Women's Legal Services Australia

A national network of community legal centres specialising in women's legal issues

PUT SAFETY FIRST IN FAMILY LAW

What can you do?

- Support the Family Law Amendment (Family Violence) Act 2011, especially the provisions that remove disincentives to reporting violence in the family law system (the 'friendly parent' and 'costs' provisions);
- Move amendments to the Bill to:
  - make the safety of children and other family members the first priority in all cases and support the introduction of a legislative framework that ensures safe outcomes for victims of violence and children;
  - remove presumptions of equal shared parental responsibility and references to particular care arrangements so each family can be treated as unique;
  - give effect to other amendments recommended by WLSA so that unintended consequences and re-victimisation of victims of violence and their children are avoided.

What changes are needed?

1. No ifs, no buts: Safety first in family law

Children's emotional and physical safety and the safety of other family members should be the priority in family law. Safety of children and other victims of violence is not only about protecting them from future violence but also about addressing their current needs, taking into account the impact that the violence has had on them individually. The Family Law Amendment (Family Violence) Bill 2011 prioritises safety only in cases where "*there is an inconsistency*" between achieving a safe outcome for a child and a child having an ongoing meaningful relationship with another person. This is not enough.

Safe outcomes in families should not be made subject to other considerations, such as 'proving an inconsistency'. A clear statement in legislation making children's safety and the safety of other family members a priority is required and needs to be 'backed up' by a legislative framework that supports safe outcomes.

2. One size doesn't fit all: No presumptions in family law

The presumption of equal shared parental responsibility and the emphasis in the Family Law Act on shared parenting, over and above other parenting outcomes, places children and other family members, who have experienced domestic violence, in danger. We all know that each family and each individual child in each family is unique and has different needs. This is especially true for children who have experienced violence and abuse. However, the amendments do not touch the presumption or the shared parenting provisions. How can legislation presume one outcome when there are so many different possibilities?

Parenting arrangements should be in the best interests of each child, worked out on a case-by-case basis. The safety and well-being of families is too important to not take the time to judge each case on its own merits; especially, when issues of domestic violence and abuse are involved.

3. Making primary carer's safe; increases children's safety

It makes sense that if the primary carers of children are emotionally and physically safe from violence and abuse then this will be positive for their children. The safety of children is not just about preventing violence directed against them, it is about the safety and well being of their family and enabling all members of the family to heal from past violence. It defies logic that in legal practice "a *parent who is violent to their partner can be considered a bad partner but a good parent".* This must stop. Legislation should protect primary carers and recognise their significant role in children's lives (especially in very young children) because it is important for the emotional development of children, in the short and long term.

4. The amendments: just a first step

Overall, the direction of change detailed in the Bill is positive; especially the provisions that remove disincentives to victims of violence reporting abuse such as the 'friendly parent' and 'false allegations costs provisions'. However, much more has to be done. Importantly, amendments to the current drafting needs to be made in line with recommendations made in the Women's Legal Services Australia submission (www.safetyinfamilylaw.com) so that unintended consequences and re-victimisation of victims of violence and their children are avoided.

Why is more change needed?

The system is failing victims of domestic violence and their children

Victims of domestic violence are especially vulnerable to being bullied into unsafe agreements involving shared parenting. Once agreements are made they can be difficult to change. Domestic violence often occurs 'behind closed doors' and there is a failure by many participants in the system to identify it or to prioritise emotional as well as physical safety. Victims reach agreements often in an attempt to appease the perpetrator, because the victim believes 'shared parenting' is the law, they are told it is the law; they have no say or are threatened. Additionally, they are also susceptible to court orders for shared parenting being made for a range of reasons including a lack of legal aid, inability to advocate in the system for assistance and because perpetrators of violence frequently and vigorously pursue "their legal rights" through the system.

Shared parenting arrangements can 'mess up' important normal daily routines of children who have experienced violence. Clients have reported to us

- having to stop breastfeeding babies to comply with orders;
- their school-age children are being delivered to school without uniforms, with no lunch and/or are not being taken at all;
- children struggling emotionally to cope where one parent is constantly denigrating, abusing or undermining the other;
- children witnessing their mother and care-giver being hurt, assaulted and verbally abused;
- some children being abused themselves and both mothers and children experiencing a deterioration in their health (including their mental health);
- children being anxious, confused, angry and fearful;
- Others being violent and denigrating towards their mothers.

These problems are widespread and national.

There is strong evidence that the system is not working

Three government-commissioned reports and a law reform commission report have all identified that there are significant problems in how family law and its processes respond to cases of family violence, and substantial changes are needed to keep victims of violence and children safe.[1] Researchers are now seeing the 'fallout' since the 2006 amendments and are warning against shared care's appropriateness for young children, especially when there is high conflict.[2] The disadvantage is intensified for victims who are Aboriginal and Torres Strait Islander or from culturally or linguistically diverse backgrounds or who experience other social disadvantage.

The Family Law Act already offers protection – why is more change needed?

Child abuse and domestic violence are core issues in the family law system. There are serious deficiencies in the way the system deals with these issues. An under-resourced system struggling with complex issues can often 'latch onto' simple solutions, such as 50:50 or notions of 'equality'. This is especially the case when many professionals lack training and expertise in identifying and dealing with domestic violence and child abuse and their interrelationship. It is common for these issues to co-exist in many families moving through the system. A lack of protection for victims of violence and their children can be further compounded when there is a lack of cultural sensitivity or sensitivity towards other issues such as disability.

Clear, concise and unequivocal language in the Family Law Act is required to protect the most vulnerable. Listening to the people on the ground who have expertise in domestic violence and who work with victims of violence and their children is essential to gain knowledge about how changes to the law *will* work in practice.

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[1] Australian Institute of Family Studies (2009) *Evaluation of the 2006 family law reforms*; Professor Richard Chisholm (2009) *Family Courts Violence Review*; Family Law Council (2009) *Improving responses to family violence in the family law system*; Australian and NSW Law Reform Commissions (2010) *Family Violence – A National Legal Response*.

[2] McIntosh J and Chisholm R (2008)*Shared Care and Children's Best Interests In Conflicted Separation: A Cautionary Tale from Current Research*, Australian Family Lawyer Vol 20 No 1 p.4.