



SUBMISSION IN RESPONSE TO:

## **Family Law Amendment (Family Violence) Bill 2010 - Exposure Draft**

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## ABOUT US

Family Relationship Services Australia (FRSA) is a national peak body. Our purpose is to provide national leadership and representation for services that work to strengthen the wellbeing, safety and resilience of families, children and communities. FRSA member organisations deliver services in more than 650 locations across Australia and work with over 300,000 people each year. They consist primarily of non-profit organisations embedded in local communities.

FRSA provides support to members and draws on their expertise to understand the changing needs of families accessing services and to inform public policy. FRSA also works collaboratively with the Australian Government and its agencies. FRSA receives funding through the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to provide sector representation and support to services funded under the Family Support Program which has three core streams:

1. **Community and Family Partnerships:** providing intensive and coordinated support targeted to disadvantaged communities and families, especially where children are at risk.
2. **Family and Parenting Services:** providing early intervention and prevention services to families to build and strengthen relationships, develop skills and support parents and children.
3. **Family Law Services (Attorney-General's Department responsibility):** assisting families to manage the process and impacts of separation in the best interests of children.

Many of FRSA members deliver a mix of other Australian Government and State/Territory Government funded programs, such as:

- Family violence and sexual assault services
- Child protection services
- Family support
- Community legal services
- Crisis accommodation and support
- Community/neighbourhood centres
- Disability and carer support services
- Mental health services
- Children's services

FRSA works collaboratively with related service networks, peak bodies and advocacy groups to promote effective support for families across these and many other program areas.

For more information visit [www.frsa.org.au](http://www.frsa.org.au).

## RESPONSE TO THE DRAFT BILL

FRSA appreciates the opportunity to comment on the *Family Law Amendment (Family Violence) Bill 2010* - Exposure Draft (the 'Bill').

Practitioners in family and relationship services are at the forefront of family safety and wellbeing. They work regularly with families affected by family violence, including those in which children are exposed to violence and/or may be directly at risk. Often the reason families access support services is because they are separating or separated and have a dispute over parenting arrangements. The Australian Institute of Family Studies reports that in a sample of 9,877 separating parents just over two thirds of mothers and half of fathers report that their partner had either emotionally abused or physically hurt them<sup>1</sup>.

Specific programs including Family Relationship Centres (FRCs), Family Dispute Resolution (FDR), Family Counselling, Children's Contact Services (CCS), Parenting Orders Programs and Supporting Children after Separation (SCASP) are integral to the Australian Family Law System. Changes to the Family Law Act can have both direct and indirect impacts on these services.

In framing this response we have drawn on the wisdom of provider organisations many of which have been providing services to Australian families for over 60 years. We have also had the benefit of reading a draft of Professor Richard Chisholm's submission and will refer to points in that submission where we concur rather than repeat his comments and recommendations.

### PRIORITISING THE SAFETY OF CHILDREN

FRSA supports the placement of a new object in Part VII of the Family Law Act confirming that the Act gives effect to the UN Convention on the Rights of the Child. We have previously advocated in favour of the Convention on the Rights of the Child to be adopted into domestic law and see this as a mechanism to strengthen the expression of values on which the Family Law Act is based.

FRSA also supports the proposed change (item 17) to give greater weight to the primary consideration of protecting the child from harm above the benefit of having a meaningful relationship with each parent where there is an inconsistency in applying the primary considerations. We note the concerns expressed by Professor Chisholm and Professor Parkinson (quoted in Professor Chisholm's submission) regarding the complexities of having a hierarchy of considerations. Nonetheless, in the absence of a full redrafting of the issues to be considered by decision makers it is appropriate to strengthen the attention to protection from harm.

It is important that the Family Law Act does not make assumptions about the best interests of an individual child. This needs to be examined on a case by case basis. Research by Mudaly & Goddard (2006) emphasises the importance of giving children and young people who have experienced abuse or neglect by a parent the opportunity to tell their story and participate in decisions about whether to maintain the relationship, albeit with appropriate safety precautions.

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<sup>1</sup> AIFS (2009) *Evaluation of the 2006 Family Law Reforms*, p 26.

