



Australian
Human Rights
Commission

everyone, everywhere, everyday

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

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Australian Human Rights Commission Submission
to the Senate Legal and Constitutional Affairs
Legislation Committee

29 July 2011

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1 Introduction

1. The Australian Human Rights Commission (Commission) makes this submission to the Senate Legal and Constitutional Affairs Legislation Committee in its Inquiry into the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (the Bill).
2. The rights of women and children to live their lives in safety and with dignity, free from fear of violence or abuse are well recognised in international law.¹ Despite this, many Australian women and children continue to experience violence, particularly domestic or family violence, as an everyday reality.
3. A 2006 study has shown that of those women who were physically assaulted, 46 % were assaulted by a current and/or previous partner and of all women with children who had experienced current partner violence, 59 % reported that the violence has been witnessed by children.² Another study shows that there is a high percentage (55 %) of co-occurrence between children's exposure to domestic violence and children being subjected to domestic violence.³
4. Vulnerable women and children, in particular, those with disability, Aboriginal and Torres Strait Islander people, those from culturally and linguistically diverse backgrounds, or from the gay, lesbian, bisexual, transgender and intersex communities and older people, experience higher levels of violence and abuse. It is not surprising, therefore, that physical violence is an issue in over two thirds of cases brought before the Family Court.⁴
5. The Commission commends the actions that the Australian Government is taking to combat family violence and child abuse, including the National Framework for Protecting Australia's Children 2009-2020, the National Plan to Reduce Violence against Women and their Children 2010-2022 and the development of a national scheme for recognition of domestic violence orders across Australian jurisdictions. These initiatives evidence the ongoing commitment of the Australian government to this area.
6. This submission outlines the Commission's support for those amendments to the *Family Law Act 1975 (Cth)* (Act) that will align its provisions with international human rights standards.

2 Summary

7. The Commission supports the amendments to the Act, in particular the:
 - a) broadening of the definitions of 'family violence' and 'child abuse'
 - b) prioritisation of the safety of the child in ensuring the best interests of the child

- c) introduction of mandatory notification and intervention provisions
 - d) giving effect to the *Convention on the Rights of the Child* (CRC) under the Act.
8. The Commission notes that additional amendments, as set out below, could be introduced to further strengthen the Act.

3 Recommendations

9. The Australian Human Rights Commission recommends:

Recommendation 1: That item 13 of the Bill be amended by inserting a second note after new s 60B(4) that reads ‘the Act be interpreted consistently with Australia’s obligations under the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, wherever relevant’.

Recommendation 2: That the Bill explain the nature, features and dynamics, including the gendered nature, of family violence as a note to the definition of ‘family violence’ in section 4 of the Act.

4 Amendments supported by the Commission

4.1 Definition of family violence and child abuse

10. The Commission welcomes item 8 of the Bill, which, if passed, will broaden the definition of ‘family violence’. The Commission also supports the inclusion of a non-exhaustive list of examples of behaviour that may constitute family violence.
11. The Commission notes that the Explanatory Memorandum to the Bill states that the ‘definition is intended to cover a wide range of behaviour including assault, sexual assault or other sexually abusive behaviour, stalking, emotional and psychological abuse, and economic abuse’.⁵
12. In General Recommendation 19, the CEDAW Committee has described family violence as ‘one of the most insidious forms of violence against women... Within family relationships, women of all ages are subjected to violence of all kinds, including ... mental and other forms of violence’. The CEDAW Committee further considers that:
- Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion.⁶
13. The Commission therefore supports broadening the definition of family violence from conduct that causes someone to reasonably fear or be

apprehensive about their personal wellbeing or safety to 'behavior that coerces, controls or causes a family member to be fearful'.

14. The Commission submits that a broad definition of family violence is consistent with the CEDAW Committee's view of family violence.⁷ The Commission further notes that the proposed definition is broadly consistent with the Australian Law Reform Commission's Report: *Family Violence - A National Legal Response* (2010)⁸ (ALRC Report) Recommendation 5-1.
15. The Commission also supports item 1 of the Bill which, if passed, will broaden the definition of 'child abuse' to include psychological harm caused by a child being exposed to family violence.⁹

