SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

RESPONSE TO THE CONSULTATION PAPER:

FAMILY VIOLENCE: IMPROVING LEGAL FRAMEWORKS

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25 June 2010

1.0 EXECUTIVE SUMMARY

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.

Over the last twenty years there has been an increasing awareness of the prevalence of family violence within Australia and in more recent times there has been discussion as to the inconsistencies between state and territory family violence protection legislation and the legal framework of the federal family law system with respect to family violence.

PCLC's casework practice predominantly comprises family law. PCLC provides duty lawyer services at the specialist family violence intervention order service at the Frankston Magistrates' Court and in family law matters at the Dandenong Federal Magistrates' Court.

PCLC welcomes the opportunity to make a submission with respect to the Australian Law Reform Commission's (ALRC) consultation paper – *Family Violence: Improving Legal Frameworks*. PCLC broadly endorses the proposals of the Consultation paper and welcomes the review emanating from the *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children*.[1]

Whilst it is not possible to comment on all issues of importance arising from the Consultation Paper, 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 has sought to respond to Part B of the paper, Family Violence, specifically. This is due entirely to resource and time constraints and does not indicate that PCLC does not have views or wishes to provide further input into the need or otherwise for significant changes to the justice system's response to 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

[1] National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (2009)

4. That the best interests of the children are the paramount considerations in making any decisions concerning children's living and contact arrangements, particularly in the context of proven family violence. There is concern that 'live with' and 'spend time with' arrangements do not reflect those best interests in such situations.

   It is necessary, in PCLC's view, that the justice system adopt a variety of processes to ensure appropriate outcomes in all situations. Accordingly, a more flexible system, that is better equipped to deal with the more complex and diverse range of behaviour, is required. In this regard, PCLC supports further exploration of alternative justice system approaches to family violence.

   While PCLC acknowledges the substantial improvements in police initiation of family violence protection orders, the Centre believes that it is essential that there be more education for police members in regard to the handling of breaches of protection orders. If police are unwilling to actively pursue those breaches, the gravity of the order is diminished, the perpetrator is not held accountable and the safety and autonomy of the victim is repeatedly threatened. All reports of family violence should be recorded by police and made available for use as evidence, where required in family violence protection order and/or federal family law court applications.

   Recommendations discussed include:

   - Child contact issues where there is family violence need to be addressed. There should be no unsupervised contact where there is an identified risk of harm.
   - Actual or threatened abuse of animals should fall within the category of emotional abuse and be covered by any protective legislation.
   - The definition of "family member" ought to be expanded to incorporate the ordinary meaning of the words "family member" that do not involve blood relatives and should be broad enough to allow for the protection of people with disabilities who are suffering violence at the hands of their carers.
   - It is a fundamental right of all people, including those seeking and defending intervention orders, to have access to legal advice and representation.
   - Courts dealing with exclusion orders, should consider safety to be a paramount concern, and magistrates should make rights associated with ownership secondary to ensuring the safety of any victims.
   - PCLC supports recent reviews of the family law system recommending the removal of s. 60CC(3)(c) and s. 117AB *Family Law Act* 1975 (Cth).
   - The discrepancy between the federal family court's view of protection orders made as consent without admission, as opposed to other protection orders needs to be clarified and applied consistently.

PCLC commends the ALRC on their comprehensive consultation paper and would welcome the opportunity to participate in further discussions concerning aspects of the paper, as well as involvement in the development of initiatives to improve the response of the justice system to family violence.

CONTENTS

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 client's 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.

3.0 Part B – FAMILY VIOLENCE

Chapter 4: Family Violence: A Common Interpretative Framework?

Family Violence Legislation

The definition of family violence in state and territory family violence legislation should include the types of conduct that constitute violence, as well as providing that family violence is violent or threatening behavior or any other form of behavior that coerces, controls or dominates a family member or causes that family member to be fearful. The definition of family violence contained within the *Family Violence Protection Act 2008* (Vic) is a model which could be extrapolated to other states and territories. In PCLC's experience the definition is sufficiently broad to ensure that persons from cultural and linguistically diverse backgrounds are not ostracized by the legislation and those with disabilities or suffering from taunts relating to sexual orientation are included.

