HAWKESBURY NEPEAN COMMUNITY LEGAL CENTRE

Hawkesbury Nepean Community Legal Centre, located in Windsor NSW, is an independent, non-government and non-profit community-based legal service providing free legal information, advice and casework to people living in the Hawkesbury, Nepean and Hills areas and is one of thirty nine community legal centres in New South Wales.

Hawkesbury Nepean Community Legal Centre works for the public interest, particularly for disadvantaged and marginalised people and communities. We promote human rights, social justice, and a better environment by advocating for access to justice and equitable laws and legal systems through the provision of legal services including strategic casework, community legal education, community development and law reform campaigns. Community Legal Centres:

- have a human rights focus;
- work within human rights frameworks;
- advocate for human rights on behalf of their clients and communities of interest;
- inform, advise and represent individuals and groups where human rights are at issue;
- educate individuals, groups and communities of interest about human rights and related legal and societal processes; and
- undertake law reform activities to improve human rights protections and processes.

Family violence and child protection issues fall squarely within human rights and social justice issues.

Our Services

Hawkesbury Nepean Community Legal Centre has 3 services:

1. **Legal Service**

   The Legal Service provides free legal services to people living in the Hawkesbury, Hills and Nepean areas. We provide legal advice and representation on a broad range of legal issues and in particular, target our casework services to those clients who are the most economically and socially disadvantaged in our community. Our client base consists of Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, gay, lesbian, bisexual, transgender and intersex people, women, prisoners, young people and other people who, because of mental illness, disability or social or economical disadvantage, find it difficult to access legal services.

In the financial year 2009 – 2010, advice on family law issues and family violence accounted for 62% of all advice provided by the Centre. Further, casework in family law matters and family violence matters accounted for 58% of all casework provided to clients by the Centre.

Since January 2010, the Centre has provided legal services to clients of both Blacktown and Penrith Family Relationship Centres. These legal services include legal education sessions, workshops on family law and preparing for Family Dispute Resolution for women who have experienced domestic violence, legal advice sessions and lawyer-assisted Family Dispute Resolution.

In addition to advice and casework, the Legal Service also provides community legal education and advocates for reforms to laws and practices which negatively impact upon our clients.

2. **North West Sydney Women's Domestic Violence Court Assistance Scheme**

Hawkesbury Nepean Community Legal Centre has been the auspice of a women's domestic violence court advocacy service since 1995. The service provides a holistic support, referral and legal advocacy service for women experiencing domestic violence and who are applying for Apprehended Domestic Violence Orders at Windsor and Blacktown Courts. Solicitors from the legal service provide advice and representation to women appearing at Windsor Court in AVO matters.

3. **Aboriginal Legal Access Service**

Hawkesbury Nepean Community Legal Centre has provided an Aboriginal Legal Access Service (ALAS) for more than ten years. The service is involved in a variety of groups and committees advocating for increased access and participation to legal and community services for Aboriginal families and individuals in the Hawkesbury. The ALAS also provides outreach services at locations South Windsor and Riverstone.

While providing legal services to individuals, the descriptions above also illustrate that we work beyond the individual. Our centre undertakes community development, community legal education and law reform projects that are based on client need, are preventative in outcome, and that develop the skills of individual clients and strengthen our communities.

We believe that the expertise afforded by our service provision and client contact provides us with the capacity to make an informed and relevant submission to the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011*.

FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011

In January 2011, Hawkesbury Nepean Community Legal Centre took the opportunity to provide a submission to the Attorney General's Department on the 2010 Exposure Draft Family Law Amendment (Family Violence) Bill. We note that seventy three percent of submissions to that consultation, including that from Hawkesbury Nepean Community Legal Centre, supported the Exposure Draft Bill.

We welcome the opportunity to now provide a submission to the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.*

At the outset, we wish to indicate our strong support for the steps taken by the Federal Government to provide better protections within the family law system for people who have experienced family violence. We believe that the proposed amendments are essential to ensure that the safety and protection of children and family members are at the forefront of the *Family Law Act 1975.* Such changes also reflect findings from social science research[1] about the developmental needs of children in the context of family law, including those circumstances where there is family violence. The proposed amendments are also responsive to the findings of the four reports commissioned by the Federal Government and released in late 2010 regarding the operation of the *Family Law Act 1975* as it concerns children, family violence and the interaction of state family violence and child protection laws with family law.[2]

In this submission, Hawkesbury Nepean Community Legal Centre will comment upon the major proposed changes, including those which were incorporated into this Bill following the earlier consultation and identify further changes which are needed to ensure the greatest level of protection is afforded children and their caregivers who have experienced family violence as they traverse the family law system.