For some children, maintaining their relationship with a parent who has been violent or abusive can be very important to the child's sense of identity and healing. While this research was undertaken within the child protection system, many of the issues are comparable with the family law system with children often torn between securing their own safety and maintaining contact with a parent who they continue to have deep feelings for, despite a history of violence, abuse or neglect. Mudaly & Goddard argue persuasively for children to be involved in identifying ways they can maintain relationships without putting themselves at risk, when this is important to them – while also giving them the choice to suspend or end the relationship if it is no longer contributing positively to their wellbeing. Indeed the research suggests that children are often very good at identifying strategies for staying safe while still maintaining contact with an 'unsafe' parent. The challenge for the service system is to create the capacity to really listen to children and mobilise the resources needed to implement appropriate arrangements, monitor safety and intervene when necessary.

Both of these changes to the Act have the potential to influence the way in which services are provided across the family law system, particularly in relation to the direct involvement of children and young people in decision-making processes. Article 12 of the Convention gives children capable of forming their own views on a matter affecting them, the right to express and to have those views given appropriate weight in decision-making processes. The placement of this new object in the Act has the potential to give family courts, but also the broader professional body working in the family law arena, a stronger mandate to listen to children and duly consider their views. FRSA would like to see this supported with resources to increase the capacity of services to work directly with children. Comprehensive research confirms the benefits of child inclusive practice when properly implemented, particularly in the process of family dispute resolution<sup>2</sup>. Dedicated funding for Child Counsellors and Specialists to work within Family Dispute Resolution services but also Family Counselling and other therapeutic services would enhance the capacity of the system to hear from children directly in a way that is safe and appropriate to their developmental stage.

#### Summary Points:

1. FRSA supports the new proposal to include an object in Part VII of the Family Law Act confirming that the Act gives effect to the UN Convention on the Rights of the Child.
2. FRSA supports proposals to give greater weight to the primary consideration of protecting the child from harm above the benefit of a meaningful relationship with each parent.
3. FRSA recommends that these legislative changes be supported by strategies to enhance the capacity of the family law system to increase the participation of children and young people in decision-making processes and the design of post separation parenting arrangements.

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<sup>2</sup> See for example McIntosh JE, Wells YD, & Long CM. (2007) *Child-focused and child-inclusive family law dispute resolution: one year findings from a prospective study of outcomes*, *Journal of Family Studies*, vol.13 (1) pp 8-25 and McIntosh J E & Long C M (2006) *Children Beyond Dispute: A prospective study of outcomes from child - focussed and child inclusive post-separation family dispute resolution*, Final Report for Attorney General's Department. Family Transitions, School of Public Health, LaTrobe University.

## DEFINING FAMILY VIOLENCE

While we support the intent behind the proposed changes to the definition of family violence outlined in the discussion paper, we are concerned that the draft definition included in the Bill could be problematic.

As outlined in our submission to the Review of Family Violence undertaken by the Australian Law Reform Commission (ALRC) and the NSW Law Reform Commission (NSWLRC), individuals seeking support from family and relationship services are often ambivalent about recognising and naming violence within their family relationships. This can be because they are afraid of the consequences of admitting to violence – it may trigger an escalation in the violence or result in changes to the support being provided (e.g. support services might call in the police or child protection agency). Perhaps, more often, it is because the violence is seen as part of the family dynamic and not clearly identified as unacceptable behaviour. There may be confusion, uncertainty and shame about family violence, yet its impact on family members is often under-estimated or not acknowledged. Family violence lacks clear definition and common understanding in the community.

Current differences in the way that family violence is defined across jurisdictions and legal systems (e.g. family law, child protection) reflects an ambivalence in the community more broadly towards violence within the family. FRSA supports efforts to promote greater understanding of the many forms that family violence can take and the impact it can have, including the impact on children. Clear and consistent definition across legislative frameworks and service systems has the potential to contribute to this by reducing confusion. Behaviour that is illegal is more clearly unacceptable than behaviour that is merely shameful. To this purpose, we support the development of a model definition of family violence that can be used in both Commonwealth and State/Territory legislation as well as service delivery frameworks.

FRSA strongly supports the position articulated by the ALRC and NSWLRC in their *Final Report in the Inquiry into Family Violence* recommending the adoption of a common interpretative framework in relation to family violence across state and territory family violence legislation and the *Family Law Act*. To this end we support replacing the definition of family violence included in the Exposure Draft of the Bill with the definition developed by the ALRC and NSWLRC:

*“family violence is 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) above.”*

FRSA agrees with the Commissions' that adopting consistent definitions of family violence across different legislative schemes allows the courts to send clear messages about what constitutes family

violence. Furthermore we also support the Commissions' recommendations, in Chapter 7, that this definition be complemented in family violence legislation by a provision that explains the nature, features and dynamics of family violence, including: *while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children.* In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous peoples; those from a culturally and linguistically diverse (CALD) background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.

