Submission to the Family Law Amendment Bill 2023

June 2023

For further information in relation to this submission please contact:
Engender Equality
03 6278 9090
admin@engenderequality.org.au

This report was produced on the lands of the muwinina people, who due to the impacts of colonisation, did not survive invasion. Engender Equality pays its respects to the present Tasmanian Aboriginal community and pledges its commitment to fighting for Tasmanian Aboriginal justice and rights. This always was, and always will be Tasmanian Aboriginal land.

This submission was prepared for Engender Equality by Advocate for Change, Caroline Noulton

EMPATHY. INSIGHT. ADVOCACY.

Introduction

Introduction Engender Equality is Tasmania's state-wide specialist family violence service, providing frontline counselling and support to all people affected by family violence and abuse, alongside advocacy, community education and training to address gender inequality and gendered violence in all its forms. Established in 1987, we are a Tasmanian leader in promoting gender equality and addressing family violence to benefit the whole community. We welcome the opportunity to comment on the Family Law Amendment Bill 2023.

We provide:

- Trauma-informed and evidence-based counselling
- Locally sourced information
- Specialised, world-class, evidence-based resources
- Education and support for individuals and groups affected by violence
- Community training and education
- Referral, where appropriate
- Advocacy for systemic change to gender inequity and violence against women

Engender Equality's Position on Family Law Reform

Reform to Australia's Family Law System is long overdue and desperately needed. We note that there have been a myriad of inquiries and reports focused on the Family Law system since the inception of the *Family Law Act* in 1975, that have highlighted serious failures and deficiencies with the system that have severely impacted Australian families.

While Engender Equality is supportive of system reform of current family law legislation, we note that the current *Family Law Amendment Bill 2023* does not go far enough to resolve issues of the magnitude that have been identified in previous inquiries, including:

- The lack of acknowledgement of the different presentations, impacts and trauma of family violence on the family environment, parenting styles, and children's wellbeing
- The lack of acknowledgement of the child as a victim-survivor of family violence, regardless of whether the violence was directed at them or their parent
- Women, especially victim-survivor's, unequal access legal representation involving family law matters, and increasing needs for self-representation
- Ongoing instances of gender bias within the Family Law system
- The use of the Family Law system as a tactic of systems abuse by perpetrators
- The minimization of abuse that is not physical in nature within Family Law matters
- The need for a Royal Commission into the Family Law Courts of Australia to inform meaningful reform of the problematic, dangerous and inadequate family law response in Australia

Family Courts are Family Violence Courts

Most cases before the Family Courts in Australia are characterised by the presence of family violence. The Federal Circuit and Family Court of Australia itself has identified that 67% of parties engaged in parenting matters have indicated they have experienced family violence from the other party within the family environment.

Engender Equality supports the greater focus on the best interests of the child held within the *Family Law Amendment Bill 2023*. However, we propose increased attention and acknowledgement must be given to the fact that the best interests of children are closely linked to the health and safety of their parents and caregivers.

Family violence impacts children negatively, even when the violence is not directed at them. Witnessing violence, including emotional abuse and coercive control, directed towards one of their parents is also extremely harmful and associated with negative short and long-term consequences for children.

The Family Law system is currently trying to apply a legal solution to what is inherently a psycho-social problem. For outcomes to improve for children who are victim-survivors of family violence in their own right, the Family Law system needs to take a trauma-informed approach overseen by experts from the specialist family violence sector. The Family Law framework in its entirety will remain flawed if it continues to ignore the root of the problems that cause people to seek intervention in the Courts.

The Family Court System is essentially operating at the coal face of Australia's family violence epidemic. Without the consideration and genuine embedding of context around the presentations, impacts and trauma for children exposed to family violence within the *Family Law Act* and the decisions it informs, will we be able to see the change essential to ending family violence in this country, instead of enabling it.

The Issues Surrounding Gender in Family Law

Meaningful change to Australia's Family Law system will only happen when the gendered drivers of violence as well as the intersectional factors that impact experiences of violence become a core focus in Family Law legislation and the family law framework it informs in our society.

The family violence epidemic is almost entirely gendered, with the victim population overwhelmingly comprised of women (and subsequently their children) and the perpetrator population almost entirely comprised of men. This is not reflected in both the current legislation, nor judicial decisions made with the Federal Circuit and Family Court of Australia.

Further, current research and knowledge informing Family Law legislation remains largely heteronormative and does not adequately deal with violence and family dynamics in LGBTI families, leaving the response to their family situations largely inadequate.