PCLC supports Proposals 4-3 to 4-5 and 4-7 to 4-10, which provide for the inclusion of specific conduct within definitions of family violence in the state and territory family violence legislation. Of particular benefit would be the inclusion of the exposure of children to family violence as a separate category within the definition of family violence, similar to s.5 *Family Violence Protection Act 2008* (Vic). Consideration of the effects of such exposure to children should not be underestimated. The trauma to children can be immense, particularly when a loved one is harmed, including a family pet. The definition for family violence must also be sufficiently broad to include emotional or psychological harm. In PCLC's experience it is common for a perpetrator of family violence to harm or threaten to harm a family pet, effectively harming the other members of the family emotionally.

Given the encompassing definition provided by the Victorian legislation, there has been a tendency by lawyers, particularly, to treat the examples of conduct as an exhaustive list, rather than an illustrative list and try to exclude certain conduct as not falling within the definition of family violence. Such practice may cause affected family members who are unrepresented at return dates prior to a contested hearing to question the merits of their application and concede unnecessarily. The recent experience of PCLC Duty Lawyers has been that judicial officers have been much more comprehensive in their interpretation of the new definition.

Criminal Law

PCLC endorses proposals 4-13 and 4-14 providing for the inclusion of the definition of family violence as included in the *Family Violence Protection Act 2008* (Vic) within s9AH of the *Crimes Act 1958* (Vic). The definition needs to be consistent between the criminal and the civil family violence protection legislation.

Family Law

Questions 4-4 and 4-5.

In PCLC's experience, in practice, the difference between the definition of family violence in the Victorian legislation and the definition of family violence within the *Family Law Act 1975* (Cth) causes several problems. In situations where an order has been obtained, often as a consent without admission, the federal family courts review only the final order and not whether there has been any finding of the alleged violence or risk. This creates potential problems, where the existence of a protective order may serve to unfairly restrict contact between children and a parent or alternatively, may expose a child to risk by way of unsuitable living arrangements. PCLC proposes that the Family Court have power to review protective orders differently, where an order is in place on a consent without admission basis.

Where no protective order has been obtained and violence is alleged, such allegations can be dismissed by the federal family courts, as lacking validity for want of evidence. A fundamental difficulty faced by the federal family courts is that they do not have an investigative role. Adduced evidence is presented by the independent children's lawyer (if appointed) or by the parties. It is noted that there is some legislative support for judicial officers to access evidence as required to make decisions with respect to the best interests of the child, however where there are issues pertaining to the capacity of a party or both parties to parent, the evidence may be difficult to adduce and there may be parallel child protection issues.

The *Family Law Act 1975* (Cth) currently provides costs disincentives for those who raise allegations of abuse or violence. Such provisions create the impression that allegations are more often than not fallacious, when evidence shows that in the overwhelming majority of cases the allegations are well founded.[2] By contrast there is no cost disincentive for perpetrators who deny abuse or violence when the allegations are well founded.

Clients have reported that they feel powerless to protect their children from harm in the family law system and that their concerns are not being adequately addressed by the Court. The different approaches to family violence have created a situation where the victims can be further harmed through the federal family court process. For example, Family Court Consultants are required to look for psychological abuse, but no further. Physical abuse is not defined *per se*, but would fall within 'ill treatment', which also lacks definition in the legislation. The right of children to contact with both parents appears to take precedence over the right of children to be protected from harm.

[2] R. Chisholm, *Family Courts Violence Review* (2009) pp. 117-120

Persons Protected

Question 4-7

PCLC supports proposals 4-19 and 4-20. In particular PCLC views the inclusion of carers within the category of relationships covered by family violence protection legislation as an important move forward. Such an inclusion makes significant progress in providing protection for people with disabilities experiencing family violence who can suffer the most extreme forms of marginalisation in society.

Carer relationships are within a domestic setting and where violence is present, there are dynamics of power, opportunities for abuse and control, victim impact and other characteristics similar to those situations where the victim is subjected to violence from a family member. People with disabilities in such situations are entitled to the same degree of emergency response and legal protection as others who experience such violence.
To achieve legislation which includes carer relationships, definitional framing similar to that in New South Wales, which defines the relationship, 'domestic relationship'[3] rather than positing the relationship as 'family member' is suggested.

