

Joint Statement

Alliance for Children's Safety

May, 2011

The **Alliance for Children's Safety** is an initiative of the *NSW Women's Refuge Movement, The Benevolent Society, the National Council for Children Post-Separation* and *Justice for Children*.

The Alliance recognises that the 2006 amendments to the *Family Law Act 1975* and the interpretation of these amendments by legal practitioners have posed serious problems for parents and children experiencing domestic and family violence. The Alliance is calling for the Act to be amended in line with the findings and recommendations of several recent national reports that conclude that the Act does not give sufficient protection to victims of family violence.

The Government has introduced an amendment Bill to the Family Law Act called the [Family Law Amendment Legislation \(Family Violence and Other Measures\) Bill](#), ("the Bill") which is currently the subject of a *Senate Legal and Constitutional Affairs Committee* Inquiry. The Committee is due to submit a report to Parliament on the Bill on June 23.

Overall, the direction of change detailed in the Bill is positive as it will better protect victims of family violence. These changes proposed in the Bill include: broadening the definition of 'family violence' to include elements of coercion and control; widening the definition of child abuse to include exposure to violence; removing disincentives that have prevented victims of violence from reporting abuse, such as the 'friendly parent' provision ; and repealing mandatory costs orders relating to 'false allegations' of violence.

However, the proposed amendments are just a first step. The Alliance is calling for the following further changes in order to make the safety of children and their carers a priority in family law.

The Alliance for Children's Safety is calling for a Family Law Act that:

1. Puts children's safety first
2. Assesses children's safety on a case-by-case basis,
3. Protects the safety of primary carers in order to make children safer

The Alliance has thus far, received **250** endorsements of these key messages. Organisations and individuals that have endorsed the key messages are diverse, ranging from YWCA Australia, Headspace National Youth and Mental Health Foundation, Lifeline Australia, Australian Lawyers for Human Rights, Uniting Care Wesley Adelaide, the Australian Women Against Violence Alliance, Homelessness Australia and the NSW Association of Child Welfare Agencies. This diversity of support indicates that the failings in the current Family Law legislation have had a far reaching effect on many children and their families and the services that support them. This is an overwhelming demonstration of support for the Alliance's Key Messages (outlined in more detail below) and the need to take further action to protect the safety and wellbeing of children through Family Law legislation.

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Family law and Family Violence in perspective

The extensive evaluation of the 2006 Family Law reforms undertaken by the Australian Institute of Family Studies (AIFS) found that 60% of separated parents were in friendly or cooperative relationships¹. Most separated parents are able to make parenting arrangements with little use of family law services or lawyers. However for families where complex issues such as family violence, child safety concerns, mental illness and substance addiction exist there is a high use of the family relationship service system, courts and lawyers².

The evaluation also found that, whilst the reforms have had some success in assisting separated parents to resolve parenting arrangements without the use of the legal system, **“the family law system has some way to go in being able to respond effectively to family violence and child abuse”**³.

In addition to the evaluation several other Inquiries and research reports have recommended numerous changes to the family law system and legislation to assist in improving responses to children and parents who have experienced family violence and other abuse. Most notably these have included:

- *Family Violence: A National Legal Response*, Australian Law Reform Commission & NSW Law Reform Commission, 2010;
- *Family Courts Violence Review 2009*, Professor Richard Chisholm; and
- *Improving Responses to Family Violence in the Family Law system: An advice on the intersection of family violence and Family Law Issues*, Family Law Council 2009

Key Messages and Evidence

1. Putting children's safety first

The Bill prioritises safety only in cases where the court considers there is ‘an inconsistency’ between achieving a safe outcome for a child and a child having an ongoing meaningful relationship with parents. Whilst the proposed amendments prioritising children's safety is welcome, the *Alliance for Children's Safety* believes that that the child's safety, welfare and wellbeing should be the *paramount* consideration, in *all* cases, regardless of whether there is conflict between the two provisions, and taking into account the circumstances of each individual case.

¹ Kaspiew, R., Gray, M., Weston, R., Moloney, L, Hand. K., Qu, L., 2006, Evaluation of the 2006 family law reforms: Summary Report, Australian Institute of Family Studies, p.34

² Higgins, D., Kaspiew, R, 2011, ‘Child Protection and family law.... Joining the dots’: National Child Protection Clearinghouse Issues, No.34, Australian Institute of Family Studies, p.2

³ Kaspiew, R., Gray, M., Weston, R., Moloney, L, Hand. K., Qu, L., 2006, Evaluation of the 2006 family law reforms: Summary Report, Australian Institute of Family Studies, p.13

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The evaluation of the 2006 Reforms also found that despite parents having safety concerns for themselves or their children, they were no less likely to have shared care arrangements than parents who did not have safety concerns⁴.

