encounter professionals in the context of the family court who question their motives, or who suggest they may be fabricating stories of abuse, or who fail to understand their safety concerns for their children.

Case study

Shari was in an arranged marriage and lived in a house with her husband, parents-in-law, and baby. Shari was responsible for keeping house for the family, and for cooking all the meals. She was regularly criticised and abused and allowed to spend only a small amount of time each day with her child. Finally she became so distressed at this treatment that she escaped the house. Police were called and because Shari was very upset and crying, she was assessed by a mental health professional who said she had no concerns for her mental health, and allowed her to leave the hospital. Shari immediately found safe accommodation and made an application to the court for her child to be placed in her care, but notwithstanding the fact that she was still breastfeeding her child when she left the house, she was initially allowed only small amounts of supervised contact. Shari said the professionals she encountered in the family law system seemed to question her motives for reporting the abuse only after leaving the house and commencing family law proceedings, and questioned the state of her mental health and ability to parent her child on evidence provided only by her husband and parents-in-law. Shari said her contact with these professionals was always rushed, and she said they did not seem to understand that she was highly distressed at the time of leaving the house, but not mentally ill as her husband and parents-in-law maintained.

We respectfully request a further amendment pursuant to recommendations made by the Australian and New South Wales Law Reform Commissions Report, Family Violence – A National Legal Response,[16] to require all judicial officers, family law solicitors, family consultants and family dispute resolution practitioners and advisors in the family law system to undertake comprehensive and regular training on the dynamics of family violence and the impact of violence on children.

Please contact us if you require any further information about this submission.

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[15] Laing 2010 at 11.
[16] Australian and NSW Law Reform Commissions Report 114 (2010) Family Violence – A National Legal Response, Chapter 32.