Guiding Principles and a Human Rights Framework

It is agreed that any family violence framework should include express reference to a human rights framework and such a framework should be consistent with and make specific reference to the relevant international rights conventions. Both state and territory family violence legislation and the *Family Law Act 1975* (Cth) should include an explanation of the nature, features and dynamics of family violence.

Grounds for obtaining a protection order

Question 4-9

PCLC believes the grounds for obtaining a family violence protection order in Victoria are appropriate. Namely, that either the person seeking protection has reasonable grounds to fear family violence or the person he or she is seeking protection from has used family violence and is likely to do so again.

[3] *Crimes (Domestic and Personal Violence) Act 2007* (NSW), s 5.

Chapter 5: Family Violence Legislation And The Criminal Law – An Introduction

Interactions with federal criminal law

Questions 5-1, 5-2 and 5-3.

In practice there are few matters that are prosecuted in the federal context, despite breaches of the *Criminal Code Act 1995* (Cth). There are many cases where family violence protection orders have been issued pursuant to the state legislation, arising from alleged breaches of the federal criminal legislation. In Victoria, coercing a family member to obtain a payment from Centrelink is recognised as economic abuse by virtue of s.6 *Family Violence Protection Act 2008* (Vic), however PCLC is not aware of any federal prosecutions arising from such abuse.

PCLC endorses proposals 5-1 to 5-3, as it is important that family violence legislation be sufficiently broad to capture family violence prohibited in the federal context and that there be additional monitoring to ensure that such offences are prosecuted accordingly.

PCLC believes that in placing additional emphasis on prosecutions in the federal criminal context, and ensuring that actions prohibited federally are also included in the relevant state and territory legislations, that additional training be made available for lawyers involved in family violence matters, through Continuing Professional Development activities.

Civil and criminal proceedings

Question 5-4

According to Victoria Police Statistics for the year 2008/2009, within the municipality of Frankston, Victoria Police attended, 1,439 'family incidents' and of those attendances 522 charges were laid and 302 applications for Intervention Orders were made[4]. The statistics are inconclusive as to whether criminal charges are preferred over civil protection applications.

The Victoria Police Code of Practice for the Investigation of Family Violence states: "Police must make and sign an application (complaint) for an intervention order wherever the safety, welfare or property of a family member appears to be endangered by another. This may mean making an application without the agreement of the aggrieved family member

[4] Victoria Police 2008/2009 Crime Statistics, as extracted from LEAP on 18 July 2009, <http://www.police.vic.gov.au/content.asp?Document_ID=782> at 10 February 2010.

who may be fearful of the consequences of initiating such action."[5]
However, the Code also refers to the primacy of the pursuit of criminal charges.[6]

In practice, police actions are more difficult to follow. The code of practice has certainly seen an improvement in the appropriate handling of family violence situations, however more education within the police force is required to ensure that, where appropriate, both civil and criminal options are pursued.

Interactions with participants in the criminal justice system

Questions 5-6, 5-7 and 5.8

As police are often the first point of contact in domestic and family violence incidents they are in a unique position to respond to, intervene in, and be proactive about, preventing family violence. With indications that the volume of recorded violence has increased and the complexity of family violence matters has increased police workloads, police face many challenges in responding in an effective and timely manner to reported incidents.

Responding appropriately is important in ensuring victims receive the care and support that they need, minimising further harm and encouraging a willingness to report to and cooperate with police. It is also important for ensuring offenders are dealt with appropriately and quickly, minimising their capacity to re-offend and delivering and reinforcing the messages that offending behaviour will not be tolerated and that police will act swiftly.

Where police have issued a Safety Notice, it is also imperative that the return date enables parties to seek legal advice concerning their rights and obligations pursuant to the safety notice and/or a family violence protection order. Proposals 5-4 and 5-5 are supported for these reasons.

In practice, police have been pro-active in applying for safety notices, however, police have been less active in following reports of breaches of such orders. Victims are often advised by police that there is nothing that can be done about the alleged breach. There needs to be more education for police with respect to breaches to enable victims to feel confident with the Order they have obtained and confident that offending behaviour will not be tolerated.

[5] Victoria Police, Code of Practice for the Investigation of Family Violence, August 2004, p.38, <http://www.police.vic.gov.au/files/documents/464_FV_COP.pdf> at 27 May 2010.