The safety of children should not be compromised by the courts needing to identify 'an inconsistency'. Given the high number of cases within family courts involving family violence and child abuse, the *Alliance for Children's Safety* agrees with Professor Chisholm's finding that, "it would be unrealistic to treat issues of violence as if they were exceptional⁵".

Requiring the courts to identify an 'inconsistency' places another layer of complexity within the legislation, which can compromise the safety and wellbeing of children. The ability of the courts to identify 'inconsistency' is an even more troubling prospect considering that the bulk of family law matters that proceed to courts are handled by the Federal Magistrates Courts which has no requirement that Magistrates be trained or experienced in Family Law matters,⁶ and the objective of the Federal Magistrates Court is for the process to be "informal, fast and cheap, and to encourage settlement"⁷.

Requiring the courts to identify 'an inconsistency' will be even more difficult in interim hearings where judicial officers will have fewer resources and time available to consider allegations of family violence, as noted in Professor Chisholm's report⁸.

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. Children's emotional and physical safety and the safety of other family members should be a priority in family law. Safe outcomes in families should not be jeopardised by other considerations.

The Alliance for Children's Safety recommends

That the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 have only one primary consideration: 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse and exploitation, neglect or family violence'.

⁴ Kaspiew, R., Gray, M., Weston, R., Moloney, L, Hand. K., Qu, L., 2006, Evaluation of the 2006 family law reforms, Australian Institute of Family Studies,

⁵ Chisholm, R, 2009, Family Courts, Family Violence Review, Commonwealth Government, p.54

⁶ Ibid, p.65

⁷ Ibid, p.52

⁸ Ibid, p.80

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Additionally, this provision should include explicit reference to past family violence and its impact on children. The past experiences of family violence and its impact as well as the individual needs of children should be taken into consideration. Determinations as to which parent a child should live with, and the amount of contact granted to the non-resident parent, must be made in consideration of a child's paramount needs, including the need for safety, constancy and consistency of care, stability and security in their lives. These are the most important considerations of parents who are reasonable and responsible and give priority to their child's needs, before their own 'Rights' and should be reflected in Court considerations.

2. Assessing children's safety case by case. There should be no presumptions in family law

The Act's presumption of equal shared parental responsibility, and the emphasis on shared parenting arrangements over and above other parenting outcomes, place children and other family members who have experienced family violence in danger. The proposed amendments fail to address the safety risks posed by the presumption of equal shared parental responsibility and the subsequent emphasis on shared parenting arrangements.

The presumption does not account for the fact that, for the majority of families engaging in the family law system, particularly the family courts, there is a high incidence of family violence, child safety concerns and other complex issues such as mental illness and substance addiction.

The Australian Institute of Family Studies Evaluation of the 2006 family law reforms, found that 60% of separated parents were in friendly or cooperative relationships⁹. Most separated parents are able to make parenting arrangements with little use of family law services or lawyers. However, for families where complex issues such as family violence, child safety concerns, mental illness and substance addiction exist, there is a high use of the family relationship service system, courts and lawyers¹⁰.

It is, therefore not appropriate that the default position of the family law system (courts and formal family law services) be a presumption of shared parental responsibility, when a significant proportion of the families engaging with family law services and the courts are the very families to which the legislation states this presumption may not apply.

⁹ Kaspiew, R., Gray, M., Weston, R., Moloney, L, Hand. K., Qu, L., 2006, Evaluation of the 2006 family law reforms: Summary Report, Australian Institute of Family Studies, p.34

¹⁰ Higgins, D., Kaspiew, R, 2011, 'Child Protection and family law.... Joining the dots': National Child Protection Clearinghouse Issues, No.34, Australian Institute of Family Studies, p.2

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The current legislation has placed several exceptions on presumption of shared parenting, including where there is 'reasonable grounds' to believe that the parent has been abusive to the child or where family violence is present (Shared Parental Responsibility Act 2006: 61 DA (2)). However, the evidence suggests that these exceptions are not well understood by a majority of parents and a proportion of family law practitioners, and are not applied in many family law decisions¹¹. The AIFS Evaluation noted that despite the exceptions in the legislation the courts are only removing parental responsibility in cases where it considers that there are 'very serious circumstances' of family violence, child abuse and substance misuse and mental illness¹².

