



14<sup>th</sup> of January 2011

Public Consultation: Family Violence Bill  
Family Law Branch  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

Email: [familyviolencebill@ag.gov.au](mailto:familyviolencebill@ag.gov.au)

Dear Sir/Madam,

**Re: Family Law Amendment (Family Violence) Bill 2010**

Women's Legal Services Australia (WLSA) and Australian Women Against Violence Alliance thank the Attorney-General's Department's for providing the opportunity for public consultation on the Family Law Amendment (Family Violence) Bill 2010.

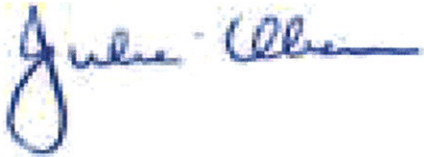
WLSA & AWAVA have decided to do a joint submission in response to the public consultation, as the proposed amendments are viewed by members of our alliance and network, as a positive step by the Federal Government in addressing some of the negative and unintended consequences of the 2006 reforms.

AWAVA is one of six National Women's Alliances funded by the Australian Government, to bring together women's organizations and individuals from across Australia to share information, identify issues that affect them, to identify solutions and to actively engage with the Australia Government on policy issues. AWAVA's vision is to ensure *that all women and children are able to live free from all forms of violence and abuse*. AWAVA has a wide range of women's organizations as well as individual women as its members and supporters and part of its Australia-wide alliance. All the women's organisations are generally not for profit, provide services to the community sector and most do not receive government funding for their operations.

WLSA is a national network of community legal centres specialising in women's legal issues. WLSA regularly provides information, advice, casework and legal education to women on family law and family violence matters. We have a particular interest in ensuring that women experiencing domestic violence are adequately protected in the family law process, and that disadvantaged women, such as those from culturally and linguistically diverse backgrounds, Aboriginal and Torres Strait Islander women, women with disabilities and rural women are not further disadvantaged by the process.

If you would like to discuss any aspect of this submission, please contact Julie Oberin, AWAVA Lead Agency & Contract Manager on 0419 539 346 or [Julie.oberin@wesnet.org.au](mailto:Julie.oberin@wesnet.org.au), or WLSA's Law Reform Coordinator, Zita Adut Deng Ngor, on (08) 8231 8929 or [wlsa@clc.net.au](mailto:wlsa@clc.net.au).

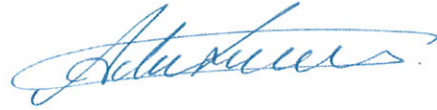
Yours faithfully,



Julie Oberin

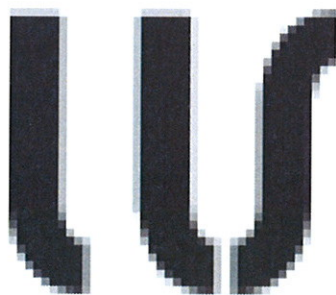
AWAVA

Lead Agency & Contract Manager



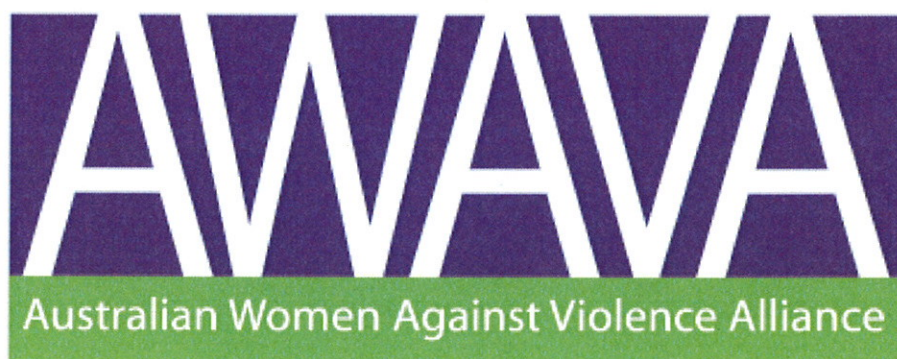
Zita Adut Deng Ngor

WLSA National Law Reform Coordinator



**WOMEN'S LEGAL SERVICES  
AUSTRALIA**

And



**FAMILY LAW AMENDMENT (FAMILY VIOLENCE)  
BILL 2010 CONSULTATION SUBMISSION**

14 January 2011

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## Summary

1. In 2009 the National Council to Reduce Violence Against Women and their Children stated that the "...biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence is being a woman."<sup>1</sup> It is clear that the core business of the family law system is responding to family violence and child abuse. Therefore legislative and system responses should be reformed to reflect this reality.
2. We strongly support the Federal Government's moves to provide better protections for people who have experienced family violence within the family law system. We believe that the proposed amendment and removing the objective test of "reasonableness" so that family violence can be properly considered whenever the victim actually fears for their safety, will improve the situation for the victims of family violence.
3. Furthermore we support the following:
  - a. Taking children's rights into account;
  - b. Broadening the definition of "child abuse";
  - c. Prioritising family violence when considering what is in the best interests of the child;
  - d. Removing the friendly parent provision; &
  - e. Repealing section 117AB about costs orders relating to false allegations or denials of violence.
4. However we believe that there are a number of changes needed immediately which have not been addressed in the Bill. We urge the Federal Government to consider amendments to:
  - a. The presumption of equal shared parental responsibility.
  - b. The concept of equal shared parental responsibility.
  - c. The link between equal shared parental responsibility and equal time/substantial & significant time arrangements.