Women are disadvantaged by legal systems globally, and within Australia, including matters regarding Family Law. Legal support is particularly difficult to access for women in the Family Law setting where legal supports are often geared towards criminal law support rather than family law. Many women are

unable to access legal support and are required to self-represent, with the number of self-represented litigants increasing in recent years.

Legal support is particularly difficult to access for women in family law matters. Often the primary carers of children from the separated family, and due to their gender, often in casual or part time work in lower-paid industries, the costs of private representation in family law matters is often prohibitive. While community legal services are able to provide assistance to women unable to afford representation, funding limitations and limits in scope and specialization able to be provided can provide yet another barrier to women seeking assistance. Merit tests for legal aid also consider jointly owned assets separated women may still own, but do not have access to, making them ineligible for this form of support. As a result, many women engaged in the Family Law System are forced to self-represent in court proceedings, leading to unequal representation amongst parties, and unfavourable and unsafe outcomes.

Engender Equality references the 2004 Report by the Senate Standing Committee on Legal and Constitutional Affairs *Inquiry into Legal Aid and Access to Justice* which discuss the extensive disadvantage women face when accessing the Family Law System in Australia detailed above. It cannot be ignored that many of these issues, highlighted almost two decades previously in this report, remain today as primary barriers to women's access to justice in the family courts.

Most women engaged in Family Law proceedings have experienced family violence in their relationship, leading to their need for direction from the Family Law system to ensure their children's safe engagement with their perpetrator. The system as it stands today, led by the concept of equal shared parenting and ill-informed and executed consideration of the impacts of family violence on children, are not only inadequate, but profoundly traumatic for women and their children who are forced to co-parent, and be parented, by men who chose to use violence.

It is unacceptable that these issues of gender discrimination within the Family Law system continue today, knowing that governments have been aware of these issues for decades. We at Engender Equality wonders what will it take for these issues to be meaningfully addressed by our government, and demand that meaningful consideration of the gendered issue of family violence and its impact on children are more widely considered in current reforms of the *Family Law Act (1975).*

Gender Bias in Family Law

As we are widely aware, due to robust national and international research, one of the primary drivers of violence towards women is rigid gender stereotyping around women's place in our patriarchal society, including within families as wives and mothers, that perpetuate gender inequality at the root of the existence of family violence.

Gendered stereotyping is evident within the Family Law system and must be rigorously addressed in the further consideration of legislative reforms to eradicate the discrimination of women within the Family Courts based on their adherence to gendered expectations.

Engender Equality, as a specialist family violence counselling and support service, consistently work with women who are victim survivors of family violence, and who have faced gendered discrimination and bias within court proceedings enacted by the Federal Circuit and Family Court of Australia.

"I feel as though I was punished for being a relatively strong, articulate woman in the family law court. I was treated as though my complaints of family violence couldn't be true because I wasn't behaving like the perfect victim, and being a weak, blubbering mess"- Victim-Survivor Advocate

"My lawyers have always advised me not to mention family violence unless there is physical violence present because emotional abuse is not recognized as being serious in family law and might reflect badly on me. Apparently, the courts can view a woman's complaints of violence as simply being a tactic to take children away from fathers"- Victim-Survivor Advocate

"I feel that I have definitely been discriminated against in family law on the basis of my gender. My child's father is always viewed as being a great dad when his contribution to parenting is minimal. I have always wondered if the tables were turned and it was me as the mother who contributed so little, whether I would be viewed as being a great mother. My feeling is that I would not- that I would be viewed as negligent"- Victim-Survivor Advocate

"Parental alienation may not be a concept that has made its way explicitly into family law in Australia the way it has in other countries, but I sense that it still has a strong influence on the way the system operates in Australia. There seems to be a perception that women make up allegations as a way to discredit the father of their children. The burden of proof in terms of having allegations of family violence considered seems to be so high that only extreme or physical violence will be considered"- Victim-Survivor Advocate

"While I was on the stand being questioned about family violence allegations that I had made, the Judge said to me "I suppose you think family violence is only something that impacts women". I did not know how to respond to this as I had not made any such claims about the broader issue of gendered violence. I was only giving evidence about the specific allegations of family violence about which I was being questioned"- Victim-Survivor Advocate

"If they have been victims of financial abuse, their ex-partner is actively avoiding child support obligations, and they had had to leave and start again- chances are they won't have $30 plus grand available to employ a lawyer in any court, let alone a family court" Victim-Survivor Advocate

"I have felt so alone throughout my years going through the family law system. I feel completely out of my depth when it comes to reading and understanding the laws and having to represent myself in court. I tried to get legal advice, but all the free legal services are at capacity. I enquired about paying for legal representation and I was quoted in excess of $35,000, which I simply cannot afford. As a victim of financial abuse, I have no back up funds, let alone this amount of money in my bank" Victim-Survivor Advocate