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[1] Bagshaw D; Wendt S; Campbell A; McInnes E, Tinning B; Batagol B; Sifis A; Tyson D; Baker J and Fernandez AP 2010, *Family Violence and Family Law in Australia: ther experiences and vies of children and adults from families who separated post 1995 and post 1996,* Monash university, University of NSW and James Cook University; Social Policy Research Centre of University of NSW, May 2010, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms*; McIntosh, J; Smyth, B; Kelahar, M; Wills, Y and Long, C, May 2010, *Post -separation parenting arrangements and developmental outcomes for infants and children*; and Laing, L, University of Sydney, June 2010, *No Way to Live: Women's experiences of negotiating the family law system in the context of domestic violence.*

[2] *Evaluation of the 2006 family law reforms* (Australian Institute of Family Studies); *Family Courts Violence Review* (Professor Richard Chisholm, AM); *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* (Family Law Council); *Family Violence – A National Legal Response, October 2010* (Australian Law Reform Commission and NSW Law reform Commission.

1. Broadening of the definition of 'family violence'

We are strongly in support of the broadening of the definition of family violence to include a wider range of behaviour covering physical abuse, sexual abuse, coercion, intimidation, harassment, domination, control, torment, damage to property, threats including threats of self-suicide, economic and financial abuse. This definition closely aligns with the definition of family violence in the Victorian family violence legislation and the recommendations proposed by the ALRC / NSWLRC report.[3]

We note that the definition of family violence in this Bill at section 4AB(1) and (2) is generally stronger than that in the Exposure Draft Bill. The current definition recognises the significance of coercion and control by perpetrators as well as a victim's fears and importantly, provides a non-exhaustive rather than exhaustive list of the types of behaviours that constitute family violence. We commend the broadening and strengthening of this definition.

We are also strongly in support of the removal of the objective test of "reasonableness" so that family violence can be properly considered whenever the victim actually fears for their safety, rather than requiring an assessment of whether a "reasonable" person would fear in those same circumstances.

The expansion of categories of people defined as family members is also a welcome change.

Issues with the definition of family violence and definition of exposure to family violence

We are concerned that the 2011 Bill does not align itself completely with the ALRC / NSWLRC definition of family violence.

In particular, the definition of family violence does not include exposure to family violence as an example of family violence. Further, the definition of exposure to family violence is too narrow in that it lists examples of specific incidents or events of physical violence. In practice, these examples may be used to limit the meaning of "experiences the effect of family violence." The definition also fails to recognise the impact that being exposed to violence has on children who live in a violent family environment. It is our recommendation that the definition of "exposure to family violence" should include a reference to all of the forms of violence as defined in the proposed sections 4AB(1) and (2).

Finally, it is imperative that the legislation is drafted to ensure that the definition of exposure makes it clear that it applies only to exposure by the person who perpetrates the family violence. It must be clear in the *Family Law Act* that victims of violence must not be held responsible for not being able to remove children from the violence.

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[3] ALRC Report 114, NSWLRC Report 128 page 55

Recommendations

1. Broadening the definition of 'family violence'

1.1 That the expanded and strengthened definition of family violence in the proposed Bill is included in the *Family Law Act*.

1.2 That the objective test of "reasonableness" is repealed in the *Family Law Act*.

1.3 That the expanded category of people regarded as family members in the proposed Bill is included in the *Family Law Act*.

1.4 That the definition of family violence in the *Family Law Act* is the same definition as that included in the ALRC / NSWLRC definition of family violence and in particular, that the definition includes "exposure to family violence" as a form of "family violence."

1.5 That the definition of "exposed to family violence" is not limited by the provision of examples that only include incidents of physical violence. The definition should refer to all aspects of behaviour deemed family violence.

1.6 That the definition of "exposed to family violence" in the *Family Law Act* makes clear that it applies only to the person who perpetrates the violence.

