



Peninsula Community
Legal Centre Inc

**SUBMISSION TO THE
FAMILY LAW BRANCH
ATTORNEY-GENERAL'S DEPARTMENT
PUBLIC CONSULTATION:**

**EXPOSURE DRAFT, FAMILY LAW
AMENDMENT (FAMILY VIOLENCE) BILL 2010**

14 January 2011

1.0 INTRODUCTION

Peninsula Community Legal Centre (PCLC) welcomes the opportunity to make a submission with respect to the Exposure Draft, Family Law Amendment (Family Violence) Bill 2010 (hereinafter referred to as the “bill”). PCLC broadly endorses the promising response to the issue of family violence and the need for legislative reform, however PCLC also views the scope of the bill as somewhat limited and advocates for further reform.

The submission of PCLC has focused on those areas that PCLC believes are of particular importance to our clients and may require further investigation and/or review in the development of initiatives which appropriately address family violence.

PCLC acknowledges that significant reforms are required within the family law system, in particular, to ensure that women and children are not exposed to, or placed at risk of, family violence. PCLC believes that the primary objectives of any family violence protection should be:

1. To ensure the safety of victims, inclusive of children who witness family violence;
2. To ensure that a perpetrator is held appropriately accountable for their actions;
3. To restore the victim’s capacity to make decisions for themselves; and
4. That the best interests of the children are the paramount consideration in making any decisions concerning children’s living and contact arrangements, particularly in the context of proven family violence.

PCLC commends the Commonwealth Attorney-General’s Department on their commitment to legislative reform and would welcome the opportunity to participate in further discussions concerning aspects of the development of the legislation, as well as involvement in the development of initiatives to improve the response of the justice system generally to family violence.

2.0 PENINSULA COMMUNITY LEGAL CENTRE

PCLC is a not-for-profit organisation that has been providing free legal services to Melbourne's outer south east communities for over 30 years. Its mission is "To empower and support disadvantaged community members of the South East and Westernport Region to use the law and legal system to protect and advance their rights and broaden their awareness of their rights and responsibilities."

PCLC's staff and volunteers provide clients with free and accessible legal services, particularly the most disadvantaged and marginalised in our community who may otherwise fall through the gaps. Our clients' life circumstances can be severely affected by their legal problems and they are often not able to access other legal services. Being able to obtain free legal assistance can often help our clients move on with their lives and become active participants in their local communities.

Underpinning all service delivery is a philosophy of client empowerment and recognition of the inherent dignity of all people. In casework services, this translates to a focus on informed decision-making by clients and supported self-help wherever appropriate, so that clients achieve the confidence and skills to navigate the legal system. Most of the Centre's clients could not afford a private lawyer and would not qualify for legal aid. Their right to equality before the law might be meaningless if not for the work of the Centre in resourcing and directly assisting them to uphold their rights.

The Centre also has a strong commitment to empowering the broader community through community development and community legal education activities, viewed as core functions of the Centre. The Centre is regarded by the local community as its key legal resource, organising and participating in forums about legal issues, providing customised workshops and reporting on policy issues that affect the community through local media. Across the community, the Centre endeavours to improve understanding of legal issues through its education activities, as well as supporting community groups and participating in relevant law reform activities.

In addition to the above, PCLC provides duty lawyer services in the specialist family violence intervention order program at the Frankston Magistrates' Court and in family law matters at the Federal Magistrates' Court at Dandenong. A Family Law specific program is operated by the Centre to address the obvious need for family law services identified by the level of demand for family law advice from PCLC each year.

Complementing the family law program, PCLC also operates programs in Child Support and Tenancy and Consumer Advocacy.

3.0 EXPOSURE DRAFT BILL PROPOSED AMENDMENTS

Rights of the Child

PCLC supports the inclusion of an additional object and principle in children’s matters under Part VII of the Family Law Act to consider the rights of children. Such an inclusion is consistent with Australia’s international obligations as a signatory to the United Nations Convention on the Rights of the Child.¹

Definition of Family Violence

PCLC strongly supports the broadening of the definition of ‘family violence’ to include a wider range of behaviours. PCLC notes that the proposed definition is similar to that contained within the family violence legislation of Victoria and is in alignment with the recommendations made by the Australian Law Reform Commission (ALRC), in their report, *Family Violence – A National Legal Response*.²

Professor Chisholm has, in his submission to the bill, raised some concerns about the drafting of the new definition of family violence, which PCLC shares.³ In particular PCLC is concerned that the new definition of family violence is limited to behaviour included on the list and does not include an overarching context for the behaviour that focuses on a pattern of violence, or behaviour used to coerce, dominate or control others in the family. Without such a general statement, it is foreseeable that a perpetrator of family violence could use attempts to resist violence, or actions of self-defence, to accuse the victim of violence or of mutual violence. PCLC strongly recommends that the definition includes such a contextual statement, which is followed by a list of various behaviours as examples. Such drafting would allow for other forms of violence not specifically listed to be taken into account in individual cases.