4.2 Determining the best interests of the child

(a) Prioritising the safety of the child

16. Item 17 of the Bill inserts a new subsection 60CC(2A) which requires the court to prioritise the safety of the child when determining what is in a child's best interests in parenting matters.
17. Section 60CC of the Act assists the court to determine what is in the child's best interests in particular cases by specifying a number of primary and additional considerations.
18. The Commission supports the court prioritising the safety of the child when determining what is in the best interests of the child in parenting matters. The Commission further submits that the safety and protection of the child should be a primary consideration in all family law matters.¹⁰

(b) Removing the 'friendly parent provision'

19. The Commission supports item 18 of the Bill which, if passed, will repeal paragraph 60CC(3)(c) of the Act.
20. Paragraph 60CC(3)(c) of the Act currently requires the court, when determining what are the best interests of the child, to consider 'the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent'.
21. As currently worded, paragraph 60CC(3)(c) of the Act may act as a deterrent to parties disclosing concerns of family violence and child abuse for fear of being found to be 'unwilling or unable to facilitate or encourage a close and continuing relationship between the child and the other parent'.
22. Item 18 of the Bill, if passed, will replace this paragraph with a new paragraph 60CC(3)(c) and (ca) which will require the court to instead

consider the extent to which each of the child's parents has participated in major long-term decision making, spent time with the child, communicated with the child or fulfilled maintenance obligations.

(c) *Repealing the 'false allegation provision'*

23. The Commission supports item 43 of the Bill. If passed, item 43 of the Bill will repeal s 117AB of the Act (the 'false allegation provision').

24. The 'false allegation provision' requires courts to make a mandatory costs order against parties who have knowingly made false allegations or statements.

25. The Commission acknowledges the challenge courts face when assessing claims of family violence. However, the Commission also acknowledges the difficulty claimants have in substantiating genuine claims of family violence.¹¹

26. As the ALRC noted in its report:

It may be difficult to prove specific incidents in the course of ongoing violence to the requisite standard because:

- victims may be unable to recall the dates or times of particular incidents;
- victims may not have reported incidents at the time, which may be due to reasons including: fear; unawareness of the criminal nature of the violent behaviour; a desire to protect the person committing the violence from criminal sanctions; unawareness or inaccessibility of services; or lack of confidence in the legal response;
- victims may have explained away their injuries to third parties, for the above reasons;
- evidence of the victim's disclosures to third parties, such as friends or counsellors, may be inadmissible as hearsay evidence;
- corroborating evidence may be of limited probative value—for example, the evidence of neighbours who heard incidents through a wall, or that of young children present in the home; and
- there may be no evidence of injuries or harm suffered at the time a complaint is made, particularly where non-physical abuse is alleged.¹²

27. While s 117AB of the Act aims to only penalise false allegations or statements 'knowingly' made, the Commission believes that the fear of a costs order can operate, in practice, as a disincentive to parties coming forward with legitimate claims of violence against themselves or their children.

28. The Bill does not purport to repeal s 117(2) of the Act, which provides the court with the discretion to make orders as to costs and security for costs,

‘where the court is of opinion that there are circumstances that justify it in doing so’.

29. This discretion is capable of being exercised in cases where a party has knowingly made a false allegation or statement and in the Commission’s view, is a more proportionate way to deal with this legitimate concern.

4.3 *Mandatory notification and intervention*

30. The Commission welcomes changes to the Act that oblige:

- a) advisers (legal practitioners, family counsellors, family dispute resolution practitioners and family consultants) working with parents on parenting arrangements to focus on the best interests of the child and encourage parents to do so also (Item 22 of the Bill)
- b) parties to inform the court of care arrangements under child welfare laws in line with ALRC Report Rec 22-1 (Item 21 of the Bill)
- c) courts to actively inquire of each party into the existence of family violence in child-related proceedings (Item 38 of the Bill).

4.4 *Convention on the Rights of the Child*

31. The Commission welcomes Item 13 of the Bill which inserts an additional object into the objects clause of Part VII of the Act regarding Children.

32. The proposed additional object will read ‘(A)n additional object of this Part is to give effect to the Convention on the rights of the Child done at New York on 20 November 1989’.

33. Under Australian law, where legislation gives effect to an international convention or treaty, in the interests of certainty and uniformity, it will be recognised that those provisions should be interpreted using the interpretative principles which are applied to the Convention or treaty.¹³

34. The proposed amendment therefore clarifies that a court should consider the CRC when interpreting Part VII of the Act.