2. Taking children's rights into account

We commend and support the inclusion of the International Convention on the Rights of the Child as an additional object and principle in children's matters under Part VII of the *Family Law Act*.

Recommendations

2. Taking children's rights into account

2.1 That the proposed legislation as it relates to the inclusion of the International Convention on the Rights of the Child is included in the *Family Law Act*.

3. Broadening the definition of child abuse

We commend and support the broadening of the definition of child abuse in section 4(1) of the Act. The proposed definition recognises that causing a child to suffer serious psychological harm is child abuse and that such harm can be caused by being directly subjected to or exposed to family violence. We also support the examples of child abuse provided for in the legislation which make clear that there does not need to be intent for a child to hear, witness or otherwise in order to establish that a child has been exposed to family violence.

Issues with the definition of child abuse

We are concerned that the separate definitions of "family violence" and "child abuse" in the 2011 Bill fail to reflect

that "child abuse" and "exposure to family violence" amount to family violence.

As the ALRC / NSWLRC 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.*[4]
>
> *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.*[5]
>
> *Further family violence towards a parent may affect the ability of the victim to parent effectively.*[6]

Accordingly, as recommended by the ALRC / NSWLRC Report, it is our strong recommendation that "child abuse" and "exposure to family violence" should both be included within the definition of family violence.

It is also imperative that the definition of exposure makes clear that it is only exposure by the person who perpetrates family violence. This will avoid the unintended consequences which may otherwise arise where a victim who is unable to remove the child from violence is held responsible for exposing the child to violence.

The relevance of past family violence and its impact needs to be specifically referred to in the primary consideration about protection. As it is currently worded, the second primary consideration is only about protecting a child from future harm. The effects on a child from being subjected to or exposed to family violence in the past is as relevant to the need to protect a child from any future harm when making arrangements about where a child will live and how a child will spend time with their other parent.

Finally, it is also important that the *Family Law Act* recognises that a child's exposure to family violence and child abuse can not be isolated from the experience and effects of family violence on their caregiver. This means that protection of a child's caregiver who is the victim of violence must also be given priority when determining arrangements for children post-separation and not treated as a separate and distinct issue from that of the protection of a victim's child.

In order to ensure that the impact of the proposed broader definitions of family violence and child abuse are not

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[4] ALRC Report 114 Vol 2 page 895

[5] ALRC Report 114 Vol 2 page 265

[6] ALRC Report 114 Vol 2 page 895

minimised in practice when making arrangements regarding children, consideration of family violence and it's effects on caregivers should be included in the best interests factors, preferably in the primary considerations.

Recommendations

3. Broadening the definition of child abuse

3.1 That the expanded and strengthened definition of child abuse in the proposed Bill is included in the *Family Law Act*.

3.2 That the definition of family violence in the *Family Law Act* is the same definition as that included in the ALRC / NSWLRC definition of family violence and in particular, that the definition includes "child abuse" as a form of "family violence."

3.3 That the definition of "exposed to family violence" in the *Family Law Act* makes clear that it applies only to the person who perpetrates the violence.

3.4 That a past history of violence is specifically included in the primary considerations.

3.5 That a past history of violence on a primary caregiver is included in the best interest factors, preferably in the primary considerations.

4. Best interests of the child

The 2011 Bill retains the two primary considerations for determining the best interests of the child:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence.

The Bill proposes section 60CC(2A) which directs that where there is a conflict between the two provisions, greater weight should be given to consideration (b).

Issues with retaining the primary considerations in their current form

Despite the introduction of a proposed section 60CC(2A), we are concerned that the 2011 Bill retains the two primary considerations currently contained in section 60CC of the Act.

The equal weighting of the two considerations must be reassessed. In practice, greater emphasis has been placed on the benefit of a child having a meaningful relationship and involvement with both parents than on the need to protect a child from harm. The removal of the friendly parenting provisions (to be discussed in greater detail further) will not in and of itself resolve this issue.

Whilst the proposed section 60CC(2A) provides that where there is a conflict between the two provisions, greater weight is to be given to consideration (b), it is our concern that this does not go far enough to counterbalance the effects of the primary considerations in their current form. We believe this will in fact create a third tier of best interests that will just cause greater complexity, rather than simplifying the process of decision making.