'Judges need to be more knowledgeable, dig deeper about the complexity of children's experiences of coercive control. They need to listen to mothers who have experienced coercive control and not dismiss the allegations.' - Victim-Survivor Advocate

'I was cross examined and had to cross examine my abuser in a family court as both of us were self-represented. As a result of this experience of cross examination, I have suffered PSTD, was sedated for a couple of months, had to close our family business, and have been unable to return to work for the past 18 months.' – Victim-Survivor Advocate

Condoning of Violence Against Women

While there has been increased awareness and discussion about violence against women in recent years, the fact remains that levels of violence against women have not improved. Despite the acknowledgement we are facing a national crisis in Australia when it comes to family violence, the statistics reflecting that one woman is killed by a current or former partner per week in Australia remains.

The Family Law system is an essential focus point for addressing family violence and it is currently failing to do this, nor ensure the safety of women, and particularly children, that they have the unique opportunity and mechanisms to protect.

The issue of family violence is not being addressed within the Federal Circuit and Family Court of Australia, which repeatedly forces victim survivors of family to attempt to co-parent with their abusers, condemning both themselves and their children to a life of continued abuse, and further risk to emotional and physical safety.

The family law system in reality, works to perpetuate the violence, by leaving victim-survivors unable to escape their abusers.

When family violence is minimised or ignored within the Family Courts, the perpetrator's use of violence is validated and sends a message to abusers that their behavior is acceptable, while conversely communicating to victims that their health and safety do not matter in the context of safely parenting their children.

Engender Equality speak to countless victim-survivors every week who have been traumatised and re-traumatised in the Family Law Court and have been forced to abide by Orders made by the Family Law Courts that facilitate their ongoing abuse, and heighten their risk to safety, and that of their children.

"The very high bar that is currently set for behavior to be considered abusive allows perpetrators to get away with ongoing abuse because they can fly under the radar. They can do just enough to terrorise you without breaking any laws, or by only pushing the boundaries of law breaking"- Victim-Survivor Advocate

"Many processes that lead to court are so focused on "dispute resolution" that they can become tunnel visioned in trying to resolve the issue and to have an agreement between parties, ignoring

the signs of abuse that are there. Parties can be harassed and coerced into agreeing to arrangements that they do not believe are in the child's best interests"- Victim-Survivor Advocate

"The Judge in my case was trying to force my child's father and I to agree on something he was proposing. He threatened us that if we don't agree that we are basically assigning decision making for our child over to a complete stranger. He then told us that he has the power to take our child away from both of us, so neither of us would have any custody of him. It did not feel safe to disagree with him and I felt I had to do what he said, or he would punish me"- Victim-Survivor Advocate

Family Courts are Failing to Recognise Post-Separation Abuse.

It is well known that family violence does not automatically end when a relationship ends. In fact, the most dangerous time for women who leave their abusers is after the relationship ends, and particularly, at the intersection of engagement with the Family Law system.

It is common for abusers to attempt to retain control over their ex-partner for many years after separation, and many use the tactic of ongoing, frivolous and vexatious engagement in family law matters as a way of continuing to exert control over their victim via continued abuse, manipulation, harassment and threats.

'The impact of this is that abuse is taken less seriously by authorities when the relationship ends, which can be a fatal mistake. Studies have shown that abuse often escalates post separation, and that homicides more often occur after a relationship ends. I think that failing to address post-separation abuse as being as big a problem, and so often as dangerous a problem, as abuse within a relationship, leaves a gaping hole for victims to fall through.' – Victim-Survivor Advocate

"The judge in my trial said that since we had separated over 10 years ago, that family violence would not be considered as a factor in his findings. This is despite me providing lots of evidence of post-separation abuse. He actually said that in his reasons for judgement"- Victim-Survivor Advocate

"My perpetrator uses legal systems to continue engaging with me, as it's the only way he can force me to engage now. We are currently embarking on our sixth round of legal proceedings in ten years, with a third trip through the family law courts likely to be our seventh later this year. These legal proceedings have all been initiated by my abuser and have occupied hours and hours of my time, and utilised massive amounts of my energy"- Victim-Survivor Advocate

'I am tethered to my abuser by family court orders, and I am required to try to co-parent with him while he actively counter-parents. I cannot escape my abuser and have been forced to try to live my life as best I can while the abuse is ongoing. At times this has felt like living a nightmare.' – Victim-Survivor Advocate

Coercive Control

Under current legislation and practice with the Federal Circuit and Family Law Courts, coercive control, while widely recognized as an insidious, dangerous and highly traumatic form of abuse closely tied to cases of intimate partner homicide, remains largely ignored and unacknowledged within family court proceedings. Many victim-survivors report of their inability to have coercive control recognised as a legitimate and damaging form of abuse within family law proceedings, based on the belief, and legal advice, that abuse is only damaging or "real" if it is physical in nature. This approach to family violence and assessing risk to safety of both the victim-survivor and children during proceedings often results in the invalidation of the very real experiences of family violence victims who have experienced emotional abuse and coercive control, and the significant risk to safety it poses. Further, such an approach aids in encouraging and validating abusers who choose to use this type of abuse.