[6] Ibid, paragraph 4.1.1, p.28

It is also imperative that police receive training in respect of culturally sensitive and appropriate methods for dealing with family violence and that there be specific support services in place within courts to ensure that those from CALD backgrounds, including indigenous backgrounds, are supported in making applications without police involvement.

Interaction with criminal law procedures

Questions 5-11 and 5-12

PCLC supports additional training of officers who will be authorizing Safety Notices to consider the gendered nature and dynamics of family violence and the grounds for and the need to protect children from harm. Where there is potential for a party to be detained it is imperative that the safety notice binds the perpetrator and not the victim and that a victim's own assessment of their risk is seen as often the best indication as to their safety.

In Victoria, there is currently a direction that police must make reasonable enquiries to ensure that a condition that restricts a respondent from being within a specified distance of the protected person or a particular place is '*workable'* in the circumstances before imposing the condition.[7] The level of inconvenience to the perpetrator should never outweigh the safety of the affected family member/s. It is very easy for the perpetrator to misrepresent their options and create a belief in the victim that it may be safer to leave the property.

There is also evidence to suggest that notices are being issued against the person who is actually the victim. The perpetrator of family violence at times misrepresents themselves as the victim and police, who may lack training to deal with the power dynamics in a relationship, issue a notice against the wrong person, creating further powerlessness for the victim.

There has also been reluctance on behalf of police to include children on safety notices or applications for intervention orders, even in situations where the children have been exposed to violence. It must be ensured that the safety of the victims, including children, is the paramount consideration in issuing a civil notice.

[7] Department of Justice, Victoria, Measuring Family Violence in Victoria*: Nine Year trend Analysis, Victorian Family Violence Database, 1999-2008*, p.37

Chapter 6: Protection Orders And The Criminal Law

Concurrent proceedings under family violence laws and criminal law

Questions 6-4 and 6-5

PCLC does not support the ALRC proposals with respect to Court initiated protection orders and supports the Domestic Violence Legislation Working Group's contention that the making of such orders would amount to a 'denial of justice'.[8] It is irrelevant that the civil or criminal liability of the person bound by the order is not affected by the making of the order. A fundamental basis of the rule of law is the right of a party to defend any application against them, rather than having an order issued on the basis of what may constitute untried facts and an order that the affected family member may not wish to have imposed.

Protection order conditions and the criminal law

Question 6-7

In our experience, generally the conditions attached to protection orders are tailored to the circumstances of the particular cases. There may be problems with determining appropriate orders where parties are unrepresented at the Court, but in general parties who are represented will consider the orders sought and adjust by agreement where appropriate proposed orders for the mutual benefit of parties. PCLC does not support proposal 6-5, which may have potential ramifications where children are involved or where other issues, such as property require dealings. Inclusion of a non-location provision has too much potential to impact upon other grounds where parties may need to have contact for issues including civil and/or family law.

In considering the making of a protection order, a judicial officer should consider whether an exclusion order is appropriate in the circumstances. Therefore, PCLC supports proposals 6-7 and 6-8.

Exclusion Orders

Question 6-8

Where a Safety Notice is issued by police, which provides an exclusion clause, there should be an obligation on the part of the police to ensure that the excluded person has adequate temporary accommodation. The nature of an exclusion clause may create homelessness for the excluded person and it is necessary to ensure that systems are in place to address any

[8] Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), p.67; ALRC Report at p.54

homelessness that may ensue. It is also crucial that risks to safety and welfare are the paramount considerations and that affected family members should not be left in an unsafe situation because the perpetrator has no alternative accommodation.

Question 6-10

PCLC does not believe that an express presumption that the protection of victims of family violence is best served by their remaining in the home in circumstances where this is shared with the perpetrator. PCLC believes that the individual circumstances of every situation should be examined and the preference of the affected family member should be considered in whether they wish to remain in the home or would feel safer away from the home.

Breach of protection orders

Questions 6-15 and 6-16

PCLC strongly endorses the Commission's position with respect to removing potential charges for aiding and abetting breaches of protection orders, 'because it overshadows the fact that a protection order is made against a person who uses family violence – not the victim.'[9] Proposals 6-13, 6-14 and 6-15 are therefore supported.