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<sup>1</sup> National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009-2021* (2009), p. 26.

- d. The “one size fits all” approach in which it is assumed that equal time and substantial & significant time arrangements are best for children.

## Family Violence, Exposure and Child Abuse

### *Child Abuse*

5. The proposed amendment to the definition of 'abuse' in subsection 4(1) of the Family Law Act is a welcome change to the extent that it broadens the definition of 'abuse' and recognizes that various forms of behaviour can constitute abuse, including where children have been exposed to family violence.
6. WLSA and AWAVA have the following concerns about the proposed definition and the way it will operate in combination with the other definitions and provisions relating to the consideration of violence:
  - a. it does not ensure children will be protected from psychological and emotional abuse and intimidation directed to them; and
  - b. the new definition of when a child is "exposed to family violence" provides examples that are narrowly limited to specific incidents or events of physical violence and does not capture the extensive impact on children of living in an environment where there is family violence.

### *Exposure*

7. The insertion of a definition for 'exposed' in subsection 4(1) of the Family Law Act is welcome. However, the proposed definition of exposure should make it clear that it means exposure by the person who perpetrates family violence (to avoid unintended consequences that a victim of violence is alleged to have exposed the child to violence by a perpetrator). It must be clear in the *Family Law Act* that victims of violence must not be the person held responsible for not being able to remove children from the violence.
8. The list of examples of what constitutes "exposure to family violence" is narrowly limited to specific incidents or events of physical violence inflicted on a family member. It is likely that the list of specific examples of what being exposed to family violence means will be used to restrict the meaning of "experiences the effects of family violence".
9. If a list is to be retained in the definition of 'exposure', it should be amended to state that the paragraphs contain examples only and that the list of possible scenarios where a child may be exposed to family violence is not exhaustive. This is because not only physical demonstrations of family violence should be considered but also more subtle and coercive forms of family violence. WLSA and AWAVA recommend that the definition of "exposure" to family violence be broadened to capture other incidences that do not involve physical violence.

10. Also the proposed definition of exposure to family violence does not recognise the impact on children just from living in a family environment where their parent is the victim of family violence, in all its forms (as identified in the proposed new definition of family violence). Research shows that children in these situations have even greater needs than other children whose parents have separated. This is a glaring inconsistency and gap in the proposed changes.
11. The impact of witnessing violence is also widely recognised within the family violence sector.<sup>2</sup> A 2006 survey found that 57% of women who experienced violence from a current partner reported that they had children in care at sometime during the relationship, and 34% reported that children in their care had witnessed violence. 62% per cent of women who experienced violence from a former partner reported having children in their care and 40% reported that the children witnessed violence.<sup>3</sup>
12. Children who are exposed to family violence are at increased risk of psychological, physical and social problems with a long-term impact on a child's future, and the effects of trauma begin when a child is in utero.<sup>4</sup> Social science data have consistently found this to be case in situations where family violence is present.
13. Children's exposure to family violence cannot be isolated from the experience of family violence on their caregivers and the 2010 Bill does not rectify the complexity of the *Family Law Act* having separate definitions of "family violence" and "child abuse". The lack of clarity and inconsistency in this terminology and meanings continues in the proposed changes. As the ALRC/LRC 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.*<sup>5</sup>

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<sup>2</sup> *Magistrates' Court (Family Violence) Act 2004* (Cth) provides that hearing or witnessing domestic violence (and a likelihood to hear or witness it again) is a ground for the making of an order to protect a child. See also police policy in some Australian in relation to mandatory notification to child protection agencies.

<sup>3</sup> Australian Bureau of Statistics (2006), *Personal Safety Survey*, ABS Catalogue No 4906.0, 6. Similarly, a 2001 Australian Institute of Criminology paper reported that up to one quarter of young people aged between 12 and 20 had witnessed violence against their mother or stepmother: Indermaur, D (2001) *Young Australians and Domestic Violence*, Australian Institute of Criminology, Trends and Issues No 195.

<sup>4</sup> For a good summary of the literature see Queensland Government (2006), *Practice paper: Domestic and family violence and its relationship to child protection*, 27-30, accessed 20 August 2009 at <[www.childsafety.qld.gov.au/practice-manual/documents/prac-paper-domestic-violence.pdf](http://www.childsafety.qld.gov.au/practice-manual/documents/prac-paper-domestic-violence.pdf)>. See also *ibid*: 41% women reporting domestic violence reported violence during pregnancy.

