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6 May 2011

Committee Secretary
Senate Legal and Constitutional Committees
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Chairperson

**Re: National Legal Aid submission
Family Law Legislation Amendment (Family Violence and Other Measures) Bill
2011**

Thank you for the opportunity to make a submission in relation to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011.

About National Legal Aid and Legal Aid Commissions

National Legal Aid (NLA) represents the Directors of each of the eight State and Territory Legal Aid Commissions. The Legal Aid Commissions (Commissions) are independent statutory authorities established under respective State or Territory enabling legislation. The Commissions are funded by Federal and State or Territory governments to provide legal assistance to disadvantaged people.

Experience of family violence is common in our client base. The Commissions each provide legal representation, advice, information, education and referral services including to non-legal support services, on a daily basis to many people, including children, who experience family violence and abuse.

Overview

NLA is generally supportive of the proposed amendments, which if introduced should help to protect family members who are the victims of family violence and child abuse. As a consequence, our comments are relatively brief and directed to those few proposed amendments where we perceive that there are/might be issues.

Our comments are made in the context of our submissions to the recent review of family violence laws and legal frameworks by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC) *Family Violence: Improving Legal Frameworks (July 2010)*; and the Attorney-General's Department public consultation on the Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010 dated 14 January 2011 ("the Exposure

Draft"). Those submissions are referred to in these comments and copies are enclosed for ease of reference.

NLA's view is that the response that is required to ensure the safety of victims should be a systems response, rather than the responsibility of the victim. In addition to legislative reform, there is a need for integrated service delivery which requires:

- improved systems for information sharing
- collaborative professional approaches, and
- coordinated case management.

Initiatives including joint or cross agency training involving professionals from relevant agencies will facilitate the cultural shift required to promote collaborative and coordinated working arrangements.

Appropriate levels of resources will be required to support this approach.

There is a need for courts and service providers to:

- (i) articulate a shared vision to provide safety for the victims of family violence and child abuse;
- (ii) commit to sharing information and resources as far as is practicable and permissible pursuant to provisions of their legislation in individual cases;
- (iii) commit to ensuring that education and training are provided to judicial officers and service providers to facilitate the development of a common language for communication in relation to family violence and child abuse issues. This will help to ensure the workability of the arrangements¹;
- (iv) commit to address any case management issues that are identified in a co-operative manner;
- (v) maximise the ability of the courts to make timely, informed decisions in respect of family violence and child abuse related issues, and
- (vi) use resources efficiently.

Comments on proposed amendments:

Item 1 - Subsection 4(1) - Definition of *abuse*

Proposed s. 4(1)(c) appears to require proof of actual harm to the particular child in the circumstances of each case, and that the harm be "serious". This could have the effect of delaying proceedings to enable psychological assessments of the child to be carried out and the incurring of the additional expense associated with that process.

There is a substantial research base which confirms the psychological harm to children of being subjected to, or exposed to family violence. Consequently, it should not be necessary to subject children to psychological assessment in these circumstances. The focus should be on whether or not the conduct occurred rather than whether it has had a psychological impact on the particular child. In the circumstances it is suggested that the definition in subsection 4(1)(c) should be

¹ NLA notes the recently announced multi-disciplinary family training package, Avert Family Violence: Collaborative Responses in the Family Law System, refer Media Release, "New national training to improve responses to family violence", the Hon. Robert McClelland MP 17 March 2011.

expressed as "**conduct by the person using the violence which is likely to cause the child to suffer psychological harm**".

Item 2 - Subsection 4(1) - Definition of *exposed* in relation to family violence

NLA supports the insertion of the word "exposed" in subsection 4(1)(c) and the definition of "exposed" set out in the proposed provision 4 AB (3). In our comments on the Exposure Draft we expressed some concern that the examples set out in the definition are too specific and might be interpreted as exhaustive rather than illustrative. The words used in the current draft "include (but are not limited to)", may address this concern.

There is also ongoing concern that victims of family violence not be discouraged from disclosing family violence for fear that this might lead to a finding that they had exposed children to family violence. This concern should at the least be addressed in the education and training strategies that accompany the introduction of the amendments.