Given the broad consensus and large body of research indicating that children's development and wellbeing is significantly compromised by experiences of family violence and child abuse, only removing parental responsibility in cases where the court considers that there are 'very serious circumstances' is not in the best interest of children, as all violence affecting children should be accepted as serious.

The Alliance for Children's Safety, therefore recommends the removal of the presumption for Equal Shared Parental responsibility.

Parenting arrangements, including parental responsibility 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 family violence and abuse are involved.

3. Protecting the safety of primary carers to make children safer

The legislation and the proposed changes do not sufficiently address or articulate the need for Family Law courts and associated services to protect primary carers who have been victims of family violence. A report by Dr Lesley Laing found that women's disclosure of family violence was very often met with disbelief and that in some cases women's concern for the safety of their children lead to the court labeling them as anxious. Women's perceived 'anxiousness' then became the court's focus and not the safety risks caused by history of family violence¹³. Any focus on the protective parent's perceived parenting capacity instead of the perpetrators actions and violence is highly concerning and not in the best interests of children. Indeed for children and other victims of family violence this is a form secondary victimisation.

¹¹ Kaspiew, R., Gray, M., Weston, R., Moloney, L, Hand. K., Qu, L., 2006, Evaluation of the 2006 family law reforms Australian Institute of Family Studies, p.209

¹² Ibid, p.209

¹³ Laing, L, 2010, No way to Live: Women's experiences of negotiating the family law system in the context of domestic violence, p.66

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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'. Family law interventions should support and nurture the relationship between the protective parent and the child and should seek to improve the safety of both the child and the protective parent. It makes sense that if the primary carers of children are emotionally and physically safe from violence and abuse then this will improve the safety of their children.

The Alliance for Children's Safety therefore recommends

That when there is family violence, the legislation should recognise and support the significant role that primary carers have in protecting the lives and wellbeing of children.

Another Priority

In addition to the key messages endorsed by many organizations and individuals the Alliance for Children's Safety notes the importance of improving coordination between the family law system and state/territory based child protection systems.

Improved coordination between the Family Law Courts and Child Protection authorities

The Australian and NSW Law Reform Commission Family Violence Inquiry report notes significant problems with coordination between the family law system and state based authorities, such as child protection agencies¹⁴. This position is supported by numerous other research reports that have found the lack coordination between these two systems to be very problematic. Some of the key problems identified are:

- That State based authorities are reluctant to investigate and respond to family violence and child abuse when family law courts are already involved despite, the Family Law courts not have any investigatory function or capacity¹⁵;
- Evidence from State based authorities not being provided to the Family Law Courts or considered by the Family Law Courts¹⁶

¹⁴ Australian Law Reform Commission & NSW Law Reform Commission, 2010, *Family Violence: A National Legal Response*, 19.87 -19.100

¹⁵ Australian Law Reform Commission & NSW Law Reform Commission, 2010, *Family Violence: A National Legal Response*, 19.87 -19.100 & Laing, L, 2010, No way to Live: Women's experiences of negotiating the family law system in the context of domestic violence, pp.92-3

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The Alliance therefore supports the recommendation made by the ALRC and NSW LRC that:

“Recommendation 19–1 Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children's safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.”¹⁷

Some Key facts and figures

Safety concerns in the context of Family Law

One in five parents held safety concerns relating to ongoing contact with the child's other parent¹⁸.

Those with safety concerns were more likely to indicate use of lawyers and courts¹⁹. Cases where mothers reported serious safety concerns were significantly more likely to be litigated, with just under 60% of cases being litigated. Just over 20% of cases where there were serious safety concerns were resolved through agreement with professional help²⁰.

Safety concerns are associated with lower child wellbeing in all parenting arrangements²¹. Where family violence and safety concerns are present shared care time exacerbates the negative impacts on children²².

Lawyers and other practitioners within the family law system have much less confidence in the system to protect children from harm than they do in the system facilitating involvement of each parent in the child's life²³.