<sup>5</sup> ALRC & NSW LRC, *"Family Violence- A National Legal Response: Final report"*, October 2010, ALRC Report 114, NSWLRC Report 128, p. 895



*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.<sup>6</sup>*

*Further, family violence towards a parent may affect the ability of the victim to parent effectively<sup>7</sup>*

14. Similarly, in recent research undertaken by Bagshaw, Brown and other's<sup>8</sup>:

*Many respondents reported family violence and child abuse as coexisting or as indistinguishable from each other because the perpetrator inflicted violence:*

- *on their (ex) partner in front of the children, or*
- *on the children in similar ways to that inflicted on the adult victim, or*
- *on both adult and child victims at the same time*

15. Established and internationally recognised researches suggest that the overlap between woman abuse and child physical or sexual abuse is estimated to be between 30% and 60%.<sup>9</sup> It is those cases where family violence is present that represent the greatest risk to children's safety in terms of family violence fatality.<sup>10</sup>

16. It is imperative that the complex and far-reaching impact of family violence on a caregiver and the children is addressed in appropriate definitions and in the considerations of the best interest factors, particularly the primary

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<sup>6</sup> Above, n.5, p. 265

<sup>7</sup> Above, n.5, p.895

<sup>8</sup> Bagshaw, D., Brown, T., Wendt, S., Campbell, A., McInnes, E., Tinning, B., Batagol, B., Sifris, A., Tyson, D., Baker, J., Fernandez Arias, P. (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. Attorney-General's Department, Canberra, 3

<sup>9</sup> Edleson, JL (2001), 'Studying the co-occurrence of child maltreatment and domestic violence in families', in Domestic Violence in the Lives of Children: The Future of Research, Intervention, and Social Policy, eds SA Graham-Bermann & JL Edleson, American Psychological Association, Washington, DC cited in Laing, L (2003), Domestic Violence in the Context of Child Abuse and Neglect Australian Domestic and Family Violence Clearing House Topic Paper no 9, 1.

<sup>10</sup> Edelson JL (1996), 'The overlap between child maltreatment and woman battering', *Violence Against Women*, vol 5(2), 134 cited in Laing (2000) *Children, Young People and Domestic Violence*, Australian Domestic and Family Violence Clearing House Issues Paper no 2, 16; New South Wales Child Death Review Team (2002), *2001-2002 Annual Report*, NSW Commission for Children and Young People, Sydney quoted in Humphreys, C (2006), *Domestic Violence and Child Protection: Challenging Directions for Practice*, Issues Paper 13, Australian Domestic and Family Violence Clearinghouse, 7.

considerations. A failure to do this will lessen any positive impact derived from the improving the definition of family violence and child abuse and will not achieve the Federal Government's aim of improving the safety of children and not tolerating family violence and child abuse.

17. There is also concern about how the term 'serious psychological harm' will be defined and determined by judicial officers. This terminology may be used to limit the number of cases that will be applicable or fall within the definition of 'serious psychological harm'. The establishment of a high judicial threshold to satisfy the 'serious psychological harm' test will negate the aims of the current proposed reforms.
18. The definition focuses on the apparent impact (which may not be clear from an assessment at a particular point in time) rather than focusing on the nature the behaviour/conduct that was engaged in. Current assessment processes in the preparation of expert reports for court can be extremely limited and there is a serious risk that reliance on this evidence will mean that the true impact is missed and children remain unprotected. Consideration should be given to whether there should also be a focus on the whether or not the conduct occurred rather than whether it has had a psychological impact on the particular child.

### *Family violence*

19. The proposed amendments to the definition of 'family violence' in subsection 4(1) of the Family Law Act are a positive step that has long been advocated by members of WLSA & AWAVA. The acknowledgement of the various forms of family violence ranging from economic abuse to sexual servitude reflects the experience of many victims of family violence. Importantly, the new definition removes the objective test of "reasonableness" and requires only that the victim actually fears for their safety, rather than a reasonable person in those circumstances.
20. However WLSA and AWAVA do retain concerns about the proposed definition and about the ongoing problems that may still be experienced in family violence cases without a comprehensive analysis and plan for responses to family violence in family law.
21. The proposed changes offer a package which read together and applied in the individual case *may* provide some improvement to responses to family violence. However, in addition to our comments on particular proposals in this submission a structural analysis is required to determine how and where family violence should be referred to. This should include ensuring that there is no unnecessary duplication and complexity which runs the risk of creating additional elements requiring proof, a greater evidentiary burden and hence unintended consequences.

22. In addition there are systemic/procedural issues that must be addressed to ensure there are no barriers to disclosures of violence that any disclosures are appropriately responded and that relevant details are provided to the courts.
23. In relation to the proposed definition, we are concerned that the definition of family violence provides a list of behaviours in the definition of family violence that seems to be exhaustive. This means that only behaviour that falls within that list may be considered as family violence. WLSA and AWAVA recommend that the definition be simplified (or divided into a clear definition) and that this list be specifically stated as examples of the types of behaviours that could constitute family violence. Ensuring this will enable other forms of family violence to be considered on an individual basis.
24. Whilst WLSA & AWAVA hope that an improved contemporary definition of family violence will be educative and will lead to a greater understanding of the nature and dynamics of family violence, we are concerned that to date legislative definitions of family and family violence are based on 'separate incidents of abuse', rather than contextualising the behaviour or identifying a pattern of abusive behaviour<sup>11</sup>. The proposed change to the definition will not address this issue.
25. WLSA & AWAVA have observed that the family law system currently can view family violence as a series of separate incidents<sup>12</sup>. This is despite the fact that even as the understanding of patterns of abuse has grown, the effects of ongoing family violence on a victim are not understood and courts and legal proceedings can judge parties and the relationship on 'separate incidents of abuse', rather than identifying whether there is a pattern of abusive behaviour<sup>13</sup>. Such an approach is detrimental to victims of violence because it ignores that individual acts of violence might appear minor but these incidences occur within an ongoing pattern of control and coercion. As stated in the ALRC & NSWLR report released at the end of 2010:

*...the dynamics of violence in the home are complex and often difficult for those on the "outside" to understand ...family violence cannot be understood as separate incidents. Any one "incident" is in actuality just a small part of a complex pattern of control & cannot be adequately*

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<sup>11</sup> Braaf R and Sneddon C, *Arresting Practices: Exploring Issues of Dual Arrest for Domestic Violence*, Australian and Domestic Violence Clearinghouse, Sydney, p.14.