It is our recommendation that in order to properly and fully protect the safety of children and / or victims of violence and ensure this protection is given due consideration in the decision making process, there should be an over-arching principle (or one primary consideration) that the safety of children is the first issue to be considered when making decisions regarding children and that issues of safety are to be given the highest priority. The consideration of a child having a meaningful relationship with both of it's parents should not be balanced against a right to safety, but rather, should be just one of the many factors to be considered in section 60CC. Such a change would ensure that there are no longer competing provisions which balance a right to safety of a child against a right to a meaningful relationship, a situation which is particularly fraught in cases of family violence or child abuse.

As stated previously, we also recommend that the primary consideration is amended to include reference to past family violence and its impact on both children and their caregiver so as to ensure it is considered in making arrangements for children.

Recommendations

4. Best interests of child

4.1 That the current primary considerations are removed from the *Family Law Act* and replaced with an over-arching principle or a single primary consideration that notes that the safety and protection of children is the first issue for consideration when making arrangements for children and is to be given priority over all other considerations.

4.2 That the primary consideration in 4.1 above includes a reference to a past history of violence and asserts its relevance to making any future arrangements regarding children.

5. Friendly parent provisions

We strongly support and commend the removal of the friendly parent provisions from the Act.

Sections 60CC(3)(c) and (k) and section 60CC(4)(b) of the *Family Law Act* discourage victims of family violence from taking steps to protect their child from violence by placing that child (and themselves) in unsafe situations because of a perceived threat that if a child is not made available for time with the violent parent, the non-violent parent will be punished for not being a "friendly parent."

The above provisions also have the undesirable effect of discouraging the disclosure of violence to the court. This is compounded by the fact that lawyers frequently caution parents against alleging violence or abuse in circumstances where there is limited evidence so as to also ensure that parents are not characterised as being "unfriendly."

Issues with the retention of some of the friendly parent provisions

We are concerned that despite the removal of the elements of facilitating a relationship with the other parent, the retention of the friendly parent provisions currently contained in section 60CC(4)(a) and (c) of the *Family Law Act* in the proposed section 60CC(3)(c) and (ca) of the 2011 Bill that require the courts to consider each parent's participation in decision making about the child, spending time with and communicating with the child and maintaining the child could still be used against a parent in a matter involving family violence where that parent limits the other parent's participation in order to protect the child. Accordingly, to avoid unintended consequences, it is our recommendation that the 2011 Bill repeals of all of the friendly parent provisions as proposed under the Exposure Draft.

Recommendations

5. Friendly parent provisions

5.1 That all of the friendly parenting provisions in the *Family Law Act* are repealed in accordance with that proposed in the Draft Exposure Bill.

6. Family violence orders

We strongly support and commend the deletion of the current provision of section 60CC(3)(k) and its replacement with a similar provision which no longer requires that a family violence order is final or contested. This effectively enables a Court to take into account any family violence orders made and give appropriate weight to any Order, whether it is interim, final, non-contested, private or police initiated.

Recommendations

6. Family violence orders

6.1 That the proposed legislation as it relates to family violence orders in included in the *Family Law Act*.

7. False allegations provisions

We strongly support and commend the proposed changes to section 117AB of the Act. As noted in the Chisholm Report, section 117AB must be repealed because it carries with it,

"the suggestion that the system is suspicious of those who allege violence and which does not significantly change the ordinary law of costs under section 177."

Section 117AB has the effect of discouraging a parent in the disclosure of violence, abuse or safety concerns for fear of being subjected to a costs order if their claim can not be substantiated. Its removal will enable the Court to more effectively deal with family violence and abuse and remove some of the barriers to its disclosure. In any event, section 117 of the Act is already sufficient to deal with any false allegations or denials of violence.

Recommendations	
7.	**False allegations provisions**
7.1	That the proposed legislation as it relates to false allegations in included in the *Family Law Act*.

FURTHER CHANGES NEEDED TO THE *FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011*

We believe there are a number of changes that are needed immediately which have not been addressed in the Bill. Accordingly, we urge you to consider the following amendments:

8. The presumption of equal shared parental responsibility, equal time and substantial and significant time

The 2006 changes to the *Family Law Act 1975* introduced a high degree of misinformation, misunderstanding and confusion amongst the general community and advisors alike regarding the meaning of and relationship between equal shared parental responsibility and time. It is imperative that the 2011 Bill takes immediate steps to address these concerns.