In further considering reforms to the Family Law Act (1975), Engender Equality appeals for the essential addressing of the impacts of coercive control, and the propensity for a heightened risk to safety patterns of continued and sustained control can have, not only on the victim-survivor, but on their children.

More recently, research has shown that parents who use coercive control tend to exhibit similar behaviours in parenting, which has the potential to further traumatize and impact child victims of family violence and increase the risk to their emotional and physical safety while in that parent's care. The robust exploration of this risk to safety and impact on safe and positive parenting MUST be considered when addressing family environments impacted by coercive control and emotional abuse.

> *"I have been told time and time again by lawyers not to bother mentioning abuse unless it is physical. If you mention it, you run the risk of being deemed a liar or that you are just making it up to get at your ex" - Victim-Survivor Advocate*
>
> *"There is a lot of victim-blaming that goes on in the family law court still. An idea that the solution to ending abuse, is to leave, and when you do leave, that the abuse just ends. It makes you feel like you are crazy or that what you are going through is not legitimate now that you have separated"- Victim-Survivor Advocate*
>
> *"The courts expect me to just move past my abuse and start to co-parent with my abuser. There is no acknowledgement about how hard that is, to not only ignore the damage your abuser has done to you, but to encourage your children to have a relationship with your abuser. To hand them over to your abuser"- Victim-Survivor Advocate*

Children as Victims

It has long been widely accepted that family violence, as considered by the Family Law Courts, and within Family Law legislation, is limited to violence perpetuated only between those within in a relationship, in this context, between parents.

It is now widely accepted and reflected in numerous studies and research, that even the presence of family violence within the family environment significantly damages children, their emotional wellbeing, cognitive and physical development, even when it is not directed at them.

It must be widely acknowledged within further consideration of reforms to the *Family Law Act (1975)* that the abuse of a parent is abuse of a child. Careful consideration must be given to the impacts family violence has on the child who alongside the victim-survivor parent, feels the fear, trauma and risk to safety as a result of living within the presence of violence, regardless of the form of abuse present.

> *'Children and young people can be direct victims. They can experience it in much the same way as adults do, feeling confused and afraid, living constrained lives, and being entrapped and harmed by the perpetrator.' – Victim-Survivor Advocate*
>
> *'Children may find it hard to comprehend and verbalise their experiences and it is no different to a mother who has experienced coercive control. It is a silent abuse that leaves the victim completely powerless and some commit suicide.' – Victim-Survivor Advocate*
>
> *'My son can't understand why he can't have any say. He is being forced to spend half of his school holidays with his father, who spends very little of that time actually interacting with him. My son feels angry about it- angry at the courts, angry at his powerlessness and angry that he is being controlled- both by his father and by the system who he feels supports his father. '– Victim-Survivor Advocate*
>
> *'All of the mental health issues that I have developed due to this coercive control have taken away my ability to be fully present for my children. My health has suffered, and my finances have suffered. All of these things take away from the resources I have for parenting my children. My children have been harmed by the abuse I have been subjected to, and this has not been recognised by the legal system at all.' – Victim-Survivor Advocate*

Family Courts as a Haven for Abusers

Engender Equality strongly suggests a higher level of scrutiny of Section 121 Laws in the further consideration of reforms to *The Family Law Act* (1875). These laws, enacted to prevent experiences in the Family Law system from being shared by parties outside the court's confines arguably cause as much harm to victim-survivors as they are intended to cause protection.

While we acknowledge the sentiment behind protecting the identities of parties to Family Law proceedings is somewhat understandable, it comes at the cost of preventing transparency in what is ultimately a very powerful system.

It must be understood that with great power comes greater accountability, a concept that Judicial Officers within the Federal Circuit and Family Law Court are exempt from, by laws that do not allow for scrutiny of decisions or transparency around decisions made.

Section 121 Laws, in preventing victim-survivors from sharing their experiences beyond the court's realm, has protected the decisions of the Court from public scrutiny, community input and from the responsibility of remaining accountable to the society in which they are entrusted to provide justice.