<sup>12</sup> Women's Legal Services Australia (2009) Submission to the *Family Courts Violence Review*, p.7.

<sup>13</sup> Above, n.12, p.7

*understood not its gravity measured in isolation from that background. At the centre is disempowerment and degradation.*<sup>14</sup>

26. The family law system must be provided with greater guidance about how and why victims of violence who have been subjected to ongoing violence may lash out in response to the violence - in anger or self defence in a way that does not form part of a pattern of abuse. This is particularly crucial when looking at issues involving mutual claims of family violence and in determining who is the predominant aggressor.
27. The notion of a 'predominant aggressor' was introduced into Family violence Policing in the United States during the early 1980's to differentiate between a person who is violent towards their partner, and a person who reacts to being abused. It is a way of assessing family violence to contextualize the individual incident of violence or abuse rather than view each of these as discrete occurrences.<sup>15</sup> Judicial officers and personnel, lawyers and family dispute resolution practitioners need to be trained to adequately identify and respond appropriately to situations where allegations of mutual violence are made. This is crucial in ensuring that victims of family violence are not penalized for taking defensive actions in situations of violence.
28. Women are more likely to be at risk of claims of mutual family violence in the family law context. The broader definition of family violence proposed could enable perpetrators of violence to neutralise circumstances of family violence by portraying a victim's resistance to violence as intimidation, harassment/torment or other conduct that is now included in the broader definition. It is imperative that the broader definition does not have unintended consequences for victims of violence and their children.
29. The definition of family violence in the Bill does not incorporate 'causing fear or apprehension' and does not fully capture the dynamics, insidious and gendered nature of family violence (see clause (f) of the definition of family violence in the Bill). We propose that the opening words of the definition should acknowledge the dynamics/patterned and gendered nature of family violence in the way that this has now been captured in a number of states family violence legislation.
30. Whilst WLSA & AWAVA advocate for a definition of family violence that identifies and understands the nature and dynamics of family violence, any proposed definition of family violence must not raise the evidentiary burden of proof for women and children who are victims of family violence. Raising the evidentiary burden of proof will result in many vulnerable women and children being further re-victimised by the family law system.

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<sup>14</sup> Above, n.5, p.832

<sup>15</sup> See the Duluth Police Domestic Violence Handbook.



31. Although the *Family Law Act* provides substantial legislative directions on shared parenting and equal time, the same legislative direction is not provided on family violence and its effects on children. Consideration should be given to whether greater Guidance should be included in the Act on evidence of family violence that could be produced and on its effect on children. Principles could also be drawn from the Best Practice Principles and included in the *Family Law Act*.
32. 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.
33. Greater legislative guidance and improved understanding of the dynamics of family violence is an essential part of ensuring that violence is screened for, adequately considered and weighted in judicial decision making.<sup>16</sup> Also greater skill in identifying and recognising family violence as a pattern of abuse utilised to coerce and exert power and control over the victim and an ability to recognise the predominant aggressor is required.

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<sup>16</sup> Above, n.5, p.832

## Best Interest of the Child

### *Objects of Part VII*

34. The proposed amendments to the objects and principles in s.60B are supported. The recognition of the rights and protections afforded to children under the Convention on the Rights of the Child is welcomed.

35. In addition to the recognition of the Convention on the Rights of the Child being applicable within the family law domain, the Declaration on the *Elimination of Violence Against Women (Declaration)* and the *Convention on the Elimination of All Forms of Discrimination Against Women (Convention)* are also relevant to the family law system. The ALRC & NSWLR in their report stated that

*It is important ...that legislation explicitly acknowledges women's right to live free from family violence, particularly in the context of government acceptance of statistics which indicate that victims of family violence are predominately – although not exclusively – female.<sup>17</sup>*

36. It is particularly essential that the *Family Law Act* refers to the *Declaration* and *Convention* as it is highly desirable that the provisions setting out the nature, features and dynamics of family violence in the *Family Law Act* be consistent with state and territory family violence legislation.

### *Section 60CC: best interests factors*

37. The proposed changes to s. 60CC are welcome changes designed to give greater protection to children from family violence.

38. However the recognition of the Convention and the addition of the proposed paragraph 60CC (2A) are insufficient to address the inherent inconsistencies between the two primary considerations. The proposed amendments effectively create an additional third tier of best interest factors that increases the existing complexity involved in judicial decision making. The task of advising clients is even more onerous and the lay-person's capacity to understand how the law applies to their case is not simplified.