Items 3 and 8 – Subsection 4(1) and 4AB(1) - Definition of *family violence*

NLA considers that the appropriate definition of family violence in subsection 4AB should be that contained in Recommendation 6–4 of the ALRC and NSWLRC report *Family Violence - A National Legal Response (October 2010)*, with the addition of a further item as set out in (j) below.

The recommendation was that the *Family Law Act 1975* (Cth) should adopt the same definition as recommended to be included in state and territory family violence legislation (Rec 5–1). That is, 'family violence' should be defined as violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
 - (b) sexual assault and other sexually abusive behaviour;
 - (c) economic abuse;
 - (d) emotional or psychological abuse
 - (e) stalking;
 - (f) kidnapping or deprivation of liberty;
 - (g) damage to property, irrespective of whether the victim owns the property;
 - (h) causing injury or death to an animal, irrespective of whether the victim owns the animal; and
 - (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a) – (h).
- (j) threats to carry out the behaviours referred to in (a) - (h) above or to commit suicide or self harm.**

We have some concerns in relation to the examples of economic abuse set out in 4AB(2)(g) and (h), and their reference to "unreasonably denying... financial autonomy" and "unreasonably withholding financial support". These provisions have the potential to increase the length and expense of litigation as a consequence of the challenges associated with the presentation of evidence and the potential for overlap between the determination of children's matters and property issues where the family violence conduct alleged is that set out in these provisions.

Economic abuse should be included in the definition of family violence but, as suggested in the NLA response to the ALRC/NSWLRC Consultation *Family Violence: Improving Legal Frameworks (July 2010)* it may be difficult to succeed on the allegation of such conduct in isolation because of the possible alternative explanations for the controlling financial behaviour.

NLA notes that the wording of the proposed section would not include threats to an animal, but rather requires that the animal has to have been injured or killed for the definition of family violence to be met. In our family violence casework and advice experience “threats to harm” to pets are common and have been effectively used to prevent victims from leaving.

Item 4 - Paragraph 4(1) - Definition of *member of the family*

The proposed approach to the definition of *family member* is supported.

Item 5 - Subsection 4 (1) - Paragraph (a) of the definition of *Registry Manager*

Supported.

Item 6 - Definition of *family member* 4(1AB)(a)

Supported.

Item 7 - Paragraphs 4(1AB) Definition of member of the family applied to obligations to inform the court of care arrangements under child welfare laws

Supported.

Item 8 - Definition of *family violence* 4(AB)

See response to Item 3.

Item 9 - Subsection 12E(3) (note) - Obligations on legal practitioners

Supported.

Item 10 - Subsection 12G(1) (note) - Obligations on family counsellors, FDR practitioners and arbitrators

Supported.

Item 11 - Paragraph 43(1)(ca) - Principles to be applied by the courts

Replacement of the word “safety” with “protection” as proposed, is supported.

Item 12 - Section 60CA - What division 1 of Part VII does

Supported.

Item 13 - Section 60B - Objects of Part VII-Reference to the United Nations Convention on the Rights of the Child

Supported.

The draft Bill addresses the concerns about the incorporation of the Convention raised by NLA in our response to the Exposure Draft.

Items 14 and 15 - Section 60C (cell at table item 1, column headed 'Divisions and coverage')

Supported.

Item 16 - Subdivision BA of Division 1 of Part VII - (heading) Best interests of the child: Court proceedings

NLA queries the appropriateness of the inclusion of the words “Court proceedings” in the heading to this subdivision of the Act. It is possible that the inclusion of the words “Court proceedings” at the commencement of the subdivision may cause some uncertainty as to the relevance of the provisions of section 60CC in family dispute resolution processes, or negotiations taking place when court proceedings have not yet commenced. The provisions of Section 60CC are relevant to the consideration of the best interests of the child, whether or not the matter is the subject of court proceedings.

Item 17 - Subsection 60CC(2A) - Determining a child's best interests

NLA supports the proposed provision as it gives clear guidance to prioritise a child's safety where there is conflict between the considerations. The amendment requires that a determination in relation to a child's exposure to abuse, neglect or family violence be made before consideration is given to the benefit to the child of having a meaningful relationship with both parents. The need for this determination should logically lead to a hearing to determine whether any interim or procedural orders are appropriate, to enable evidence about the allegations to be obtained, and to ensure as far as possible the safety of family members. The procedure for the filing of a form outlined in the proposed provisions of s.67Z would be triggered.