Consent to a breach of an order is not a defence to a breach. Practically speaking, where a breach is reported, this is generally evidence in itself that the breach was not consented to. In PCLC's experience police are reluctant to investigate, act upon or even take a statement in relation to complained breaches where protective orders are in place. For the protection order to work it is necessary that the perpetrator be aware that police will act swiftly upon breaches – no matter how minor these may appear to the member receiving the complaint. If perpetrators are aware that police are complacent in acting upon breaches, perpetrators may feel emboldened to further threaten, harass and abuse the victim.

Questions 6-17 and 6-18

In practice, where a breach of an intervention order has occurred and there is a corresponding criminal offence, PCLC's experience is that charges will be laid by the police in respect of both the breach and the criminal conduct. In fact, PCLC has found that the cases where there has been criminal conduct are generally the cases where a breach of an order will be entertained by police. PCLC believes much work is required in educating police with respect to breaches of orders generally.

[9] ALRC Report, p.66

Chapter 7: Recognising Family Violence in Criminal Law

Family violence as an offence

Questions 7-1, 7-2 and 7-3

PCLC does not believe that it is feasible to create an umbrella offence through the introduction of criminal laws prohibiting family violence. PCLC believes that there are more appropriate manners in which to deal with cases of family violence from a criminal justice perspective than creating an umbrella offence. The seriousness of inappropriate conduct can be addressed, through charges being laid responding to the conduct – such as the creation of aggravated offences within a family violence context, as in the South Australian legislation.[10]

In considering whether to prosecute family violence crimes, police should primarily consider the victim's safety. In order truly to consider this they need to be guided by the victim's views about the best way to proceed and thus need to communicate properly with the victim they are employed to protect. Police responses must be able to take into account the fact that victims experience violence differently. In their communications police must recognise the victim's danger and their agency.

Responses to domestic violence need always to be holistic, encompassing education, health and social policy. Changes to processes within the criminal justice system alone will not necessarily bring about just outcomes. In conjunction with a range of approaches, strategies applied in the criminalisation of domestic violence need to continue to be developed and implemented in order to work towards the elimination of violence experienced by women, including in the context of the prosecution of domestic violence.[11] There is a need for cultural shifts about how violence against women is perceived and dealt with, as well as legislative shifts, to avoid any implementation problems. Research has shown both the potential value of criminal prosecution for those who have experienced domestic violence but it has also shown that there are dangers.[12] The criminal justice process needs to move in a direction that provides more support and safety during the process to victims who have experienced domestic violence and more appropriate outcomes for all concerned when domestic violence is prosecuted as a crime.

It would be beneficial if those convicted of committing an offence within a family relationship attracted a higher maximum penalty. A family relationship has a higher level of

[10] *Criminal Law Consolidation Act 1935* (SA) s. 5AA(1)(g)

[11] Nicola Lacey, 'Violence, Ethics and Law: Feminist Reflections on a Familiar Dilemma' in Susan James & Stephanie Power (eds), *Visible Women: Essays on Feminist Legal Theory and Political Philosophy* (2002) at 117–135, 128

[12] Ruth Lewis, Rebecca Emerson Dobash, Russel Dobash & Kate Cavenagh, 'Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence' (2001) 10 *Social Legal Studies* 105, 123

trust and power imbalances as compared to other relationships and the course of the conduct should therefore be considered within the sentencing process, such as, in the case of fiduciary relationships (employer/employee etc).

If there are to be amendments to criminal legislation, then it must be sufficiently broad to include not only family relationship situations, but also close personal relationships, such as carer relationships.

PCLC endorses the ALRC proposal 7-1, which provides that the relevant DPP ensure that police and prosecutors are encouraged by appropriate prosecutorial guidelines, and training and education programs, to use representative charges to the maximum extent possible in family-violence related criminal matters where the charged conduct forms part of a course of conduct.

Family violence as an aggravating factor

Question 7-9

As previously discussed, given the position of trust the perpetrator holds in relation to the victim of family violence, this should be considered as an aggravating factor in sentencing. PCLC considers the approach adopted by the Canadian *Criminal Code* at s 718.2(a)(iii)[13] appropriate in application to all trust and power relationships which may emanate from family violence.

PCLC agrees with the ALRC that the fact that an offence was committed in the context of a family relationship should not be considered as a mitigating factor for the purposes of sentencing.

In addition, proposal 7-3 is also supported. It would be useful for relevant agencies and professionals to develop a model bench book, with respect to family violence, incorporating a section on sentencing.

