



15<sup>th</sup> 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)

**RE: FAMILY LAW AMENDMENT (FAMILY VIOLENCE) BILL 2010**

Dear Colleagues,

We thank you for the opportunity to provide comment on the *Family Law Amendment (Family Violence) Bill 2010*. We acknowledge the importance of this Bill.

**Preliminary Consideration: Our Background**

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ("ATSILS") provides legal services to Aboriginal and Torres Strait Islander peoples throughout mainland Queensland. Our primary role is to provide criminal, civil and family law representation. We are also funded by the Commonwealth to perform a State-wide role in the key areas of: Law and Social Justice Reform; Community Legal Education and Monitoring Indigenous Australian Deaths in Custody. As an organisation which, for almost four decades has practiced at the coalface of the justice arena, we believe we are well placed to provide meaningful comment. Not from a theoretical or purely academic perspective, but rather from a platform based upon actual experiences.

## Preliminary Comments

We note that a number of the changes are technical and consequential updates and are generally positive in terms of the workability of the legislation and therefore not at issue. We intend to make specific comment on those particular changes where we view it necessary and general comments in respect to how the changes, as well as the existing legislation (where it will not be changed) will affect Aboriginal and Torres Strait Islander peoples in general terms. We trust that our comments are of assistance.

We also wish to highlight that the family law system continues to be difficult for users to navigate. It is extremely important that some focus goes into making the process smoother for these people and their pathway(s) become easier to navigate.<sup>1</sup>

### **Item 3 - The definition of family violence.**

We agree that the **definition of “family Violence” in s 4 *Family Law Act 1975*** is extremely narrow and outdated. The definition at Item 3 is far more detailed than the existing definition of family violence in the *Family Law Act 1975*. In general terms we agree with this widened and modernised definition, however, we recommend the use of examples as occurs in s 5 *Family Violence Protection Act 2008* (Vic). We also suggest that the language used in Item 3, in particular that referring to a perpetrator (“the first person”) and a victim (“the second person”), makes the proposed section more difficult to understand. Again, the wording in s 5 *Family Violence Protection Act 2008* (Vic) is clear. Given the importance of this proposed section it is imperative that it can be clearly understood by all, particularly those who are not legally represented.

We note that at present a review has been conducted of the Queensland family violence legislation (*Domestic and Family Violence Protection Act 1989*) and the definition of family violence was one of the provisions being examined. Differing definitions in State and Commonwealth legislation are problematic when those

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<sup>1</sup> Australian Institute of Family Studies, December 2009, “Evaluation of the 2006 family law reforms”. Commissioned by the Australian Government Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs, pp. E2 & 366.

pieces of legislation are expected to work together. However, it is now the case that the Commonwealth legislation will be wider than that of the State legislation. This may be confusing for some clients in family law matters, given that State legislation may not capture the family violence as set out in the *Family Law Act 1975*. This could result in the anomaly where people may not be successful in gaining protection under State based family violence protection orders, yet the behaviour is acknowledged at the Commonwealth level as being family violence. This is likely to cause confusion for clients who will not understand that different jurisdictions define family violence differently. It will be for legal practitioners to ensure that clients understand the definition under the *Family Law Act 1975*. We also view that defining abuse and neglect (although neglect is not defined in the legislation and is simply given its “usual meaning”) separately can be confusing, as they essentially are defined under the term “family violence”.

Widening the types of behaviours in the definition of family violence to reflect modern views of family violence will not only assist in sending a message of what is unacceptable behaviour, but also has the potential to limit those being harmed directly and indirectly by family violence, especially children.

**We applaud the inclusion of cultural abuse** as listed at s 4(1) (e)(iii) of the Bill. It is extremely important for Aboriginal and Torres Strait Islander peoples and children in particular, to maintain access to culture and beliefs.<sup>2</sup>

As mentioned above, the proposed definition encompasses the wide range of abusive behaviours now identified as constituting family violence. We still suggest the inclusion of examples such as those set out in the *Family Violence Protection Act 2008* (Vic). We view the inclusion of examples as helpful, however if used, it should be made clear that the examples listed are simply illustrative and are not meant to be restrictive.

We also agree with the proposal at **Item 29** for family violence to be formally notified (separate to child abuse notifications) to the Court in respect to the

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<sup>2</sup> Moloney, M. and Bedford, K., 2005, “Through Young Black Eyes: A handbook to protect children from the impact of family violence and child abuse”, Secretariat National Aboriginal and Islander Child Care, Victoria, p. 15.

**proposed s 67ZBA** on a form similar to the existing Form 4. This obviates the possible existence of a serious issue that the Court must consider a matter as a priority (as is indicated in s 60K(2A)(a)) where there are allegations of child abuse or family violence).

#### **Items 6 and 7 - The definition of family**

In respect to Aboriginal and Torres Strait Islander peoples any definition of relationships to be included in the legislation needs to be broad to include all of the family/kinship relationships that exist and are recognised by Aboriginal and Torres Strait Islander people's cultures. To a certain extent s 4(1AC) *Family Law Act 1975* does this, however it is clear from the wording in the definition that the legislation is likely to be interpreted from a western cultural perspective. The section should include a clause or note to make it a more inclusive definition in terms of Aboriginal and Torres Strait Islander cultures. We make this point not just in terms of identifying family members to assess whether "family violence" has occurred but so that the importance of family members and their roles and responsibilities to children can be acknowledged and included in proceedings.