It is our submission that there should not be a presumption in favour of equal shared parental responsibility. Whilst it is a rebuttable presumption, it is our experience that in a great many of cases involving family violence, the presumption is not in fact rebutted. This is particularly so at the interim stage where the court is not resourced with the time and personnel to properly and fully assess allegations of family violence and / or abuse. Given that interim orders in some Courts remain in place for up to two years, the presumption and a failure to rebut means that children and caregivers who are victims of family violence remain at significant risk of harm over a lengthy period of time.

If there is a decision to retain the rebuttable presumption of equal shared parental responsibility, then it is our recommendation that the presumption should only apply to final hearings rather than to interim matters.

It is our further recommendation that the word "equal" should be removed, leaving the term "shared parental responsibility." It is not appropriate that the word "equal" be used when determining decision making with respect to children. It is much more appropriate that this responsibility be a shared responsibility, rather than a right to an "equal" shared responsibility.

There is overwhelming misinterpretation that the concept of equal shared parental responsibility in fact relates to time and that the Family Courts will order that a child lives equal time with each parent. Accordingly, this is commonly the starting point for negotiations around arrangements for children post-separation. It is imperative that the concept of parental responsibility and time are not linked in any way, but are each determined as separate issues and according to the individual circumstances of each particular case.

We recommend that the provisions relating to time, that is, equal time and substantial and significant time, are repealed. Arrangements should be made according to an assessment of the best interests factors of the individual case and not according to pre-determined legislative terms, concepts or arrangements or a one size fits all approach. Repealing all provisions relating to time would accord with Professor Chisholm's recommendation that the best interests 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 best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of the case.*[7]

Should the concept of shared time remain, it should not apply in matters involving young children (for example those under four years of age) or matters involving high parental conflict or family violence. This is consistent with social science research referred to in footnote 2 of these submissions.

Recommendations

8. The presumption of equal shared parental responsibility, equal time and substantial and significant time

8.1 That the presumption in the current *Family Law Act* in favour of equal shared parental responsibility is repealed.

[7] Chisholm, R. *Family Courts Violence Review 2009* page 13 Recommendation 3.4(1)

8.2	If the rebuttable presumption is retained, that it only applies at the final hearing ie not at an interim stage.
8.3	That the word equal is removed form the term "equal shared parental responsibility" so that the term reads "shared parental responsibility."
8.4	That the provisions in the current *Family Law Act* relating to time are repealed.
8.5	If the time provisions are retained, that they do not apply to children aged 4 years and under or in cases involving family violence or high parental conflict.

9. Risk Assessment

In order to properly protect the safety of victims of family violence and / or children exposed to family violence, there must be a well-resourced and comprehensive risk assessment framework implemented in all parts of the family law system. The Federal and State and other government agencies must be resourced and able to interact to meet the needs of victims of family violence and children. The legislation must include provisions to facilitate this co-operation and framework.

Recommendations

9. Risk Assessment

9.1	That the family law system is resourced at all levels to properly carry out a thorough risk assessment so as to ensure the safety and protection of children and caregivers from family violence and / or exposure to family violence.
9.2	That the *Family Law Act* includes provisions to ensure the proper resourcing of the family law system for this purpose.

10. Training on family violence and child abuse

It is imperative that judicial officers, family consultants, family dispute resolution practitioners and all advisors in the family law system, including lawyers, undertake regular and comprehensive training on the dynamics of family violence. The 2011 Bill does not provide for this training and it is essential that the Government and family law courts and relevant professional bodies mandate this requirement.

Recommendations

10. Training on family violence and child abuse

10.1	That all advisors in the family law system are mandated by legislation to undertake regular and comprehensive training on family violence.

Conclusion

In closing, we confirm our strong support for the proposed amendments to the *Family Law Act* and the steps taken by the Federal Government to improve the safety of children in the family law system. We urge the Federal Government to act now in response to the evidence-based research commissioned in the past 18 months and the promises made to address the serious problem of family violence in the family law system.

We strongly recommend that this Bill is passed expeditiously and that you seriously consider our recommended amendments and the ramifications of failing to address the outstanding issues which have not been resolved by the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* in its current form.

Yours sincerely,

Hawkesbury Nepean Community Legal Centre

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