35. The CRC protects the full range of human rights of the child, including protection rights,¹⁴ participation rights¹⁵ and survival and development rights.¹⁶ While, courts are familiar with interpreting the Act with reference to the best interests of the child principle, the Commission is of the view that these additional rights will further assist courts to interpret other provisions of the Act.

5 Commission's recommendations for further amendments

5.1 Reference to CEDAW and the CRPD

36. The Commission submits that the safety of the child is inextricably linked to the safety and protection of the primary care-giver of the child.

37. Women are generally the primary care-givers of children. At the same time women are far more likely to be victims of domestic and family violence. A 2006 study shows that of all those assaults in the preceding 12 months, 31 per cent of women were physically assaulted by a current and/or previous partner compared to only 4.4 per cent of men.¹⁷

38. Violence against women seriously impacts on the capacity and ability of a woman to care for a child, contrary to the best interests of the child.

39. Further, gender-based violence is a form of discrimination prohibited under CEDAW:¹⁸

Article 1 - defines 'discrimination against women' as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms

Article 2 - requires State Parties to take steps to pursue by all appropriate means and without delay a policy of eliminating discrimination against women.

General Recommendation 19 - the CEDAW Committee specifically recognises that family violence impairs the ability of women to participate in family life on a basis of equality and recommends that States Parties ensure that laws against family violence and abuse give adequate protection to all women.¹⁹

40. Accordingly, the Commission recommends that a note be inserted into the objects clause to also give effect under the Act to CEDAW such that any interpretation of the Act is consistent with Australia's obligations under CEDAW.

41. The Commission also notes that special protection is sometimes required to ensure children with disabilities enjoy their human rights and fundamental freedoms on an equal basis with other children. Further, parents with disabilities should be supported to ensure their children also enjoy their human rights and fundamental freedoms on an equal basis with other children. This is recognised by the Convention on the Rights of Persons with Disabilities (CRPD).²⁰ The CRPD particularly recognises:

- *Article 16(1) - that States Parties should take all appropriate legislative and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse, including their gender-based aspects.*

- *Article 23(4) - [i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.²¹*
- *Article 23(2) - appropriate assistance be provided to persons with disabilities in performance of their child-rearing responsibilities.*
- *Article 23(3) - ‘to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.’*

42. Given the greater risks experienced by women and girls with disability to violence and abuse, the Commission recommends that the objects also state that the CRPD also be given effect under the Act such that any interpretation of the Act is consistent with Australia’s obligations under CRPD.

43. **Recommendation 1: That item 13 of the Bill be amended by inserting a second note after new s 60B(4) that reads ‘the Act be interpreted consistently with Australia’s obligations under the Convention on the Elimination of all forms of Discrimination against Women and the Convention on the Rights of Persons with Disabilities, wherever relevant.**

5.2 Explain the nature of family violence

44. The Commission supports ALRC Report Recommendations 7–2 and 7–3 which state that the Act should contain ‘a provision that explains the nature, features and dynamics of family violence’.²²

45. Further, consistent with ALRC Report Recommendations 7–2 and 7–3, the Commission supports this explanation prompting judges to consider the particular impact of family violence on persons from minority groups in Australia.

46. The Commission recommends that this statement be worded to the effect that:

While anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. Family violence has a particular impact on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.

47. This explanation should be included as a note to the definition of ‘family violence’ in section 4 of the Act. The note should act as an interpretive aid to identifying cases of family violence, supporting a, precautionary approach.

48. **Recommendation 2: That the Bill explain the nature, features and dynamics, including the gendered nature, of family violence as a note to the definition of ‘family violence’ in section 4 of the Act.**

5.3 Recommendations in ALRC Report

49. Finally, the Commission notes that several of the recommendations set out in the ALRC Report remain unaddressed in the Bill. The Commission supports these recommendations and submits that the Government should undertake efforts to address the outstanding recommendations in the ALRC Report.

¹ *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981), Articles 1, 2; *Committee on the Status of Women - General Recommendation No. 19* (11th session, 1992); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Article 19

² Australian Bureau of Statistics 2005, *Personal Safety Survey 2005 (Reissue)*, Catalogue No. 4906.0, pp. 10 and 40 <Available at:

[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf)> (Accessed: 20 July 2011)

³ Goddard and Bedi 2009, *Intimate Partner Violence and Child Abuse: A Child-Centred Perspective*, *Child Abuse Review* Vol. 19: (2010) pp. 8 <Available at:

<http://onlinelibrary.wiley.com/doi/10.1002/car.1084/pdf>. (Accessed: 20 July 2011)

⁴ Family Court of Australia, 2003. *Part B (Statistical Analysis) and Part C (Full Court Analysis) of Submission to Standing Committee on Family and Community Affairs – Inquiry into Joint custody Arrangements in the Event of Family Separation* pp. 15 <Available at:

<http://www.aph.gov.au/house/committee/fca/childcustody/subs/sub1550.pdf>> (Viewed: 15 July 2011)

⁵ Explanatory Memorandum to the Bill, [16].