It is imperative that any broadened definition of family violence does not result in unintended consequences for victims of family violence and in turn, their children.

PCLC supports the wording of the ALRC proposed definition, (recommendation 5.1)⁴, which in our belief addresses all of the issues that have been raised:

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:

¹ Convention on the Rights of the Child, resolution 44/25 of 20 November 1989, <<http://www2.ohchr.org/english/law/pdf/crc.pdf>> at 4 January 2011.

² Australian Law Reform Commission Report 114, *Family Violence – A National Legal Response*, October 2010, p.55

³ R. Chisholm, Submission on Exposure Draft, Family Law Amendment (Family Violence) Bill 2010, pp.9-11.

⁴ Op cit, n2, p.246

- (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.*

Definition of Abuse

The broadening of the definition of child abuse in s4(1) to recognise that children are harmed through exposure to family violence, more appropriately reflects current understandings about the many means by which children are harmed by violence, and is supported by PCLC.

The proposed s4(1AD) explicitly defines exposure to family violence and links directly to consideration of the best interests of the child principles (s60CC(2)). This definition of exposure to family violence would be greatly improved through the inclusion of all forms of family violence as defined in the new bill. PCLC believes that there needs to be some clarity and cohesion between the two definitions, which is supported by the ALRC findings. The ALRC report states, “child abuse is an element of family violence and family violence may be an important factor in child neglect. For the victims it is therefore difficult to separate these experiences ... The Family Law Act distinguishes between ‘family violence’ and ‘abuse’ of a child. The same conduct in relation to a child however, may constitute both family violence and child abuse.”⁵

Primary Considerations of the Legislation

The two primary considerations (‘the twin pillars’) for making decisions about children effectively remain unchanged in the new bill, with the goals of children having a meaningful relationship with both parents and the children being protected from harm. The proposed

⁵ Op cit, n.2, paragraph 19.16, p.895

change is to make provision, in the event of inconsistency between the goals, for the protection of children from harm to be given primacy.

This amendment is to be commended, but it is not the preferred option of PCLC for dealing with the inherent problems that these two, oft competing goals give rise to.

PCLC believes that the legislation would best be amended, through the removal of the primary considerations, and replacement with one list of best interest factors for consideration, where the primary aim is the protection of children from harm. In such a situation, scope is provided to the courts to determine each individual case based upon all of the relevant factors from the list of matters to be considered in the determination of best interests.

While the proposed amendment, s60CC(2A), is not the approach favoured by PCLC, it is certainly an improvement on the current law and therefore supported.

Repeal of the Friendly Parent Provision

Currently, the Family Law Act lists, among the ‘additional’ considerations, each parent’s willingness and ability to facilitate and encourage a close and continuing relationship between the child and the other parent.⁶ PCLC agrees with and endorses the reasoning included in the Consultation Paper, noting that it is “important that legislation does not create barriers to raising concerns about these issues”, and testifies to the recent reports which “indicate that some lawyers caution parents against alleging family violence or abuse where there is limited evidence, to ensure that victims of family violence are not characterised as an ‘unfriendly parent’”.⁷ To address this issue the bill proposes to repeal paragraph 60CC(3)(c) and subsections (4) and (4A).

PCLC supports the simplicity of repealing paragraph 60CC(3)(c), which would be an improvement to the current provision and would in our opinion redress some of the problems identified in the consultation paper pertaining to family violence.

PCLC, however, is not supportive of the repeal of subsection 60CC(4). PCLC believes that these subsections had some positive aspects which were helpful in determining the best interests of children. Subsection (4) requires the court to take into account ‘the extent to which each of the child’s parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent’ and specifies how this is to be undertaken. There is reference to facilitating the

⁶ Section 60CC(3)(c) Family Law Act

⁷ Exposure Draft Family Law Amendment (Family Violence) Bill 2010, Consultation Paper, November 2010, paragraphs 15 and 16, p.6

child's relationship with the other parent, but there is also reference to various other matters, such as participating in decisions, spending time with the child and paying child support, which PCLC believes are most appropriate for the court to take into account.

Whilst it may be argued that the removal of these matters does not exclude their consideration, it does relegate these matters as being not as important as other matters that have been listed. The current legislation lists all matters that are considered important and the 'de-listing' of the matters included in subsection (4) means that these matters will no longer be drawn to the attention of the courts or litigants as important matters for consideration.

PCLC therefore supports the repeal of paragraph 60CC(3)(c) and subsection (4A), however recommends the amendment of subsection (4) in relation to the 'friendly parent' aspect only.

Repeal of Costs Provision for False Allegations

PCLC welcomes the repeal of section 117AB. This section has operated as a disincentive to disclosures of family violence and as the Consultation Paper notes, the ordinary power to make costs orders is "adequate to deal with false allegations of family violence as well as false denials of family violence".⁸

⁸ Op cit, n.7, paragraph 17, pp. 6-7.