Family violence as a defence

Questions 7-10 and 7-11

Recent reforms in Victoria with respect to the defence of family violence for homicide, have been welcomed by PCLC. The abolition of the defence of provocation, which was found to adversely impact female victims of family violence and the expansion of self-defence to include family violence are welcome steps forward within the criminal legislation. Section 9AH of the *Crimes Act 1958* (Vic) expressly allows defendants to lead evidence about family

[13] *Criminal Code 1985* RSC c C-46 (Canada)

violence in the context of defence to homicide. These measures are viewed as appropriate steps forward for victims of family violence.

Chapter 8: Family Violence Legislation and Parenting Orders

Parenting proceedings under the Family Law Act

PCLC endorses ALRC Proposals 8-1, 8-2 and 8-3. It would be beneficial where the Department of Human Services (DHS) directs a parent to seek a protection order against the other parent, that DHS provide a written statement to this effect which can be used within the federal family court jurisdiction as a measure to alleviate any accusations of 'unfriendly' parenting for the purposes of s. 60CC(3)(c) *Family Law Act 1975* (Cth).

PCLC notes that the Chief Justice of the Family Court, the Honourable Diana Bryant, has called for the removal of unfriendly parenting from the Act[14], and both the recent Chisholm Review and Family Law Council have recommended its removal. PCLC endorses these recommendations, as well as the removal of s. 117AB, which requires a court to make costs orders against a party who knowingly makes false allegations or statements during proceedings. Such a section implies that false allegations and statements are commonplace, when this is in fact not the case and may penalise a parent who is attempting to protect a child from violent behaviour.

Consideration of pre-existing orders

Questions 8-2 and 8-3

In practice, PCLC finds there is a tendency where a party is bound by a protection order and has sought legal advice, for the legal adviser to seek children's arrangements by consent which are inconsistent with the protection order. Often the party protected by the Order has not sought legal advice and feels pressured by the other party's lawyer to agree to what is proposed to avoid having to go to court.

Allegations of family violence need to be more adequately dealt with at interim hearings in the federal family courts. Understandably, given the time constraints for judicial officers at interim hearings there are difficulties in considering such allegations at length. However, time constraints should not be placed above issues of welfare and safety for the child concerned. Judicial officers should have the discretion to make interim parenting orders

[14] A. Horin, *Judge calls for Urgent Changes to Family Law*, The Sydney Morning Herald, 6 May 2009, <http://www.smh.com.au/national/judge-calls-for-urgent-changes-to-family-law-20090501-aq6f.html> at 30 July 2009.

which satisfy the welfare and safety of the child as the paramount consideration, without having regard to making orders which provide necessarily for contact for both parents.

Resolving inconsistencies between existing orders

Questions 8-4 and 8-5

In the experience of PCLC, neither s 68P or s 68Q(2) are utilised often in practice. Certainly, where family court orders are inconsistent with protection orders, parties are advised that the family court order will prevail over the protection order to the extent of the inconsistency. It has been observed on some occasions that parties with family court orders in place, have sought a protection order in an attempt to modify the existing family court orders.

Also of note in the Victorian context, there appears to have been an increase in the number of applications for protection orders made to the Magistrates' Court, where family law lawyers have advised their client to seek an order to 'strengthen' their family law case. This practice is concerning as it has the potential to reduce the potency of family violence protection orders and devalue their impact before the federal family courts.

Question 8-6

In our experience, Magistrates in Victoria do exercise their power to vary and suspend parenting orders, where they consider it appropriate to do so. Generally such orders are made on an *ex parte* interim basis and suspension orders will expire within 21 days of the suspension having taken effect. This is consistent with ALRC proposal 8-8. Also in need of consideration is how Magistrates suspend parenting orders if they elect to do so. In many cases, Magistrates are simply imposing a blanket suspension on parenting orders, effectively usurping their powers with respect to suspension of parenting orders. More education of judicial officers in the state courts is required to alleviate any potential miscarriages of justice.

Question 8-8

There is a reluctance to consider parenting orders in the state courts, but this reluctance is not only on the part of legal practitioners but also by the parties. Often the protection order is sought following an incident or threat and parties are unwilling, or it is inappropriate, to negotiate parenting orders at that point in time. An additional difficulty in the creation of parenting orders by the state courts is that the state courts are not always the best equipped to deal with the review and consideration of substantial matters which would be necessary to make appropriate parenting orders.

