



Ms Monika Sheppard
Acting Principal Research Officer
Senate Standing Committee on Legal and Constitutional Affairs
Parliament House
Canberra ACT

22nd July 2011

Dear Ms Sheppard,

**RE: RESPONSE TO QUESTION ON NOTICE AND OTHER MATTERS
CONCERNING FAMILY LAW LEGISLATION AMENDMENT (FAMILY
VIOLENCE AND OTHER MEASURES) BILL 2011**

I refer to your email dated 19th July seeking a response to a question on notice taken at the Senate Hearings into the above legislation on 8th July 2011.

1. Response to Professor Chisholm's supplementary submission dated 8th July 2011

Women's Legal Services Australia (WLSA) agrees with Professor Chisholm that family violence orders should be treated like a 'flag' to put the family law courts on alert to issues of family violence. The flag or 'alert' however, should be treated *very* seriously by the court. Our clients' experience unfortunately of the family law courts is that sufficient weight is often not given to the existence of a protection order. This may be the case because the orders are so common place in the courts that they are almost normalised and their importance can be overlooked. Often they are made by consent and without admissions and in some jurisdiction it is quite common for there to be mutual orders and this can result in an assumption of mutual violence and the importance of the order in the 'eyes of the judiciary' can be cancelled out.

Research shows and this is consistent with WLSA experience, women often take out protection orders as a last resort after being subject to repeated and serious victimization. (1) Additionally, unlike the myth propagated by father's rights groups that women use the orders as a 'weapon of war' in family law proceedings, the Melville and Hunter research actually shows that women going through family court proceedings who have lived with domestic violence do not routinely take out orders in response to these proceedings. (2) Again, this is consistent with WLSA client experience. Of course family violence orders do not tell the whole story because in some of the most serious and potentially high risk domestic violence matters, women do not take out protection orders because they are too frightened of the perpetrator's potential reaction to a court application and/ or the risk to her and her children's safety is too great.

1 Melville, A and Hunter, R (2001) 'As everybody knows': *Countering myths of gender bias in family law*. Griffith Law Review, 10 (1): 124-138.

2 Ibid, pp 127-128.

Recommendation 1

That parliament provide guidance to the judiciary through explanatory memorandum about the importance of family violence orders in ‘alerting’ or ‘flagging’ to the court issues of family violence and requiring the court to properly investigate these matters, in particular issues of safety and risk for children and to other vulnerable family members.

WLSA agrees that the context of the family violence order should be investigated. It is a common and successful tactic of perpetrators of domestic violence to take out domestic violence orders themselves or there to be mutual orders. WLSA thinks that it is very important for the family law courts to look behind these orders and investigate the true background. Perhaps, this is where a domestic violence expert as outlined in the Family Court’s Family Violence protocols could be appointed to assist the court to understand the actual dynamic that is occurring in the family, whether there has been mutual violence or has the victim of violence engaged in retaliatory violence or self defence?; who is the true victim?; and is there a predominant aggressor? Of course, sufficient legal aid funding must be made available for this to be a reality.

Recommendation 2

That an increased budgetary allocation be made available to legal aid commissions as a matter of urgency to allow the engagement of domestic violence experts to undertake reports in family law proceedings.

In relation to the amendment as proposed by Professor Chisholm, WLSA has concerns about the complexity of the provision. Successive amendments to the Family Law Act have resulted in complexity, duplication and too much layering of the provisions required for decision-making. Laws are meant to be written in a way that is easily understood by the community. If lawyers and judges have expressed difficulty in understanding the cumbersome nature of the Act, how can ordinary Australian citizens expected to understand? It is little wonder that myths are rampant in the Australian community about what people believe the law says rather than what it actually says. Consideration needs to be given to a complete re-write and simplification. Any restructure should make family violence central to the determination of parenting matters and central to the provisions in the Act.

In relation to the specific Section 60 CC provision under consideration we prefer a more straightforward approach.

Recommendation 3

(i) That Section 60 CC (3) (k) be amended to read:

“any relevant family violence order as applies to the child or a member of the child’s family including a consideration of the circumstances in which the order was made.”

(ii) That parliament considers a complete re-write and simplification of Part VII of the Family Law Act.