Items 18, 19 and 20 - Section 60CC - "Friendly parent provisions"

Supported.

The inclusion of paragraphs 60(CC)(3)(c) and (ca) will address the concerns raised by NLA in respect of the proposed repeal of section 60CC in the Exposure Draft. These provisions are also consistent with the recommendations of the Chisholm Report, which noted that the ‘family friendly’ provisions are appropriate in many situations, but that, where there is violence and abuse, the ‘family friendly’ provisions need to be qualified.

The Report states:

On the material available, it seems likely that the friendly parent provision, s 60CC(3)(c), while it might have had a beneficial effect in many situations, has had the undesirable consequence in some cases of discouraging some parents affected by violence from disclosing that violence to the family court. It is appropriate,

*therefore, to consider whether some amendment would remove this undesirable consequence while retaining the value of the provision in encouraging parents in ordinary circumstances to facilitate the child's relationship with the other parent.*²

Item 21 - Subdivision BA and sections 60CH and 60CI

NLA supports the introduction of these new provisions. The requirement for parties to provide the family courts with information in relation to the existence of child welfare orders or arrangements relating to other children will facilitate the ability of the courts to identify and assess any risk of harm to the children the subject of proceedings, including the question of whether child protection authorities should be invited to intervene in proceedings.

However, as proposed in our response to the Exposure Draft and Proposal 8-2 of the ALRC/NSWLRC Consultation *Family Violence; Improving Legal Frameworks (July 2010)*, there must be processes (including memoranda of understanding, with other courts, child protection authorities and the police) to obtain copies of relevant orders. From experience, courts should not rely on self-disclosure. Access to information of this kind will ensure more appropriate decisions.

In Western Australia the Family Court of WA (FCWA) has memoranda of understanding (MOU) in place with the Department of Child Protection (DCP) and Legal Aid WA (LAWA) for information sharing in relation to child welfare issues and with the Department of the Attorney-General, the Magistrates Courts, the Department of Corrective Services and LAWA for information sharing in relation to family violence issues. The experience of LAWA is that these memoranda of understanding work well, particularly with respect to the FCWA access to information from DCP and the Magistrates' Court's database. In addition, DCP now has an officer permanently located at the FCWA to facilitate the information sharing process.

Item 22 - New subdivision BB (after Subdivision BA) - Best interests of the child: adviser's obligations - New provision

Supported.

Item 23 - repeal of Section 60K to be substantially reenacted in 67BB

See item 34.

Items 24 and 25- Section 63DA including new subsection 63DA(1A) and repeal of paragraph 63 DA (2) (c) - Obligations of advisers

NLA supports the deletion of Section 63DA(c) and the inclusion of the new provision contained in section 63DA(1A) with the addition of the word "primary" before the word obligations, so that the provision would set out that "The obligations on an adviser under this section are in addition to the adviser's **primary** obligations under section 60D." This would ensure that there will be no misunderstanding as to the priority to be given to those provisions.

NLA suggests that the amendments to this section could also include specific reference to family violence and its significance. For example, similar to the

² Family Courts Violence Review A report by Professor Richard Chisholm 27 November 2009 p. 102

approach used in the drafting of the proposed section 69ZQ(1)(aa), an obligation could be imposed on an adviser to inform a party that a parenting plan may not be appropriate if one party considers that the child concerned, or a party, has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence.

Items 26 and 27 - Subsection 65DAA(5) repeal of (note 1) omit (note 2) and substitute with “Note”

Supported.

Item 28 - Paragraph 67A(c) amendment to inform the reader that Subdivision D of Division 8 of Part VII contains provisions relating to allegations of family violence as well as child abuse

Supported.

Item 29 - Subdivision D of Division 8 of Part VII - Allegations of family violence

NLA supports this new provision but considers that, in the implementation of this provision, the issue that will need to be addressed is what is to be expected from child welfare authorities by way of response, taking into account their traditional agency policies and thresholds for investigation of family violence as a child welfare concern. For example, in WA the MOU in place between FCWA, DCP and LAWA specifically sets out the reporting requirements of DCP in response to Form 4s alleging family violence.