Over 60% of lawyers and other family law professionals believe that the family law reforms of 2006 favour parents over children.²⁴

¹⁶ Ibid

¹⁷ ALRC & NSW LRC, 2010, *Family Violence: A National Legal Response*, Commonwealth of Australia, p.59

¹⁸ Kaspiew, R., Gray, M., Weston, R., Moloney, L, Hand. K., Qu, L., 2006, Evaluation of the 2006 family law reforms: Summary Report, Australian Institute of Family Studies,, p.27

¹⁹ Ibid, p.232

²⁰ Cashmore, J., Parkinson, P., Weston, T.m, Patulny., R, Redmond, G., Qu, L., Baxter, J. Rajkovic, M., Sitek, T. and Katz, I, 2010 *SharedCare Parenting Arrangements since the 2006 Family Law Reforms: Report to the Australian Government Attorney General's Department*, Sydney; Social Policy Research Centre, University of NSW, 81

²¹ Ibid, p.270

²² Ibid, p.270

²³ Ibid, p.219

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Report: The effect of family violence on post-separation parenting arrangements: The Experiences and views of children and adults from families who separated post 1995 and post -1996

Recent research that examined the effect of family violence on post-separation parenting arrangements, which surveyed 931 adults, found that 40% of separated parents who had used the family law system post 1996, were too afraid to tell anyone of their experience of family violence²⁵.

Of the parents who had disclosed family violence, only half believed their allegations were taken seriously. This number reduced significantly for parents who separated post the 2006 reforms with only 28% of women reporting that their allegations had been believed and taken seriously²⁶.

71% of surveyed parents believed that their children had been 'considerably' or 'extremely' harmed psychologically as a result of direct abuse by a parent²⁷

51% of surveyed parents believed that their children had been 'considerably' or 'extremely' harmed socially (for example peer relationship had suffered)²⁸

48% of surveyed parents believed that their children had been 'considerably' or 'extremely' harmed educationally²⁹

25% of surveyed parents believed that their children had been 'considerably' or 'extremely' harmed physically³⁰

14% of surveyed parents believed that their children had been 'considerably' or 'extremely' harmed sexually³¹

A quarter of adults who provided more detailed responses to the survey indicated that the violence to their pre- and post-separation children had been very serious and included overdoses of sedatives, head injuries, abduction of children and confirmed sexual abuse³². Acts of psychological, emotional, verbal,

²⁴ Ibid, p. 220

²⁵ Bagshaw, D., Brown., T., Wendt, S., Campbell, A., McInnes, E., Tinning, B., Batagol, B., Sifris, A., Tyson, D., Baker, J., Fernandez Arias, P., 2010, The effect of family violence on post-separation parenting arrangements: The Experiences and views of children and adults from families who separated post 1995 and post -1996, cited in *Family Matters: Family Law*, Australian Institute of Family Studies, No.86, 2011, p.54

²⁶ Ibid, p.54

²⁷ Ibid, p.58

²⁸ Ibid

²⁹ Ibid

³⁰ Ibid

³¹ Ibid

³² Ibid, p.57

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sexual and physical abuse and neglect of children post-separation were consistently reported by over 250 mothers who provided in depth responses to the survey³³.

Children and domestic and family violence

Almost one in four children in Australia have witnessed violence against their mothers or stepmothers (Crime Research Centre and Donovan Research, 2001, from National Plan Background Paper pg 20).

In 49% of cases where violence was perpetrated by a partner, there were children present. In approximately 27% of cases, the children had witnessed the violence. (2005, ABS Personal Safety Survey).

Violence perpetrated by a previous partner also affects the children living in the home. In 61% of cases where violence was perpetrated by a previous partner, there were children present. (2005, ABS Personal Safety Survey).

Research on the impact of DV on children (who are not also targets of abuse) has found that children under 8 find witnessing violence most traumatic³⁴.

Witnessing or experiencing violence as a child increases sharply the risk of becoming a perpetrator or victim of violence in later life³⁵.

Exposure of children to family violence causes long-term psychological, emotional, physical and behavioural problems. Children living with domestic violence have higher rates of: depression and anxiety; trauma symptoms; and behavioural and cognitive problems, than do children not living with domestic violence³⁶

Being a victim of, or being exposed to domestic and family violence has serious impacts on children of all ages, but affects children of various ages in different ways. Infants are especially vulnerable, and toddlers can develop severe emotional, behavioural and social problems. Pre-school age children are likely to feel that the violence is their fault; primary school children learn that violence is the normal way to resolve conflict and demonstrate aggressive behaviour themselves, at the same time as experiencing difficulties with school work and depression. Adolescents are likely to view the problem as being the

³³ Ibid, p.57

³⁴ Humphreys, C, 2007, Domestic violence and child protection: challenging directions for practice, Australian Domestic and Family Violence Clearinghouse Issues Paper 13, p.10

³⁵ C Coumarelos & J Allen (1998), cited in Background paper to the National Council's Plan for Australia to Reduce Violence Against Women and Children, 2009, 25

(B Perry in M Murburg (ed), (2006) cited in Background paper to the National Council's Plan for Australia to Reduce Violence Against Women and Children, 2009, p.40

³⁶ Humphreys, C, 2007, Domestic violence and child protection: challenging directions for practice, Australian Domestic and Family Violence Clearinghouse Issues Paper 13, p.10

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fault of the victim, and the presence of parental conflict at this stage of development can be a predictor of violent delinquency.³⁷

Violence Against Women in Australia key statistics

In 2005, the ABS estimated that almost 2 in every 5 women (39%) in Australia had experienced some form of violence since the age of 15³⁸. Since the age of 15, 33% of women had experienced physical violence and 19% had experienced sexual violence³⁹.