WLSA agrees with Professor Chisholm (3) that that it is worthy of consideration for Section 60 CC (3) (j) to be amended as well. Professor Chisholm does not consider this issue in great detail but we think that it is inextricably linked with the previous provision [Section 60 CC (3) (k)], which is being scrutinised and amendments that could improve the court's responsiveness to issues of family violence are worthy of consideration.

In his supplementary submission, Professor Chisholm speaks about the 'need to protect the child from violence'. WLSA believes with respect that this may not be sufficient as it does not recognise the serious and close links that have been well documented in research and brought to life recently in recent tragic post-separation events, between violence against women and violence against children.

Recommendation 4

That Section 60 CC(3) (j) be amended so that issues of safety and risk to children and other vulnerable family members is clearly articulated for the courts to consider; that issues about the impact of family violence are signposted in the legislation to ensure they are fully considered for example, the harm caused; any impact of the violence on children and family members, including any ongoing and future impact; the increased need of the child for stability; the extent which any orders require ongoing communication and its impact on children.

That parliament can seek guidance about the drafting of such a provision from similar provisions that exist in legislation in New Zealand and in provinces in Canada. (4)

Recommendation 5

Those Recommendations 1, 3 (i) and 4 be treated as a 'package' of reform. In particular, Recommendation 3(j) should not be implemented without the contextual framework that Recommendation 1 offers so that it is made clear to the judiciary the importance of family violence orders and their role in 'flagging' issues of family violence concerns to the courts.

2. Additional Research Requested

At the Senate Hearing, WLSA was requested to provide additional research about the incidence of false allegations of violence and abuse in the family law courts. A clear and succinct synopsis of the research in this area has been prepared by Dr Michael Flood from ANU at

<http://www.xyonline.net/content/fact-sheet-1-myth-false-accusations-child-abuse> and <http://xyonline.net/content/fact-sheet-2-myth-women%E2%80%99s-false-accusations-dom...>

He concludes that child abuse allegations in the context of family law proceedings have been

3 Supplementary submission, p.2.

4 See Section 18 Family Law Act 2003 (Alberta); British Columbia White Paper on proposed changes to family law that includes a similar provision drawn from New Zealand legislation; Children, Young Persons and Family Act 1989 NZ.

researched in four Australian studies and have found that:-

- The allegations rarely are made for tactical advantage;
- False allegations are rare;
- The child abuse often takes place in families where there is domestic violence;
- Any such allegation rarely results in the denial of parental contact.

In relation to myth about false accusations of domestic violence and misuse of protection orders he again analyses the research succinctly and concludes:-

- The risk of domestic violence increases at the time of separation;
- Most allegations of domestic violence in the context of family law proceedings are made in good faith and with support and evidence of their claims.
- Women living with domestic violence often do not take out protection orders and do so only as a last resort.
- Protection orders provide an effective means of reducing women's vulnerability to violence.

All of his conclusions are appropriately referenced.

3. Gaps in consultation

WLSA believes that the Senate Hearings could have benefited from wider consultation including with groups who are children's domestic violence experts, professionals who work with violent men (who abide by best practice principles in their clinical practice), academics who have expertise in issues of domestic violence, men and gender studies, such as Dr Michael Flood and Associate Professor Bagshaw and Professor Brown and Dr Lesley Laing who conducted specific research into the family law system and family violence and documented this in their reports "*Family Violence and Family Law in Australia*" and "*No Way to Live*" respectively. An important finding by Bagshaw and Brown and one that could have been further explored by the Senate Committee is that reading quantitative data alone on family violence does not reveal the whole picture and that there are important contextual differences in the experiences of violence for males and females.⁽⁵⁾ Their findings amongst other things recommend a gendered analyses of violence be applied because issues of gender and power can not be ignored.

Once again, WLSA thanks the Senate Committee for providing an opportunity for these matters to be considered further and we trust that the Committee will give appropriate priority in its deliberations to protecting some of the most vulnerable members in our community, women and children escaping domestic violence.

If require any further information please do not hesitate to contact me.

Yours Sincerley,

Angela Lynch,
CLE solicitor
on behalf of WLSA.

⁵ Bagshaw D. Brown T. et al (2010) *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post- 2006* p. 74