



Wirringa Baiya provides free legal advice to Aboriginal and Torres Strait Islander women, children and youth who are or who have been victims of violence.

28 April 2011

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

Dear Committee Secretary,

**Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011**

We welcome the opportunity to comment on the above Bill.

**ABOUT WIRRINGA BAIYA ABORIGINAL WOMEN'S LEGAL SERVICE INC**

Wirringa Baiya Aboriginal Women's Legal Centre is a New South Wales statewide community legal centre for Aboriginal women, children and youth. The focus of our service is to assist victims of violence, primarily domestic violence, sexual assault and child sexual assault.

Over the twelve (12) years of our operation we have given advice and support to many hundreds of women and children who have been victims of violence. We have also acted for many clients in applications for statutory victims compensation for the violence they have endured. Furthermore, we have provided numerous community legal education workshops to community members in New South Wales, both regional and metropolitan.

**OUR SUBMISSIONS**

From the outset we support the Federal Government's initiatives to provide protection for victims of family violence. The moves to strengthen the protections offered to children who are victims of family violence are a positive step given the findings and recommendations made by numerous reports including the recently released report by the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC).

**In particular, we strongly support:**

- Broadening the definition of 'family violence' to include elements of coercion and control, a wider range of behaviour and removing the objective test of 'reasonableness' so that family violence can be properly considered whenever the victim actually fears for their safety;
- A broader definition and understanding of child abuse that includes exposure to violence;
- Prioritising family violence when considering what is in the best interests of the child;
- Removing the 'facilitation' aspects of the 'friendly parent provision';
- Repealing section 117AB about costs orders relating to false allegations or denials of violence.

#### **Further changes that are needed**

We believe that a number of further changes are necessary to better protect the safety of children and their family in the family law system. In particular, we recommend that:

- The safety and protection of children should be prioritised above all else. Its priority should not be subject to proving an inconsistency with other considerations.
- The Act should make it clear that exposure to family violence is a form of family violence and that it applies to behaviour by the person perpetrating violence, and not the victim of the violence.
- There should be no presumptions in family law – every family should be treated as unique.
- This means that there should be no presumption of equal shared parental responsibility and the courts should not be required to start from any particular care arrangement.
- The Act should protect the safety of the primary carer as this increases children's safety.
- **Need to address the inherent inconsistencies embedded within the two overriding primary considerations – 'protecting the child from harm or psychological abuse and the child having a meaningful relationship with both parents'**

In particular the government must address, the inherent inconsistencies embedded within the two overriding primary considerations, protecting the child from harm or

psychological abuse and the child having a meaningful relationship with both parents. This is because despite the proposed recognition of the Convention and the addition of paragraph 60CC 2A, these legislative changes are insufficient to address the inherent inconsistencies within the *Family Law Act*. If the protection of children from harm is to be prioritised then it should be made the only primary consideration or the first consideration, in order to give it the primacy it currently lacks. The stated principles in section 60B (2) would also need to be amended to reflect the objects. Amending the Act in such a manner would go some way to ensuring that the law system operates cohesively with the state child protection systems to ensure the safety and protection of children.

- **Legislative requirements for 'shared parenting' has contributed to serious implications for women seeking to relocate away from violence**

The emphasis in the legislation on shared parenting has contributed to the greater restrictions on relocation arising out of the 2006 changes to the family law system. These restrictions have serious implications for women seeking to relocate away from violence. The lack of integration of responses and inadequate legal options leave women and children exposed to a greater risk of violence and abuse, particularly in rural, regional and remote communities.

#### **Example**

A client, who is a victim of domestic violence lives in a small rural town, and is prevented from relocating with her children by her ex-partner. Our client's abusive ex partner continues to intimidate, threaten and harass the client. The client has become mentally fragile and housebound. Our client's psychological trauma is exacerbated by the continued presence of the abusive ex-partner and his abusive behaviour.

Our Centre has received many calls from women in the above situation. Such is the psychological distress for some of these women that they believe their only options to escape is to either leave their children with the abusive ex-partner, or take their own life.

- **Definition explaining 'exposed' not to be exhaustive**

The insertion of a new definition explaining what it means for a child to be 'exposed' to family violence is immensely welcomed. However there is a need to explicitly mention that the paragraph (a) to (e) contain examples only and that the list of possible scenarios where a child may be exposed to violence is by no means exhaustive.

- **Need to review Legal Aid Commission NSW's Merit Test**

The application and effect of merit tests on access to justice should be reviewed. In our view, in determining eligibility for legal aid, better consideration needs to be given to the capacity of the party to self represent. This is because of the impact of

violence on women's self esteem as well as the other impediments to self-representing against a violent partner in an adversarial system. The court system is especially overwhelming and intimidating for Aboriginal women.

- **Need to review the policy of Legal Aid Commission NSW requiring 'variations be imperative'**

Another example of the increasing difficulty in accessing legal aid is that legal aid policies require that applications for variations of an order be 'imperative'. This creates problems for our clients who may have children who do not want to spend time with the other parent. Often the children have very good reasons for not wanting to spend time with the other parent but because of the legal hurdles required to justify no-contact orders when making applications to the courts, they are forced to spend time with the other parent. We hear of many examples where children, despite attempts by their mothers to encourage positive relationships, are dragged kicking and screaming by the mother to see the father. In these circumstances, because of the likely consequences if they do not, women feel that they have no choice but to take their children to handovers. These kinds of experiences re-victimise women and children, and cause further psychological trauma to both the children and women.