Since the age of 15 the Australian Bureau of Statistics estimates that, 15% of women (1 135 000) had experienced domestic violence by their previous partner and 2.1% of women had experienced violence by their current partner. Of the women that had experienced physical violence by their current partner 82% of women had not reported the violence to Police and 64% of women that had experienced physical violence by their previous partner had not reported it to the Police⁴⁰. Of the women that had experienced sexual violence by their previous partner since the age of 15 79% had not reported it to the Police⁴¹.

Of the physical violence perpetrated by men against women since the age of 15 in 44% cases the perpetrator was their partner, and in 33% of cases it was a family member or friend. Only in 11% of cases was the violence perpetrated by a person unknown to the women.

Of the 1 293 100 women who had experienced sexual assault since the age of 15, the most recent incident was committed by their previous partner in 21% cases, by a family member or friend in 50% of cases or by their current partner in 2.1% of cases. Only in 22% of cases of sexual assault against women was the perpetrator unknown⁴²

International Violence Against Women Survey (IVAWS)

According to the International Violence Against Women Survey (IVAWS) which was conducted across Australia in 2003-04, 10% of the women surveyed reported experiencing at least one incident of physical or/ and sexual violence in the past 12 months.⁴³ Over one third of women reported experiencing intimate partner violence in their lifetime⁴⁴

³⁷ James, M., (1994) *Domestic Violence as a Form of Child Abuse: Identification and Prevention*, Issues in Child Abuse Prevention No.2 July 1994, National Child Protection Clearinghouse

³⁸ Australian Bureau of Statistics, 2006, *Personal Safety Survey*, No.4906.0, p.17

³⁹ Ibid, p.17

⁴⁰ Ibid, p.21

⁴¹ Ibid, p.21

⁴² Ibid, p.33

⁴³ Makkai, T. Mouzos, J. (2004). *Women's Experiences of Male Violence: Finding from the Australian Component of the International Violence against Women Survey* (IVAWS). NO: 56, P..20, <http://www.aic.gov.au/publications/rpp/56/RPP56.pdf>

⁴⁴ Ibid, p.3

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Men as victims of domestic and family violence

The Alliance for children's safety acknowledges that men can also be victims of family violence, however, there is a dearth of research in respect of men as victims of domestic and family violence⁴⁵. Consequently, Australian and state policy responses to domestic and family violence are situated in a framework of male violence against females.

Studies that indicate men and women assault each other in equal rates have been criticised for their methodologies, including failing to investigate assaults post-separation, which is critical period for assaults against women and does not differentiate initiating acts of violence from acts of self-defence⁴⁶.

The little data that does exist in relation to domestic and family violence towards men indicates that men's experience of domestic and family violence differs significantly from that of women's most notably in that men rarely live in a state of ongoing fear of their female partners who are perpetrators of domestic and family, are less likely to have previous experiences of family violence, and are less likely to experience violence post-separation. Further, many men who identify as victims of domestic violence are often also perpetrators⁴⁷. In contrast, "Women are far more likely than men to be subjected to frequent, prolonged, and extreme violence, to sustain injuries, to fear for their lives, and to be sexually assaulted"⁴⁸.

According to a review of police statistics in Western Australia, domestic violence constituted 19.3 per cent of all forms of violence against females and 1.5 per cent of violence against men. However, this study did not indicate the gender of the perpetrator (ibid)⁴⁹.

⁴⁵ New South Wales Government (2010), *Stop the Violence, End the Silence: NSW Domestic and Family Violence Action Plan*

⁴⁶ Mulroney, J., Chan, K., Men as Victims of domestic violence, Australian Domestic and Family Violence Clearinghouse, p.5

⁴⁷ Ibid

⁴⁸ Flood, Michael (2006) The Debate Over Men's Versus Women's Family Violence. *AJIA (Australian Institute of Judicial Administration) Family Violence Conference*, Adelaide, 23-24 February, p.4

⁴⁹ Mulroney, op cit.