Items 30, 31 and 32 - Subsections 67Z(1) (2) (4) - amendment to interested person from interested party and definition of interested person

The broadening of the range of people who will be required to file Form 4s in family court proceedings to include Independent Children’s Lawyers and other persons prescribed by the regulations is supported.

Item 33 - Note at the end of 67ZA(3) clarification that person authorised to report suspicions under subsection 67A(3) is not excused from mandatory reporting under subsection 67ZA(2) in respect of child abuse or risk of child abuse

Supported.

Item 34 - At the end of Subdivision D of Division 8 of Part VII-Section 67ZBA-Where interested person makes allegation of family violence-replacement for section 60K

For these provisions to be effective there is a need for integrated service delivery which requires:

- improved systems for information sharing;
- joint or cross agency training;
- collaborative professional approaches and
- coordinated case management

in order to ensure the safety of affected family members, and to facilitate the rehabilitation of the perpetrators of violence. Appropriate levels of resources will be required to support this approach.

NLA suggests that consideration could be given to strengthening the provisions of the proposed Section 67ZBA using as a model Sections 59 – 61 of the Care of Children Act 2004 (New Zealand) ('the Act'). This requires early determination of violence allegations (the definition of "violence" is limited to physical or sexual abuse by section 58 of the Act) by the Court with consequential provisions relating to the care of children in the event that the allegations are proven or there is considered to be an unacceptable risk to the child's safety. There is currently some debate in New Zealand as to the appropriateness of broadening the definition of violence in respect of the application of sections 59 -61 of the Act, which would seem to be appropriate in the event that similar provisions were to be introduced into the Family Law Act 1975, given the proposal to broaden the definition of "family violence" in the draft legislation.

The strengthening of section 67ZBB in this way would be consistent with the NLA submission to Professor Chisholm's *Family Courts Violence Review* (27 November 2009) in respect of the challenges associated with the current approach of the family courts to the operation of section 67ZBB.

The wording of sections 59-61 of the Care of Children Act 2004 (New Zealand) is attached to these comments.

Item 35 - Section 68N (note) - references other provisions dealing with family violence-repeal

Supported.

Item 36 - Subsection 69ZH(2)-to include reference to proposed Subdivision BB-effect of reading down effect of BB to only apply to children of a marriage in States that have not referred constitutional powers in relation to ex nuptial children

Supported.

Item 37 - Paragraph 69ZN which outlines the principles for conducting child related proceedings - amends 69ZN (5) (a) to "safeguard the child concerned from being subjected to, or exposed to, abuse, neglect or family violence."

Supported.

Item 38 - Before paragraph 69ZQ (1) (a) insert new paragraph 69ZQ (1) (aa) - General duties of the court

NLA supports the introduction of the requirement of a more proactive approach from the Court in relation to making enquiries into the existence of abuse or family violence.

In LAWA's experience the Family Court of WA is proactively and effectively using the MOUs referred to in this submission for such enquiries.

NLA confirms the suggestion made in its response to the Exposure Draft that consideration should be given to the inclusion of "other member of the family in the household" in sub paragraphs 69ZQ(1)(aa)(i) and (ii).

NLA notes that the Standing Committee of Attorneys-General has agreed to "implement a national scheme for domestic and family violence orders" " which will allow a domestic or family violence order issued by a court in one jurisdiction to be automatically recognised in other jurisdictions".³ It is suggested that this sort of positive development might also help support better appropriate information sharing into the future.

Item 39 - New note at end of subsection 91B(2) - Intervention by child welfare office

Supported.

Item 40 - Subsection 117(1) removes the reference to section 117AB- costs

Supported.

Item 41 - Subsection 117(2) inserts reference to new subsection 117(4A), which introduces a new immunity for certain officers from orders involving costs or security for costs

Supported.

Item 42 - Subsection 117(4) Immunity from orders for costs or security for costs-child welfare authorities

Supported.

Item 43 - Repeal of Section 117AB-costs for false allegations

Supported.

Item 44 - Definitions to be applied in application of the transitional provisions

Supported.

Item 45 - Application of certain amendments

Item 46 - Documents filed under section 60K

Supported.

³ Joint Media Release, Hon. Robert McClelland MP, Attorney-General and Hon. Kate Ellis MP, Minister for the Status of Women, Friday 4th March 2011.