In many cases there is little prospect of a successful application for variation without access to legal representation and legislative change. In these circumstances, women's legal services also feel that they have no choice but to advise women to take their children to handovers in circumstances that do not appear to be in the best interests of the child, that place the woman and the child at risk. Therefore adequate funding levels need to be provided to legal aid commissions, community legal centres, domestic violence services and crisis accommodation services to assist women and children who are victims of family violence.

#### **Example**

Our Centre has received a number of calls from women who are controlled by their former partners, the father of their child(ren). Often there was a background of violence in the relationship, mostly being intimidation and obsessively controlling behaviour. These fathers were disengaged parents whilst in the relationship, and after separation strongly seek and enforce court orders to spend time with their children, with the underlying purpose of controlling their former partners. These children often have a poor relationship with their father (due to his indifferent parenting and violent behaviour) and are forced to have contact with a father they have little attachment to.

- **Erroneous community perception of 'equal' or '50/50' time - specific reference to equal time should be removed**

Legislative provisions that require the courts to consider equal time and substantial and significant time with a parent continues to place women and children at heightened risk of exposure to abuse and violence. The numerous legislative signposts, particularly within section 60B feed into the erroneous community

perception of parents being entitled to equal or 50/50 time with their children. The legislative emphasis on shared parenting is too strong and contributes to the silencing of victims of violence. The specific reference to equal time should be removed. No particular parenting arrangement should be specifically referred to in the legislation as it results in undue consideration of this arrangement over and above consideration of other arrangements that may better meet the best interests of the child.

- **'Primary care relationship' should be provided in the factors relating to the best interests of children**

The importance of the primary care relationship is not adequately provided for in the factors relating to the best interests of children. In cases where children have been exposed to domestic violence, the impact of this violence and their additional vulnerabilities makes it essential that the importance of the primary carer in the circumstances is taken into account. The factors listed in s 60CC should be amended to better incorporate this consideration.

- **Legislative direction should be provided on domestic violence and its effects on children.**

While the Act provides substantial legislative directions on shared parenting and equal time, the same legislative direction is not provided on domestic violence and its effects on children. Guidance could be given on evidence of domestic violence and its effect on children. Principles could also be drawn from the Best Practice Principles and included in legislation. Consideration should be given to including factors in the legislation such as:

- a) the right of children and women to live free from violence; and
- b) the responsibility of parents to ensure that children are not subjected to physical and psychological welfare, including witnessing violence being perpetrated against another parent or significant person;

Guidance on the types of evidence admissible could include:

- a) the history of the relationship including the violence involved;
- b) the cumulative effect, including psychological effect, on the children who are or have been in an abusive relationship;
- c) the general nature and dynamics of abusive relationships, including the cumulative effect on children as well as the possible consequences of separation from the abuser; and
- d) social, cultural and economic factors that impact on people who are or have been in an abusive relationship.

- **Consideration could also be given to including a preamble or purpose statement in the legislation on safety.**

Clear guidelines about how to comprehensively assess for risk where family violence and child abuse is a factor will need to be developed. The guidelines will need to include competency standards and processes with regards to family violence for all family consultants, family report writers, independent children's lawyers, other solicitors, Legal Aid and all other players in the family law system that parties and their children may come into contact with. The guidelines would need to fit within a whole of system approach. In addition to the legislative and procedural changes in the courts required to improve responses to domestic violence and a risk of harm, there is a need for an underpinning (and written) risk assessment framework to assist all State and Commonwealth agencies that play a role in the family law system to identify domestic violence. Risk identification would assist agencies to ensure that appropriate referrals can be made and safety planning undertaken for women and their children when necessary. The overarching risk assessment framework and the importance of preserving safety must be imbedded in all Government policy underpinning the family law system.

- **Continuing training for judicial officers in current issues in family violence and child abuse**

Other changes should include continuing training for judicial officers in current issues in family violence and child abuse and potentially accreditation and requirements around compulsory professional development for family consultants and family report writers. The training should not be a one off training package but a continuing professional development training that is held on a regular and consistent basis.

- **Increase funding**

Lastly the issue of family violence cannot be adequately addressed without looking at the issue of lack of resources – for court processes, support services and legal assistance – as all of these things are a major contributor to the failure of the court system to adequately protect victims of violence. Adequate funding needs to be provided to legal aid commissions, community legal centres, domestic violence services and crisis accommodation services to assist women and children who are victims of family violence.

## **CONCLUSION**

Based on our experiences and the evidence presented in numerous research reports over the last few years, we strongly recommend you support the amendments suggested in this letter and the expeditious passage of the Family Law Legislation Amendment (Family Violence and other Measures) Bill 2011.

If you require more information, please do not hesitate to contact Rachael Martin on

Yours faithfully,  
**Wirringa Baiya Aboriginal Women's Legal Centre**

Per: Rachael Martin  
Principal Solicitor