39. To address these concerns WLSA and AWAVA recommend that:

- a. there should be no primary considerations at all but one list of factors for consideration, where

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<sup>17</sup> Above, n.5, NSWLRC Report 128, p.300

- i. the safety of children is listed as the first consideration and given priority;
  - ii. that 'meaningful relationship' be listed as one of the many factors;
  - iii. that the courts should weigh up all of the factors in the list depending on the circumstances of each individual case, and
- b. secondly, if the primary considerations are to be retained that there should only be one primary consideration that is about the safety of children.
- c. If neither of those options are accepted, the third option is to support the change proposed in the 2010 Bill giving weight to safety in the two primary considerations and the wording of the proposed section 60CC(2A) should read as:

*In applying the considerations set out in subsection (2), the court is to give greater weight to the considerations set out in paragraph (2) (b).*

- 40. If there is one list of factors as recommended by WLSA and AWAVA, in all cases, greater weight should be given to issues of prioritising the safety of children. Each individual case should be judged on its facts with greater weight being given to considerations of 'safety' if allegations of violence and abuse are made.
- 41. However if as stated in our 2<sup>nd</sup> preference if any primary consideration or principle in the Family Law Act and across the family law system is to be retained, then it must be protecting children from harm or a risk of harm.
- 42. The recommendations by WLSA & AWAVA are necessary because the core objective of the 2006 reforms and the Family Law Act itself<sup>18</sup> brought the two concepts of the division of time (synonymous in the legislation with 'involvement') and risk of harm into direct conflict with each other.<sup>19</sup> Professionals (eg, lawyers and primary dispute resolution practitioners) and the

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<sup>18</sup> In particular, *Family Law Act 1975* (Cth) s 60B(1) Objects of Part VII, s 60CC(2) Primary Considerations for determining what is in the Best Interests of the Child and s 60CC(3)(c) 'the friendly parent provision'. This last provision requires a court to consider in determining the best interests of the child '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'. Parents who are concerned about violence or abuse and seek to protect their children will, by definition, be the very parents who are likely to be reluctant to facilitate a relationship with the other parent. A reluctance to facilitate a relationship with the other parent can be borne of a genuine and well-founded concern about that person's capacity to parent or their actually being abusive to the child concerned rather than an unwillingness to facilitate close relationships with the other parent.

<sup>19</sup> AIFS, *Evaluation of the 2006 Family Law Reforms*, 2009, p.235.

judiciary find these conflicting concepts difficult to easily reconcile and apply, particularly in the context of the exemptions to the presumption and the consequences of applying the presumption of equal shared parental responsibility. These sections, read together with other sections in the legislation,<sup>20</sup> have resulted in the division of time taking precedence over considerations relating to risk of harm. This is particularly evident in Interim Parenting Orders.

43. In any event, we believe that the wording of the current s60CC(2)(b) should be revised. It focuses on the risk of future physical harm and does not adequately allow for consideration of the impact of past physical and emotional abuse, the impact on a carer who has been abused and what this means for the children, nor does it provide well for good consideration of the impact on children of having lived in violence
44. Children's exposure to family violence cannot be isolated from the experience of family violence on their caregivers:

*...family violence towards a parent may affect the ability of the victim to parent effectively<sup>21</sup>*

45. Protection of children's caregivers who are victims must also be a priority and not artificially treated as a distinct issue from protection of their children, with different outcomes. In recent research, *No way to Live*, Laing<sup>22</sup> describes abuse "directed simultaneously at both women and children". This research with 22 women reflects the experiences of many women's services and women's legal services in working with women in the family law system.
46. 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 family 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.

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<sup>20</sup> In particular, s 60B(2), s 61DA, s65DAA and the sections that discourage the disclosure of violence and abuse (see particularly s117AB and s60CC(3)(c)).

<sup>21</sup> Above, n.5 p. 895

<sup>22</sup> Laing, L. (2010). *No way to live: Women's experiences of negotiating the family law system in the context of domestic violence*, The University of Sydney, June 2010, pp. 35, 36



*Friendly Parent Provisions*

47. The removal of the “friendly parent provision” (ss. 60CC (3)(c), and s.60CC (4)) is supported. Under the current provision even where women act protectively to prevent harm they are seen to be unfriendly. The removal of these sections from 60CC considerations recognizes that the friendly parent provision has had undesirable consequences in discouraging women who are victims of family violence from disclosing that violence in the family law courts.
48. The removal of section 60CC (k) is also supported by WLSA and AWAVA as this provision has acted as a barrier for victims of family violence in and prevented family violence being properly taken into account in determining parenting orders.
49. The removal of this barrier, acknowledges the reality that for many women who are victims of family violence, there are significant barriers to obtaining final intervention/restraining orders in the state courts. Laing (2010) stated that systemic issues “downstream”, such as police inaction compounded the difficulty for many female victims of family violence “...bringing evidence of family violence, child abuse and exposure... to the Family Court, beyond the difficulties arising from the often secret and hidden nature of violence in families.”<sup>23</sup>

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<sup>23</sup> Above, n.22 p. 80.

## Equal Shared Parental Responsibility and Time Arrangements for the care of the children

50. Section 65DAA states that if ESPR is ordered, then the court is mandated to consider equal time or substantial and significant time if it is in the best interests of the child and it is workable.