Relevant considerations in modifying or revoking a parenting order

Question 8-9

PCLC supports the recommendations of the Family Law Council with respect to the considerations that a court must have in regard to varying a parenting order. PCLC supports amending the considerations to include the need to protect all family members from family violence and the threat of family violence and, subject to that, the child's right to have a meaningful relationship with both parents, provided that such contact is in accordance with the best interests of the child. Division 11 of the *Family Law Act 1975* (Cth) should be amended in this manner.

Questions 8-11 and 8-12

Where interim protection orders are made in accordance with s. 68T of the Family Law Act, it is unlikely that an application for a variation or suspension of existing orders to the federal family law courts will be heard within the 21 day period. However, this period of time is generally sufficient to bring about an application for such changes to existing orders. Given the welfare concerns for children in such circumstances, then beyond the 21 day time period, a party who fails to comply with the terms of the existing parenting orders could seek to rely on the defence of reasonableness to any contravention application made against them.

PCLC believes that 21 days is a reasonable period of time in which to seek legal advice, obtain a grant of legal aid if required and commence an application to the federal family law courts.

Protection orders subject to parenting orders

Question 8-13

PCLC does not believe that contact authorised by a parenting order should be removed from the exceptions to a protection order. The provisions within the Victorian family violence legislation enable family law orders to be revived, varied or suspended where deemed necessary, which PCLC considers appropriate in the prevention of prohibited conduct.

Imposition of parenting orders by state and territory magistrates

PCLC wholly supports Proposal 8-13, which provides for ongoing training and development to be provided for judicial officers in state and territory courts who hear proceedings for protection orders with respect to their powers pursuant to the *Family Law Act 1975* (Cth). PCLC believes this will provide better and more consistent outcomes for those seeking parenting orders before magistrates.

Chapter 9: Family Violence Legislation and Other Family Law Act Orders

Injunctions available under the Family Law Act

Questions 9 -1, 9-2 and 9-3

PCLC does not see any reason for the provision of separate procedures in relation to obtaining an injunction for personal protection pursuant to s.114 *Family Law Act 1975* (Cth). Family violence protection orders are available from the state and territory courts and provide protection for the affected family member, through the potential imposition of criminal penalties where the state protection order is breached.

PCLC supports Proposal 9-1 that the *Family Law Act 1975* (Cth) be amended to provide that a wilful breach of an injunction for personal protection pursuant to ss68B and 114 is a criminal offence. For the reasons specified in the above paragraph (the lack of criminal penalty for breach of an injunction), those who obtain injunctive relief of this nature in the federal family courts generally also seek a protection order pursuant to the state legislation.

Family violence as a factor in property disputes

Question 9-5

In practice family violence plays a role in property proceedings considering both s.79(4) contribution factors and s. 75(2) future needs factors pursuant to *Family Law Act 1975* (Cth). The impacts of family violence affecting a party's ability to contribute to the relationship, fall within the adjustments required to obtain a fair, just and equitable division of relationship assets. A further assessment in relation to future needs arising from family violence can also be made. In very serious cases of family violence, there may be a long history of factors, which may adversely effect the individual's earning capacity well into the future. It is crucial that the federal family law courts have regard to these factors.

PCLC endorses ALRC Proposal 9-4 in this regard, whereby there be an express reference to family violence in relation to both contributions to the relationship and the future needs of the parties.

Relocation and recovery orders

Questions 9-8, 9-9, 9-10 and 9-11

PCLC does not believe that there should be any presumption with respect to relocation or recovery matters before the Court. It would be preferable to consider a variety of factors and deal with the individual facts and merits of each case, on a case by case basis. PCLC believes that assessment of factors should ensure that the best interests of the children remain paramount. Protection orders will, therefore, be considered as one of the elements in determining a relocation or recovery application outcome.