If the ALRC definition is not included in the Bill but an alternative change is considered, FRSA strongly recommends that consideration be given to including a specific reference to stalking behaviour in the definition of family violence. Given the evidence that stalking behaviour is a common precursor to extreme acts of violence such as abduction, familicide and homicide, it warrants specific mention in the definition as a prompt to ensure it is noticed and its implications considered. The reference could be included at point (d) or (f)<sup>3</sup>.

#### Summary Points:

4. FRSA recommends that the definition of family violence included in the draft Bill be replaced with the definition of family violence developed by the ALRC and NSWLRC.
5. FRSA would support broader elements of the interpretative framework developed by the ALRC and NSWLRC also being included in the Family Law Act.
6. FRSA believes that as a minimum, the definition of family violence adopted in the Bill should encompass stalking behaviour.

## IDENTIFYING 'ABUSE' OF A CHILD

FRSA strongly supports the proposed new definition of 'abuse' in relation to a child for the purposes of the Act. However, we recommend that the qualifier "serious" be removed from (d) *serious neglect of the child*. Use of the concept of 'serious neglect' is equivalent to introducing the notion of only *serious* abuse as unacceptable. The Act should include a definition of neglect that ensures it relates to failures of a substantial rather than incidental nature, for example:

*"Neglect can be defined as any passive or active omission/s of a parent or carer that constitutes a failure to ensure that the fundamental needs of the child or young person in their care are adequately and appropriately met, if the failure has caused or is causing significant harm to the wellbeing or development of the child or young person. The harm caused by neglect can be defined as cumulative in nature and distinct from other forms of child maltreatment."* (ACT Government, Office for Children, Youth & Family Support, *Neglect Practice Paper, December 2010 – drawing on Tomison, A., 1995, Spotlight on Child Neglect, Issues in Child Abuse Prevention, Vol 4* <http://www.aifs.gov.au/nch/pubs/issues/issues4/issues4.html>).

FRSA also suggests that consideration be given to further expanding the definition of abuse to include actions by parents that deliberately prolong children's exposure to high parental conflict.

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<sup>3</sup> In her 2005 review of child murder-suicides after separation, Carolyn Johnson identifies specific behaviours including threats of harming children, rehearsal of the act of homicide and stalking behaviour as common precursors or 'warning signs'. Johnson C H (2005) Come with Daddy, Child Murder-suicide after family breakdown, University of WA Press.

As summarised in the Australian Psychological Society's Position Paper 'Parenting after Separation', *parental conflict is a major risk factor associated with poor outcomes for children after separation*<sup>4</sup>. In the family law context, actions that deliberately exacerbate conflict and increase children's exposure to conflict are not uncommon and could be reasonably assessed as abusive and harmful to children.

#### **Summary Points:**

7. FRSA supports the adoption of the expanded definition of child abuse but without the qualifier 'serious' in part (d).
8. FRSA recommends that the Act include a definition of neglect, such as that provided above.
9. FRSA supports further expanding the definition of abuse to include prolonged exposure to parental conflict as a form of child abuse.

### **REPEAL OF THE “FRIENDLY PARENT” PROVISION**

FRSA supports the repeal of the provisions that have been disincentives to disclosure of family violence including the proposed changes to 60 CC (3)c and 60 CC (4) b.

However, we believe that it is unnecessary to remove all of 60 CC (4) and suggest that (4), (4) a and (4)c be retained in the Act albeit with modification. Section (4) could be modified to refer to matters the Court may take into account rather than must take into account. Sections (4)a and (4)c usefully identify behaviours that might be reasonably assessed when considering the extent to which parents have fulfilled their responsibility as a parent after separation. This assists understanding of the meaning of 'shared parental responsibility'.

#### **Summary Points:**

10. FRSA supports the repeal of the provisions in 60 CC(3)c and 60CC(4)b but suggest that 60CC (4), including (4)a (4)c be retained to assist understanding of shared parental responsibility.

### **STRENGTHENING ADVISER OBLIGATIONS**

The best interest of children is at the core of Family Dispute Resolution Practice. FRSA believes there is no need to impose obligations on practitioners to encourage parents to consider the children's interests as paramount as they already do that. Having said that, the obligations are not burdensome as they simply reflect current practice and there is some benefit in having this obligation applied across the various professionals that may be advising a family on a family law matter. Indeed the benefit of having obligations on advisers is that of developing a consistent message that parents hear in every contact with the Family Law System.

