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**Comment to the public consultation on the
Family Law Amendment (Family Violence) Bill 2010**

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Submitted by

National Association for Prevention of Child Abuse and Neglect (NAPCAN)

**Name: Richard Cooke
Position: Chief Executive Officer
Phone: (02) 9269 9200**

**Postal address:
PO Box K241
Haymarket NSW 1240**

NAPCAN welcomes the opportunity to provide a comment to the Attorney-General's Department's public consultation on the Family Law Amendment (Family Violence) Bill 2010 ["the Bill"].

About NAPCAN

NAPCAN is Australia's leading advocate for the prevention of child abuse and neglect. Founded in 1987, it is a national, independent, charitable organisation. Its mission is to prevent child abuse and neglect and to ensure the safety and wellbeing of every Australian child.

NAPCAN seeks to motivate and empower all adults to bring about the changes that will prevent child maltreatment by promoting the conduct and dissemination of sound research, informing public awareness and attitudes to children, advocating for changes in legislation and public policy that put the needs and rights of children first, and promoting programs and services which are effective in supporting vulnerable children and families, developing resilience in children and young people, and facilitating social inclusion and child friendly communities.

The United Nations Convention on the Rights of the Child, which Australia ratified in 1990, underpins NAPCAN's commitment to action.¹ The treaty requires national governments to:

... take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.²

NAPCAN recommendations

NAPCAN applauds the efforts to prioritise the safety of children who are affected by family law matters. It is consistent with Australia's obligations under the UN Convention on the Rights of the Child to make the best interests of children a primary consideration in all actions affecting children.

Therefore, NAPCAN welcomes the amendments as we hope that they will better protect children from violent families.

That said, NAPCAN maintains its position that one-size-fits-all legislation is not in the best interests of all babies and children aged 0-18 years.³ NAPCAN believes the shared parenting presumption is not in the best interests of children (even if it may be of benefit to their parents) and favours a child-focussed model. This requires a change in the law to allow for decisions to be made on a case-by-case basis.

¹ See <http://www2.ohchr.org/english/law/crc.htm>

² Article 19(1), Convention on the Rights of the Child

³ Please see <http://www.napcan.org.au/images/uploads/pdf/2c85ikqd6x96.pdf> for NAPCAN's position statement on the shared parenting laws.

Recommendation 1

NAPCAN recommends that the Bill be amended to:

- **allow judges to weigh up a single list of factors when determining what is in the best interests of the child;**
- and
- **discard the presumption that “equal” or “substantial and significant” time with each parent is in the best interests of every child regardless of his/her circumstances and age.**

A genuine ‘best interests’ approach as required by the Convention on the Rights of the Child calls for a careful assessment of the differing needs of each child in each case.

Recommendation 2

The Bill must recognise the particular impact on children under age 4 of shared parenting orders. A simple way to do this is to amend the Bill so that the presumption of equal shared parental responsibility does not trigger a requirement for the court to consider shared care for this age group.

Commentary: one-size-fits-all legislation does not take into account the different stages of development – from infants to young children to teenagers.

The Bill does not set out the minimum conditions under which a shared parenting order may be considered. The proposed s60CC retains shared parenting as a primary consideration, which can only be trumped by a need to protect the child from abuse, neglect or family violence.

The law must be flexible enough to recognise the trauma, that research shows is a particular risk for infants aged 0-4, from repeated disruption to the primary attachment relationship caused by overnight separations.

In studies commissioned by the Attorney-General, collectively published on his Department’s website as *Research on shared care parenting and family violence*⁴, there is strong evidence that shared parenting is not in the best interests of all children, and particularly infants and toddlers.

And although one piece of research concluded that shared care is no better or worse than other kinds of care, it found that “only a relatively small minority of parents ... can share the care of the children and fewer still manage to sustain it for a substantial period of time”.⁵

⁴ All the research is available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyRelationshipServicesOverviewofPrograms_ResearchProjectsonSharedCareParentingandFamilyViolence?open&query=family%20transitions

⁵ Social Policy Research Centre at the University of New South Wales, *Shared Care Parenting Arrangements since the 2006 Family Law Reforms* (May 2010), pp145-6

But for young children aged 0-4 in particular, an Australian longitudinal study which looked at the lives of a sample of well-resourced, low conflict and low risk families, showed that living in two households is not in the best interests of children under the age of 4 years.⁶ The research examined the effects of overnight care arrangements after parental separation on the psycho-emotional wellbeing of babies and young children aged between 0-5 years. It found that:

By four to five years, independent effects of care arrangement on emotional regulation and related psychosomatic outcomes were no longer evident.

[and]

...frequent overnight (shared) care comes at a lower cost to the kindergarten/early school-aged child than it does for the infant under four years old.⁷

The risk is for children under the age of 4 years:

[There are] specific warning flags that may warrant attention in the course of decision-making about the overnight care of children under four years of age. Specific markers for young infants under two years were irritability, vigilant efforts to monitor the presence of the primary parent, and for 2 - 3 year olds, higher rates of problem behaviours and poor persistence in activities and exploration. This study has described at length the possible mechanisms through which these risks occur, namely repeated disruption to the primary attachment relationship whose function is to co-regulate the developing infant while emotional regulatory systems of the brain are at a critical period of establishment.⁸

The Bill does not address the impact on infants' developmental security at all. Neither the Bill nor the existing *Family Law Act* differentiates between a one year old and a 16 year old when determining what is in a child's best interests.

NAPCAN considers this to be an extremely serious omission. If we are to get this right, the legislation must contain a more comprehensive and flexible approach to an assessment of 'best interests' that prioritises children's developmental needs, not just their protection from violence.

⁶ *Overnight care patterns and psycho-emotional development in infants and young children*, from Family Transitions, *Post-separation parenting arrangements and developmental outcomes for infants and children: Collected reports* (2010)

⁷ *Ibid.* at 152 and 157

⁸ *Ibid.* at 156

Recommendation 3

The Bill must include a mechanism to ensure children’s meaningful, effective and child-friendly participation in family law matters

Commentary: All children have the right to be heard in any judicial or administrative proceedings affecting them⁹ and at present, the family law system fails to ensure this right. In order to give effect to it, there needs to be an obligation on advocates to involve children to the full extent of their ability. The onus must be on advocates to obtain children’s views in an age-appropriate manner.

Unlike in criminal matters, where children from age 10 can directly instruct their solicitor, children’s participation in family law matters is limited to second-hand reports prepared by adults that describe the children’s views.

The Bill must provide a mechanism by which all children in family law cases make their views known. This can be achieved in a child-friendly manner, without traumatising children or requiring them to be present in court, as other jurisdictions have successfully shown.

Conclusion

NAPCAN thanks the Attorney-General for the opportunity to contribute to the public consultation.

NAPCAN also welcomes the opportunity to continue its engagement with the Government to ensure the best interests of children remain at the forefront of policy.

⁹ Article 12, UN Convention on the Rights of the Child. For an excellent commentary on how to ensure children’s participation, see <http://www.unicef.org/voy/media/CRC-GCArt12-Draft3-Gerison-31july2007.pdf>