51. Even though the law states that ESPR only relates to parental responsibility (decision making about long term matters) and does not include a presumption about the amount of time spent with the child, there is a wrongly held belief in the community that the starting point for negotiations is that children should spend equal time with both parents, regardless of the children's best interests in each family. Parents bring that belief to mediation and the courts. While parents are told that decisions should be made in the child's best interests, the "equal time" idea is dominant in the minds of many parents as a starting point, even where there are contrary-indicators about what is best for the children and the efforts mediators and others go to dispel this notion.<sup>24</sup>

52. The word 'equal' is inappropriate when determining what arrangements are best for children, including decision-making under parental responsibility. We recommend the term "shared parental responsibility" be used and that there be no link between shared parental responsibility and the time children spend with their parents. Further, the legislative emphasis on equal time, and significant and substantial time, contributes to the silencing of victims of violence.

53. In particular the emphasis on shared care by the legislative prescriptions and community perceptions ignores the negative impact on children of shared care and high conflict has been well established.<sup>25</sup> Rhoades (2009) states in describing the research of McIntosh and Long (2007) and McIntosh and Chisholm (2007):

*...data suggest the reforms have been successful in producing an increase in "substantially shared care arrangements" since the legislation came into force. At the same time, however, the research indicated that a significant number of these arrangements are characterized by intense parental conflict, and that shared care of children is a key variable affecting poor emotional outcomes for children.*<sup>26</sup>

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<sup>24</sup> WLSA submission to AIFS 24 Aug 09; also in WLSA sub to Chisholm review. See also AIFS, *Evaluation of the 2006 Family Law Reforms*, 2009, p.246.

<sup>25</sup> Dewar, J., *Can the centre hold?: Reflections on two decades of family law reform in Australia*, Australian Journal of Family Law (2010), vol. 24 (2), p.142

<sup>26</sup> WLSA Submission to AIFS, 24 August 2009.

54. In relation to the issue of shared time and parental responsibility, WLSA & AWAVA recommends:

- a. repeal the reference to time considerations,
- b. remove the link between time considerations and parental responsibility;  
&
- c. remove the requirement on the court to consider any particular arrangement for time children spend with their parents.

55. WLSA & AWAVA recommend that the provisions in relation to equal time and substantial and significant time be repealed. The judiciary, advisors and family dispute resolution practitioners should only need to consider what arrangements are best for children based on an assessment of the best interest factors in the circumstances of individual cases.

56. WLSA & AWAVA's position is inline with that of Professor Chisholm's recommendation<sup>27</sup> 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 child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case*

57. It is crucial that the presumption for time be repealed in the current climate as the family law courts are not properly resourced to have risk assessments and other risk screening measures from the outset, and therefore they cannot properly determine allegations of family violence and/or abuse at interim stages. The existence of the presumption has increased the risk of families and children being placed at significant risk of harm, especially as orders made at an interim stage can last for up to 2 years. If the presumption is retained without the link to time, the presumption should be excluded at interim stages and reference should only be made to the best interests of child and the circumstances of each case.

58. The negative consequences of this particular provision is compounded by the fact that there are numerous legislative signposts, particularly within section 60B that 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.

59. In the event that references to shared parenting are retained, WLSA holds the view that the 'reasonably practicable' provision (s65DAA (5)) requires

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<sup>27</sup> Chisholm, R. "Family Courts Violence Review" 2009, p.13, Recommendation 3.4 (1)

amendment. Any additional considerations to be taken into account in the consideration of whether to make an order for equal or substantial and significant time would be best included in s60CC, rather than creating this separate tier of considerations in a different part of the legislation.

60. Additionally, if shared time remains, it should not apply in matters involving very young children (e.g. under 3) or matters involving high parental conflict or family violence, unless there are exceptional circumstances. Social science research has consistently identified detrimental outcomes for infants under the age of two.<sup>28</sup> It even more crucial for the development of young infants that shared time arrangements should not be enforced, in cases where infants are still breast feeding.<sup>29</sup>
61. WLSA & AWAVA would also recommend that consideration of equal or substantial and significant time arrangements should be limited in matters involving high parental conflict or family violence. One option might be to exclude the consideration of these time arrangements in these cases unless exception circumstances exist. We believe this recommendation is supported by recent research undertaken by Bagshaw and Brown et al:

*Respondents expressed the view that the sharing of parental responsibility following separation required the kind of cooperative relationship that was at odds with the controlling and coercive behaviour that commonly characterises family violence.<sup>30</sup>*

*Respondents, in particular mothers, reported a sense of coercion in coming to parenting arrangements under the new legislation that related to the clash between the need to protect their own and the children's safety and the ideal of shared parenting or shared care of children.<sup>31</sup>*

62. The application of the considerations in s60CC in the context of the proposed definitions of abuse and family violence will not adequately assist the court to make orders for parenting arrangements which provide children with the opportunity to heal from this abuse (experienced directly or indirectly) during the

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<sup>28</sup> McIntosh, J., Smyth, B., Kelaher, M., Willis, Y. and Long, C., May 2010, p. 16

<sup>29</sup> Incidences of forced ceasing of breast-feeding to align with shared cared arrangements were found to have occurred despite the knowledge that breastfeeding during infancy contributes to positive development outcomes, as well as to good nutrition and health. See Baxter & Smith, 'Breastfeeding and infants' time in use' Australian Institute of Family Studies, 2009, p.xi

<sup>30</sup> Above, n.8, p. 102

<sup>31</sup> Above, n.8, p. 184



relationship. Time with a parent that has been abusive unsupervised will not allow a traumatized child to heal from the abuse and may in fact result in ongoing psychological trauma.