4.0 FURTHER SUGGESTED AMENDMENTS

As acknowledged initially, PCLC is pleased with the commitment of the Commonwealth Government to legislative reform of the Family Law Act 1975 and is broadly supportive of the proposed amendments. PCLC feels, however, that there are a number of further amendments which are required to address areas of concern which have been raised by the reports recently commissioned by the Commonwealth Attorney General's Department⁹. These reports demonstrate, in particular, that there are many misconceptions which have resulted from the changes implemented to the legislation in 2006. PCLC, therefore, believes that the amendments contained within the bill should also address these areas of concern.

Equal Shared Parental Responsibility

PCLC believes that amendments are required in relation to the presumption of equal shared parental responsibility. Although there is provision for this presumption to be rebutted in cases presenting with family violence, due to constraints on courts and difficulties in presenting evidence, particularly at the interim stages of a proceeding, it is likely that appropriate weight is not given to the issue of family violence.

In our experience the difficulties in provision of evidence demonstrating family violence, coupled with the presumption of equal shared parental responsibility, has created situations where victims of family violence are not appropriately protected and opportunities for further harassment and intimidation by the perpetrator have arisen. PCLC believes that the presumption of equal shared parental responsibility should be removed from the legislation or at the very least, should not be applied on an interim basis where matters cannot properly be dealt with and appropriate conclusions drawn. All decision making would best be made by reference only to the best interests of the children and the individual case circumstances, on an interim basis, without recourse to the presumption.

Recommendation:

- Presumption of Equal Shared Parental Responsibility be removed.

Equal Time and Substantial and Significant Time Arrangements

Where equal shared parental responsibility applies, according to s65DAA, a Court must consider whether equal time or substantial and significant time arrangements are in the best interests of the children and whether these contact arrangements are reasonably

⁹ Professor Richard Chisholm AM, *Family Courts Violence Review*; Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms*; and Family Law Council, *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*.

practicable in the given circumstances. Although equal shared parental responsibility as a concept refers only to decision making responsibilities where children are concerned, the concept has given rise to a community misconception in relation to time spent with the children and creates a mythical 'starting point' of equal time or substantial and significant time.

PCLC believes that inclusion of the word 'equal' has given rise to the misconceptions and its inclusion is inappropriate in determining parenting arrangements based around the best interests of the children. PCLC advocates the removal of the word 'equal' from equal shared parental responsibility and a severance of the link between parental responsibility and the amount of time children will spend with each of their parents.

PCLC therefore supports recommendation 3.4 (1) of Professor Chisholm¹⁰:

In considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case.

Severance of the link would separate decisions about parental responsibility from provisions about living arrangements and as Professor Chisholm argues, "it would revise the formulations of the considerations relevant to determining the child's best interests so that they are more clearly based on promoting the child's interests rather than accommodating notions of parental rights. Instead of requiring the court to consider any particular arrangement (with the danger it would become the default position) the Act would say that there should be no default position or presumption."¹¹

PCLC believes that there should be no legislative emphasis in relation to either equal time or significant and substantial time. In our view, it is undesirable to legislate a preference for an amount of time. PCLC recommends that the provisions in relation to equal time and substantial and significant time be removed. The courts, legal advisors and family dispute resolution practitioners should, in the opinion of PCLC, only consider what arrangements are best for children based on an assessment of the best interests factors given the circumstances of each individual case.

Recommendations:

- Removal of the reference to time considerations;
- Severance of the link between time considerations and parental responsibility; and
- Removal of requirements on the court to consider any particular time arrangements in decision making regarding children spending time with their parents.

¹⁰ R. Chisholm, *Family Courts Violence Review*, 27 November 2009, p.13

¹¹ *Ibid*, p.131

5.0 CONCLUSION

PCLC strongly supports the Federal Government's moves to provide better protections for those who have experienced family violence within the family law system and believes that the proposed amendments in the bill are essential to place safety and protection of children as the primary consideration of the Family Law Act.

In particular PCLC supports the changes relating to:

- A broader definition and understanding of family violence and child abuse.
- Prioritising family violence when considering what is in the best interests of the child.
- Removal of the s60CC(3)(c) friendly parent provision.
- Repeal of subsection 117AB pertaining to costs orders for false allegations or denials of violence.

There are some aspects of the amendments which require further clarification and expansion and there are some additional changes PCLC believes need to be made immediately to ensure the protection of family members from family violence and do not result in unintended negative consequences, including:

- Removal of the presumption of equal shared parental responsibility;
- Removal of the link between equal shared parental responsibility and equal time or substantial and significant time arrangements; and
- Removal of the requirement for the court to consider any particular time arrangement for children to spend time with their parents (need an assessment on a case by case basis, rather than one size fits all).

PCLC would welcome the opportunity to provide further comment and input into the development of the legislation and to other initiatives to improve legal responses to family violence and family law in general.