#### **Summary Points:**

11. FRSA supports the new obligations on advisers, recognising the benefit in consistency of advice given to parents across the Family Law System.

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<sup>4</sup> APS (2009) Parenting After Separation, p 5 available from [www.psychology.org.au](http://www.psychology.org.au)

## **BRINGING EVIDENCE OF VIOLENCE AND ABUSE TO COURT**

FRSA supports the development of a more comprehensive approach to risk assessment and sharing information pertinent to safety and wellbeing across the Family Law System. To this end we support the intent behind the proposed obligation on parties to inform the Family Court if there have been Family Violence Orders and/or if the child has been the subject of a report or investigation by a child protection or child welfare agency.

Nonetheless, we share the concerns raised by Professor Chisholm that this may have unintended consequences. Reports to child protection agencies may be unsubstantiated and in some cases may reflect a period of high conflict and dispute between parents – for example, it may serve no purpose to revisit accusations parents have made against each other during a period of intense dispute. One solution would be to limit the obligation to only substantiated reports and violence orders that have been tested. Another solution may be to work on information sharing between Family Courts, Police and Child Welfare Authorities such that information may be shared through a common database, rather than by parties raising matters in court. There is, we understand, a very good information sharing system in place in the UK which could provide a model for this.

### **Summary points**

12. FRSA supports the proposed obligations on parties as an interim measure, while recommending the development of information sharing mechanisms between Family Courts, Child Welfare Authorities and the police to improve reporting in the longer term.

## **IMMUNITY FROM COSTS ORDERS FOR CHILD WELFARE AUTHORITIES**

FRSA is aware of the difficulties faced by Family Courts in some jurisdictions where child welfare authorities may be reluctant to become involved in family court matters. Family and relationship service provider organisations have expressed increasing concern about highly complex children's matters proceeding through Family Courts when there are serious child safety concerns but the child protection agencies are not involved. This is an issue we have raised in previous submissions – calling for greater integration between the two legal systems. We fully supports Item 36 of the Family Violence Bill to amend section 117 of the Family Law Act to provide immunity from cost orders to child welfare authorities and officers of the State, Territory or Commonwealth who intervene to become a party to proceedings under the Family Law Act at the request of the court where the officers act in good faith in relation to the proceedings.

### **Summary points**

13. FRSA supports Item 36 to provide immunity from cost orders to child welfare authorities and government officers.

## **CONCLUSION**

FRSA broadly supports the amendments to the Family Law Act contained in the Family Violence Bill. Clear and consistent definition of violence and abuse across legislative frameworks and service systems has the potential to reduce confusion and uncertainty – sending a clear message to the community that family violence and child abuse are unacceptable. This will contribute to enhancing the safety of women and children in the longer term.

**Consolidated list of Summary Points:**

1. FRSA supports the new proposal to include an object in Part VII of the Family Law Act confirming that the Act gives effect to the UN Convention on the Rights of the Child.
2. FRSA supports proposals to give greater weight to the primary consideration of protecting the child from harm above the benefit of a meaningful relationship with each parent.
3. FRSA recommends that these legislative changes be supported by strategies to enhance the capacity of the family law system to increase the participation of children and young people in decision-making processes and the design of post separation parenting arrangements.
4. FRSA recommends that the definition of family violence included in the draft Bill be replaced with the definition of family violence developed by the ALRC and NSWLRC.
5. FRSA would support broader elements of the interpretative framework developed by the ALRC and NSWLRC also being included in the Family Law Act.
6. FRSA believes that as a minimum, the definition of family violence adopted in the Bill should encompass stalking behaviour.
7. FRSA supports the adoption of the expanded definition of child abuse but without the qualifier 'serious' in part (d).
8. FRSA recommends that the Act include a definition of neglect, such as that provided above.
9. FRSA supports further expanding the definition of abuse to include prolonged exposure to parental conflict as a form of child abuse.
10. FRSA supports the repeal of the provisions in 60 CC (3) c but we believe that the part of subsection (4) which articulates shared parental responsibility should be retained.
11. FRSA supports the new obligations on advisers, recognising the benefit in consistency of advice given to parents across the Family Law System.
12. FRSA supports the proposed obligations on parties as an interim measure, while recommending the development of information sharing mechanisms between Family Courts, Child Welfare Authorities and the police to improve reporting in the longer term.
13. FRSA supports Item 36 to provide immunity from cost orders to child welfare authorities and government officers.