Item 47 - Amendments do not affect existing orders etc, or constitute changed circumstances

Supported.

Item 48 - Transitional, application and savings-regulations

Supported.

Schedule 2 - Other Amendments

Supported.

Conclusion

Thank you again for the opportunity to comment on these proposed amendments.

Should you require any further information please do not hesitate to contact us.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Andrew Crockett', with a stylized flourish at the end.

Andrew Crockett
Chairperson
National Legal Aid

Enclosures

59-61 of the Care of Children Act 2004 (New Zealand)

Section 59 Allegations of violence made in proceedings relating to parenting orders

- (1) [Section 60](#) applies to proceedings—
- (a) relating to an application under this Act for any of the following:
 - (i) an order about the person or persons who have the role of providing day-to-day care for a child;
 - (ii) an order about contact with a child;
 - (iii) the variation or discharge of, or of any condition of, an order in subparagraph (i) or subparagraph (ii); and
 - (b) in which an allegation is made that a party to the proceedings has used violence—
 - (i) against the child or a child of the family; or
 - (ii) against the other party to the proceedings.
- (2) [Section 60](#) applies to proceedings specified in subsection (1) whether or not those proceedings also relate to any other matter (whether arising under this Act or any other enactment).
- Compare: 1968 No 63 s 16B(1), (2)

Section 60 Procedure for dealing with proceedings in section 59(1)

- (1) In proceedings to which this section applies in accordance with [section 59](#) (the **proceedings**), the court must, as soon as practicable,—
- (a) consider whether to appoint a lawyer to act for the child under [section 7\(1\)](#); and
 - (b) determine, on the basis of the evidence presented to it by, or on behalf of, the parties to the proceedings, whether the allegation of violence is proved.
- (2) Nothing in subsection (1) requires the court to make any inquiries on its own initiative in order to make a determination on the allegation.
- (3) If the court is satisfied that a party to the proceedings (the **violent party**) has used violence against the child or a child of the family, or against the other party to the proceedings, then, unless subsection (4) applies, the court must not make—
- (a) an order giving the violent party the role of providing day-to-day care for the child to whom the proceedings relate; or
 - (b) any order allowing the violent party contact (other than supervised contact) with that child.
- (4) In the situation in subsection (3), the court may make an order in subsection (3)(a) or (b) if, after complying with [section 61](#), the court is satisfied that the child will be safe while the violent party—
- (a) provides day-to-day care for the child; or (as the case may be)
 - (b) has contact with the child.
- (5) If, in the situation in subsection (3), the court is not satisfied as provided in subsection (4), it may make an order for supervised contact between the child and the violent party, and, if it does so, the court must specify in the order whether the supervised contact is to occur—
- (a) under the supervision of an approved provider; or
 - (b) in the immediate presence of a person approved by the court (for example, a relative, a friend of the family of the child, or any other person whom the court considers suitable).
- (6) Despite subsection (1), the court may make any order under this Act that it thinks fit in order to protect the safety of the child if the court—

(a) is unable to determine, on the basis of the evidence presented to it by, or on behalf of, the parties to the proceedings, whether the allegation of violence is proved; but

(b) is satisfied there is a real risk to the child's safety.

Compare: 1968 No 63 s 16B(2)–(6)

Section 61 Matters relevant to question in section 60(4)

In considering, for the purposes of [section 60\(4\)](#), whether a child will be safe if a violent party provides day-to-day care for, or has contact (other than supervised contact) with, the child, the court must, so far as is practicable, have regard to the following matters:

- (a) the nature and seriousness of the violence used:
- (b) how recently the violence occurred:
- (c) the frequency of the violence:
- (d) the likelihood of further violence occurring:
- (e) the physical or emotional harm caused to the child by the violence:
- (f) whether the other party to the proceedings—
 - (i) considers that the child will be safe while the violent party provides day-to-day care for, or has contact with, the child; and
 - (ii) consents to the violent party providing day-to-day care for, or having contact (other than supervised contact) with, the child:
- (g) any views the child expresses on the matter (as required by [section 6](#)):
- (h) any steps taken by the violent party to prevent further violence occurring:
- (i) all other matters the court considers relevant