63. Besides the negative consequences that have been covered so far in this submission the 2006 reforms have also had a negative impact with respect to relocation and the ability of child victims of family violence to gain access to therapeutic services. In most of the cases examined in Laing 2010, it was not possible for the children to obtain professional assistance such as counselling.<sup>32</sup> In these cases this occurred for reasons including the ex partners failure to consent or the court preventing this therapeutic intervention and prioritising “...*the legal process - which was conducted over several years – over the right of the children to counseling to resolve the trauma...*”<sup>33</sup> Such an approach by the family law courts has subjugated the needs of the children to those of the adults (parents) and in most cases the father who was the perpetrator of the violence. These restrictions have had 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.

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<sup>32</sup> Above, n.22, pp. 70-72

<sup>33</sup> Above, n.22, p. 71

## **Allegations of Family Violence, Mandatory Notifications and Interventions**

64. The obligation of parties and their representatives to inform the court about family violence is supported.

65. However the filing of the prescribed forms, e.g. Form 4 Notice of Child Abuse of Family Violence is not enough to address the inability of the family law courts to deal adequately with the issue of family violence. This is particularly the case if:

- a. legal practitioners still feel reluctant to file the prescribed forms as a result of a perceived risk of placing a client on the back foot prior to the commencement of proceedings; or
- b. the prescribed forms do not have appear to have any significant bearings on the interim court proceedings

then the possible effectiveness and operation of this particular amendment will be severely hampered.

66. The extension of the court's obligations to actively inquire into the existence of abuse or family violence is supported. We would also like to recommend that it would be useful for the courts to also have the ability to actively inquire from child protection agencies or police about the existence of abuse or family violence.

67. The proposed repeal of s.117AB is welcomed. As indicated in the Chisholm report, s. 117AB needs to be repealed because it carried 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 117."<sup>34</sup> Section 117 is sufficient to deal with any false allegations or denials of violence.

68. In addition to the repeal of the s.117AB, clear policy direction from the Government is required to shift attitudinal factors which may continue to affect the disclosure of violence and abuse, the nature and extent of any disclosures and the accuracy of evidence used to support court decisions. In particular Laing 2010<sup>35</sup> discusses the "Climate of disbelief"<sup>36</sup> of (and allegations of 'alienation' by)

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<sup>34</sup> Above, n. 27, p.117

<sup>35</sup> Above, n. 22, pp. 43, 44, 47-51, 80

<sup>36</sup> Above, n. 22, p. 92

mothers seeking to protect their children and the focus on the father/child relationship with almost total disregard for:

- a. the mother/child relationship;
- b. responsibilities of fatherhood, and
- c. accountability for violence and abuse.

69. The findings of Laing in her research are consistent with the experiences of AWAVA, its members and WLSA. AWAVA and WLSA hope that observations such as those made by Laing 2010 become the exception rather than a common occurrence for many victims of family violence who are navigating their way through the family law system:

*Some women's concerns for the safety of their children resulted in their being labeled as "anxious". Their anxiety, rather than the risk posed by the perpetrator to the children then became the focus of attention<sup>37</sup>*

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<sup>37</sup> Above, n. 22, p. 66

## Risk Assessment Framework

70. In addition to changes to the law, there needs to be a well-resourced and comprehensive risk assessment framework implemented in all parts of the family law system. This framework must interact with and be complemented by the State governments and all government agencies. The 2010 Bill does not deal with this crucial requirement and implementation of the proposed changes without it will not achieve effective protection of women and children in family law.
71. With over 50% of parenting matters in the family law courts involving serious allegations of family violence and/or child abuse,<sup>38</sup> the core business of the family law system is responding to family violence and child abuse. Consequently, legislative and systems responses should be reformed to reflect this and any agency that comes into contact with families after separation as part of the family law system should be heightened to the risks of violence and abuse.
72. The family law courts need to implement systems at the initial stages of application to identify and comprehensively explore issues of family violence and child abuse. The role (and number) of family consultants should also be expanded to allow for assessment of all children matters where there have been allegations of family violence and child abuse to inform case management. Early identification and thorough risk assessment of family violence and child abuse will contribute to ensuring that the matter proceeds through the most appropriate court division and ensuring less adversarial and earlier resolution of issues.
73. Clear guidelines about how to comprehensively assess for risk where family violence and child abuse is a factor will also 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.
74. In addition to the legislative and procedural changes in the courts required to improve responses to family 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 family violence. Risk identification would assist agencies to ensure that appropriate referrals can be made and safety planning undertaken for women and their

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<sup>38</sup> Moloney, L et al (2007), *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A pre reform explanatory study*, Research Report No 5, AIFS, Canberra.

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.