Although, family law legislation is said to be premised upon what is in each child's best interests, the present legislation often fails to acknowledge and include the *extended* family of Aboriginal and Torres Strait Islander children who have important roles and responsibilities to children. The inability of the process to adapt to any great extent is likely to act as a hindrance to Aboriginal and Torres Strait Islander people accessing the family law system.

#### **Item 17 – s 60CC How a court determines what is in a child's best interests.**

It is agreed that much confusion was caused with the 2006 amendments to the family law legislation in terms of the presumption of shared parental responsibility and the meaning of shared care. Many people (including legal practitioners) seemed to be of the view that the shared care arrangement meant the child or children spending essentially equal time with each parent, unless there was or had been family violence.

It may, as has been suggested by others<sup>3</sup>, be less confusing if the notion of parental responsibility is clearly separated in the legislation from the making of parenting arrangements. Along with this could be numerous options for different families based on their child or children's particular needs and the circumstances of the family based on a number of characteristics.

We note that there is no proposal to amend the wording in s 61DA referring to the presumption of "equal shared parental responsibility". **We suggest that the wording be amended to refer to a presumption that parents have "shared parental responsibility"**. This is likely to assist in removing the misapprehension of equal shared time between parents.<sup>4</sup>

We also agree that the "friendly parent provision" should be removed as it is likely to deter those affected by violence from reporting family violence in their applications to the Court.

We too view family violence as a serious issue that needs to be factored into any arrangement in regard to children and that protection from violence is essential. Although abhorrent in all forms and at all levels, family violence as can be seen from the proposed definition comes in many forms with varying effects. Like any of the other factors the Court contemplates in making its decision, it must place the relevant weight it sees fit to family violence in the context. The addition of s 60(2A) now makes it clear that the physical and psychological protection of the child is paramount over all else, including the child's relationship with their parents (i.e., at least if it is one or both of the child's parents who subject them to or fail to protect them from the harm). Although this takes precedence over other matters, each of the remaining considerations in s 60CC are important and should remain to be treated as such.

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<sup>3</sup> Chisolm, R., 27 November 2009, "Family Courts Violence Review", Commissioned by the Australian Government Attorney-General's Department, pp. 8 & 12-15.

<sup>4</sup> Chisolm, R., 27 November 2009, "Family Courts Violence Review", Commissioned by the Australian Government Attorney-General's Department, p. 12.

**Item 21 – ss 60CH and 60CI – Proposed provisions pertaining to child protection care arrangements, notifications, investigations, etc**

Although it is understandable that the court must be aware of present State orders and proceedings to resolve jurisdictional issues, these proposals are somewhat concerning in terms of the State of Queensland’s past and present welfare policies on families and children in particular. At the end of the 2009 financial year in Australia there were 10,512 Aboriginal and Torres Strait Islander children in out-of-home care. This rate of Aboriginal and Torres Strait Islander children in out-of-home care was just over 9 times the rate for other children.<sup>5</sup>

We agree that parties should be required to advise the Court of existing or pending child protection orders, as is the case in respect to family violence orders.

The proposed s 60CH is very wide ranging as it not only requires a party to inform the Court that a particular child mentioned in the proceedings is under the care of another under the hand of the State, but of any “child who is a member of the child’s family” and is under the care of another at the hand of the State. This section also obviates not only the lack of integration between the different areas of law and Courts, but also opens up another area, where parties will need to provide further evidence relating to either negotiations or litigation with State departments.

Our concern is that often Aboriginal and Torres Strait Islander peoples, especially in the past (prior to our organisation being funded to provide legal advice and representation in the area) were not legally represented in child protection matters and consented to agreements or orders proposed to them by the department without understanding their legal rights and options.

Again, the proposed s 60CI requires parties to inform the Court of notifications,

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<sup>5</sup> Compiled by Leah Bromfield & Briony Horsfall, “Child abuse and neglect statistics”, National Child Protection Clearinghouse, Published by the Australian Institute of Family Studies, ISSN 1448-9112 (Online) ISBN 978-1-921414-37-4

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investigations, etc, by the State child welfare department. One concern is that such information has the potential to be taken out of context in determining risks to children. Further, there is also the issue that not infrequently notifications are made anonymously with a considerable number not able to be justified as well as a number not even being investigated for a variety of reasons.

**We view that any such provisions need to be appropriately qualified in order to avoid the potential for unintentionally inflicting further disadvantage on Aboriginal and Torres Strait Islander peoples.**

In closing, we again thank you for the opportunity to provide comment on the *Family Law Amendment (Family Violence) Bill 2010* and wish you well in your deliberations. I also take this opportunity to acknowledge the invaluable assistance provided to me by Ms Fiona Campbell (Law Reform practitioner - Cairns office) in relation to an earlier draft of this submission.

Yours faithfully,

Shane Duffy

Chief Executive Officer