⁶ Committee on the Elimination of Discrimination against Women 1992, *General Recommendation No. 19 – Violence against women*, Para. 23 <Available at:

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> (Accessed: 22 July 2011)

⁷ Committee on the Elimination of Discrimination against Women 1992, *General Recommendation No. 19 – Violence against women*, Para. 23 <Available at:

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> (Accessed: 22 July 2011)

⁸ Australian Law Reform Commission 2010, *Family Violence – A National Legal Response* (Final Report) <Available at:

http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC114_WholeReport.pdf> (Accessed: 20 July 2011)

⁹ Under article 19 of the CRC, states parties are to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

¹⁰ This is in line with CRC, articles 5(b) and 16(1) (d) of CEDAW and articles 7 and 23(2) and (4) of the CRPD.

¹¹ Few reports made to child protection authorities are substantiated following an initial investigation. Of the 339,454 reports made across Australia in 2008–09, the AIHW found that 54,621 reports—or about 16%—were substantiated, which was a small decrease of 1% from the previous year.¹⁴ However, the rates of substantiation vary between the states and territories, and this partly reflects the different policies and approaches of individual jurisdictions to child protection matters. ALRC Report, [19.12]. In 2005 only 36% of women who experienced physical assault by a male perpetrator reported

it to the police, Australian Bureau of Statistics 2005, *Personal Safety Survey 2005 (Reissue)*, Catalogue No. 4906.0, pp. 8 <Available at:

[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf)> (Accessed: 20 July 2011)

¹² The ALRC Report, [13.7].

¹³ *Shipping Corp of India Ltd v Gamlen Chemical Co (A'asia) Pty Ltd* (1980) 147 CLR 142, 159.

¹⁴ CRC, Articles 4, 11, 19-22, 32-41.

¹⁵ CRC, Articles 4, 12-17.

¹⁶ CRC, Articles 4-10, 18, 20, 22-31, 42.

¹⁷ Australian Bureau of Statistics 2005, *Personal Safety Survey 2005 (Reissue)*, Catalogue No. 4906.0, pp. 9 <Available at:

[http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/\\$File/49060_2005%20\(reissue\).pdf](http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/056A404DAA576AE6CA2571D00080E985/$File/49060_2005%20(reissue).pdf)> (Accessed: 20 July 2011)

¹⁸ Article 1 of CEDAW defines 'discrimination against women' as any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, of human rights and fundamental freedoms. Article 2 requires State Parties to take steps to pursue by all appropriate means and without delay a policy of eliminating discrimination against women. In General Recommendation 19 the CEDAW Committee specifically recognises that family violence impairs the ability of women to participate in family life on a basis of equality and recommends that States Parties ensure that laws against family violence and abuse give adequate protection to all women. Committee on the Elimination of Discrimination against Women 1992, General Recommendation No. 19 <Available at: Committee on the Elimination of Discrimination against Women 1992, General Recommendation No. 19 <Available at:

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> (Accessed: 26 July 2011)

¹⁹ Committee on the Elimination of Discrimination against Women 1992, *General Recommendation No. 19* <Available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>> (Accessed: 26 July 2011)

²⁰ Article 7 (1) Convention on the Rights of Persons with Disabilities. <Available at <http://www.un.org/disabilities/default.asp?id=259>> (Accessed 26 July 2011)

²¹ See for example concerns recently expressed by the Victorian Human Equal Opportunity and Human Rights Commission that parents with disability are being forced to relinquish their children due to a lack of support services, page 6. *Victorian Equal Opportunity and Human Rights Commission submission to Protecting Victoria's Vulnerable Children Inquiry April 2011* <Available at <http://www.childprotectioninquiry.vic.gov.au/images/stories/submissions/victorian-equal-opportunity-and-human-rights-commission.pdf>> (Accessed 26 July 2011)

²² The ALRC Report, p 19.