75. Risk identification undertaken by all players in the family law system (as part of the overarching framework and policy) needs to be supported by a more comprehensive risk assessment.
76. In an integrated system, the role of risk assessment should be undertaken by the agencies holding the expertise in relation to issues of violence. These services have workers whose role is to work directly with women who are victims of violence. Assessment of safety is their core business and this role is not blurred, as it may be in other agencies, by a focus on legal proceeding/determining disputes (courts), dispute resolution and 'compromise' (family relationship centres and dispute resolution practitioners), advising their client (lawyers). In the case where a man (and/or father) is the victim of violence there would need to be an appropriate men's service to undertake this role.
77. The risk assessment undertaken by a specialist service would need to be made available at least to the family dispute resolution practitioner and court (where the matter preceded this) for the purpose of informing appropriate processes. Risk assessment is a continuous process and risk may change over time. The system must allow for this. Consideration should also be given to how information from a risk assessment could become part of the legal process (without the need for it to be subpoenaed). Changes to the legislation would need to be considered. Information contained in a risk assessment in the hands of a perpetrator may place a victim of violence in serious danger. Any legislative or systems changes must ensure the victim would not be placed at risk in this way.
78. Until the family law system is more integrated across the country, consideration should be given to improving collaboration between lawyers, family violence service providers, the courts and family dispute resolution practitioners to ensure that better use can be made of the skills of family violence workers in relation to the assessment of risk, and that these skills inform the role and systems of risk identification and responses to violence amongst all players in the family law system. Skilled family violence workers are also well placed to provide expert family violence reports to the court.
79. Research undertaken on the collaboration between lawyers and family dispute resolution practitioners speaks about the benefits of improved collaboration.<sup>39</sup>

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<sup>39</sup> H Rhoades, H Astor et al, *Enhancing Interprofessional Relationships in a Changing Family Law System: Final Report*, Melbourne University, May 2008.

Incidentally the research indicates that, amongst those practitioners surveyed, lawyers identified the existence of violence at much lower rates than family dispute resolution practitioners. Given the role that lawyers play in assisting their client to 'identify the issues'; it is critical that lawyers take a full history of the relationship, including the violence and abuse, to identify patterns and risk. Lawyers would benefit from collaborating with family violence workers to assist them in this work.

80. To conclude a risk assessment framework requires:

- a. Risk assessment to occur at a number of entry points within the family violence system;
- b. Access to family violence services;
- c. Disclosure of family violence during family law proceedings;
- d. Access to legal advice;
- e. Access to prompt and effective police services; and
- f. Most importantly risk assessment is an ongoing process.<sup>40</sup>

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<sup>40</sup> Above, n.5, p.300



## Training

81. It is imperative that judicial officers, family consultants, family dispute resolution practitioners and all advisors in the family law system (including lawyers) undertake comprehensive and regular training on the dynamics of family violence. The 2010 Bill does not provide for this training. It is essential that the Government and family law courts and relevant professional bodies mandate this requirement. As the ALRC/NSWLRC stated in their report on family violence “[p]roper appreciation and understanding of the nature and dynamics of family violence and the overlapping legal framework is fundamental in practice to ensuring the safety of victims and their families.”<sup>41</sup>

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<sup>41</sup> ALRC & NSW LRC, *“Family Violence- A National Legal Response: Final report”*, October 2010, ALRC Report 114, NSWLRC Report 128, p.575. Recommendation is derived from ALRC/NSW LRC Recommendation 31-1.

## Adequate Funding and Resources

82. 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.
83. 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.
84. Another example of the increasing difficulty in accessing legal aid is that legal aid policies require that applications for variations 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 to see the other parent. 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.
85. The obstacles created by lack of adequate funding or resources is compounded for Aboriginal and Torres Strait Islander women, women from culturally and linguistically diverse backgrounds for whom English may not be their first language and women living with disabilities. These groups of women face many barriers including significant difficulties in gaining access to qualified and culturally appropriate interpreters. Many of the changes proposed in this consultation paper to increase the effectiveness of the system's responsiveness to protecting victims of family violence will not be possible for these women without addressing obstacles that impact on their access to justice.
86. The issue of lack of resources is further intensified by the movement of the family law courts to a user pays systems can pose significant barriers to allowing victims of family violence access to the courts particularly women from disadvantaged groups and from lower socio-economic backgrounds. Whilst the

non-negotiable fee of \$60.00 may seem relatively small, for many women who are victims of family violence, they often have important competing demands on their limited financial resources. The fact that Legal Aid does not cover these costs may create significant impediments in ensuring that those cases that should go to court do so in a timely manner.

***Interim hearings***

87. 33. In our experience, decisions made at interim hearings tend to prioritise contact with both parents over the safety of the child and mother. The lack of court time and resources allocated to interim hearings means that family violence issues cannot be assessed comprehensively.

88. Our greatest concern with interim hearing decision relates to delay – both before and after hearings. There can be considerable delays before an interim hearing is heard, and interim orders are often in place for considerable lengths of time due to court workloads. As such, these orders are ‘interim’ in name only. As the interim orders are in place for extended periods of time, the failure to consider fully family violence issues at interim hearings can leave women and children in considerable danger.

89. The delays may also contribute to the orders made, as a decision-maker may be reluctant to make no-contact orders because the lengthy delays will mean that the interim orders have a significant impact on the final orders. If delays were reduced, a no-contact or limited contact order would prejudice the final orders less, and interim decision-makers might be more willing to err on the side of safety.

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