Engender Equality considers the lack of accountability this allows the court to be a primary reason for why the issues identified within the Family Law system have gone unanswered for so long.

Further, we are concerned about the impact being unable to share their stories has on victim-survivors, who have so often been silenced by their abuser, and again, have their right to agency and their own stories and experiences taken from them. We know that in sharing their stories and experiences, victim-survivors are able to advocate for change, find opportunities for peer support, and embrace the ability to educate and create awareness of the issue of family violence in their communities, as an important part of their recovery from the trauma violence brings. Instead, due to section 121 laws, victim survivors must rely entirely on processes such as this, and organisations such as Engender Equality to speak on their behalf.

> *"I feel like I have suffered abuse by the system as much as by my perpetrator. The things that have been said and done to me during my time in the Family Court system have been permanently damaging to me. The Courts do not recognise nor understand abuse and how impactful it can be. They diminish your experiences of abuse, blame you for them and then order you to hand your precious children over to your perpetrator. It is a special type of torture"- Victim-Survivor Advocate*
>
> *"Until I had specific family violence counselling, I felt completely alone. I had no idea that others had been through what I have been through in the Family Courts. As a result of this, I felt so much shame and self-blame as I didn't realise that the problems were so far-reaching. I thought it must have been just me and that I had failed myself and my child"- Victim-Survivor Advocate*
>
> *"I have not been able to share my experiences with anyone and that is so hard. When you go through something like cancer, you can tell people and they can rally around and support you. When you are going through the Family Law Courts with your abuser, you can't tell anyone. You are going through the hardest thing you have ever done, and you are all alone"- Victim-Survivor Advocate*
>
> *"I have spoken to media about my experiences, and they are too scared to print anything to do with Family Law Courts. The Family Law system is such a huge part of my story and has shaped who I am today, yet this huge chunk of my story will always be a secret" - Victim-Survivor Advocate*
>
> *"My abuser is constantly vindicated by legal systems and as a result, he continues to abuse both me and my son. Because the abuser is never considered severe enough to be a factor in determining the Orders, it continues. It further empowers my abuser and sends the message to him that he is indeed entitled to control me" - Victim-Survivor Advocate*

Is it Time for a Royal Commission into the Family Law System?

Given the sheer volume of work that has been conducted to examine the issues with the Family Law System and resulting recommendations for its reform that have consistently gone unanswered over several decades, it is clear that the will to meaningfully address the significant issues in the Australian family law courts has been lacking across successive governments.

It is with some skepticism that Engender Equality support this Bill, knowing that it is but a fraction of the work that ultimately needs to be done to repair this broken system.

As a victim-survivor told us:

> *"I don't have any faith in these changes being meaningful. The culture of gendered discrimination in family law seems too ingrained for any tweaking around the edges to bring about the necessary changes. They brought in changes that meant that if there were allegations of family violence, that the alleged perpetrator could not directly cross-examine the alleged victim. This was not implemented for me. I was cross-examined by my perpetrator and suffered acute post-traumatic stress disorder as a result. I lost my business, 3 months of my life and have not been able to return to work for nearly three years since. While this system continues to operate under the veil of secrecy it is currently afforded, I fear that women and children will continue to suffer as I have. It's heart-breaking"- Victim-Survivor Advocate*

Engender Equality acknowledges and wholeheartedly supports calls for our government to enact plans for a Royal Commission into the Family Law System to allow for the nuanced, comprehensive and independent examination of the harms the past and current system has had on families and victim-survivors of family violence. We believe that only a Royal Commission will allow for the robust reform required to reinvigorate the Federal Circuit and Family Law Court of Australia to work meaningfully and genuinely to protect a child's right to safety, to a family free from violence, and a positive childhood guided by loving and protective parents.

Conclusion

Engender Equality commends any effort made by the Australian Government to reform the *Family Law Act (1975)* and acknowledges and appreciates the positive impact the reform of equal shared parenting laws will have on families who have been impacted by family violence.

However, we ask the Government how the reform of equal shared parenting rights and other amendments held within the *Family Law Amendment Bill 2023* will be successfully and meaningfully enacted without reforms considering the inadequate consideration of the impacts of all forms of family violence on children as victim survivors in their own right; the continued risk to safety co-parenting with a violent abuser presents; and how the past and continued use of all forms of family violence by a parent can indicate unsafe parenting practices, placing the child at risk.

It is in this context that Engender Equality welcomes positive reforms to the *Family Law Act (1975)* but appeals to the Federal Government to commit to a Royal Commission into the Family Law Courts over its tenure and enact holistic reforms that will act genuinely to protect children from family violence in Australia.