PCLC recognises that relocation and recovery matters are difficult to adjudicate as a result of the competing interests involved. Academically, the competing interests have been described as those "between the child's right to have a relationship with the non-resident parent and the child's interest in ordinarily living with a residence parent who is happy and not 'imprisoned' in a place the parent does not want to be".[15]

If there is to be any amendment to the current legislation with respect to relocation, PCLC supports the Family Law Council's proposal on relocation, recommendation 4 as at May 2006:

> "A) Where there is a dispute concerning a change of where a child lives in such a way as to substantially affect the child's ability to live with or spend time with a parent or other person who is significant to the child's care, welfare and development, the court must:
>
> (1) Consider the different proposals and details of where and with whom a child should live, including:
> (a) What alternatives there are to the proposed relocation;
> (b) Whether it is reasonable and practicable for the person opposing the application to move to be closer to the child if the relocation were to be permitted; and
> (c) Whether the person who is opposing the relocation is willing and able to assume primary caring responsibility for the child if the person proposing to relocate chooses to do so without taking the child.
>
> (2) Consider which parenting orders are in the child's best interests having regard to the objects contained in section 60B and all relevant factors listed in section 60CC, and:
> (a) Whether given the age and developmental level of the child, the child's relocation would interfere with the child's ability to form strong attachments with both parents;
> (b) If a party were to relocate:
> (i) What arrangements, consistent with the need to protect the child from physical or psychological harm, can be made to ensure that the child maintains as meaningful a relationship with both parents and people who are significant to the child's care, welfare and development as is possible in the circumstances;
> (ii) How the increased costs involved for the child to spend time with or communicate with a parent or people who are significant to the child's care, welfare and development should be allocated;
> (c) The effect on the child of the emotional and mental state of either party if their proposals are not accepted.

[15] G. Watts, 'Can we go or must we stay? Being able to relocate with the children' (2002) 40(10) *Law Society Journal* 66, p.66

(B) The court may also consider the reasons the parent wishes to move away and any other relevant considerations."[16]

Chapter 10: Improving Evidence and Information Sharing

Protection orders as a factor in decision making about parenting orders

Questions 10-1, 10-2 and 10-3

PCLC endorses ALRC proposals 10-1 and 10-2. Courts need to be satisfied that parties are aware of the consequences of consenting to an order without admission and also that the parties are aware of the consequences of consenting to an undertaking. Acceptance of an undertaking may compromise the safety of a victim, and undue pressure may be placed on a victim to agree to an undertaking rather than proceed to a contest at a later date. Practically, it would be useful if undertakings were not to be used where the parties are un-represented.

In PCLC's experience, victims of family violence who rely on undertakings to a court from the person against whom a protection order is sought, often return to court because the undertaking has been breached and to seek protection from further family violence.

Although undertakings are made known to federal family courts, generally through attachment to Affidavit material, it is unclear how much weight, if any, the federal family courts give to an undertaking.

Affidavit evidence in protection order proceedings

Questions 10-4, 10-5 and 10-6

PCLC believes that applications for protection orders should be sworn or affirmed. This is not an onerous burden for an applicant and ensures that the importance of the application and the resulting order, if made, is respected.

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[16] Family Law Council, Relocation, *A report to the Attorney-General prepared by the Family Law Council*, May 2006, paragraph 6.72, p. 73, <http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~FINAL+Relocation+report+-+May+2006.pdf/$file/FINAL+Relocation+report+-+May+2006.pdf> at 3 June 2010

Both oral and affidavit evidence could be admitted to the court in protection order proceedings, as both forms of evidence are of importance to determining the outcome of the application. However, if affidavit material were to be accepted, there would need to be strict timelines put in place to ensure that the defendant was served with the affidavit material of the applicant in a timely manner and that the defendant also reciprocates in the response.

One of the difficulties in accepting affidavit material in protection order proceedings, is that such a process may enable a perpetrator to further demean, harass or torment the applicant in their response material and method of service. The risks of such behaviour make it preferable that oral evidence be required, which is conducted in a controlled, more protected environment. The Victorian legislation in particular provides that unrepresented parties cannot cross examine each other as a protective measure. PCLC therefore endorses ALRC Proposal 10-4, which is in concert with the Victorian legislation.

Vexatious application in protection order proceedings

Question 10-9

PCLC supports the Victorian legislation pertaining to vexatious litigants. There is merit in permitting courts to make orders in relation to a litigant who has brought several unfounded applications against the same person, which require the litigant to seek leave of the court before any further application could be made. This enables some protection for people who may be forced to defend repeated and unreasonable applications for protection orders and prevents abuse of the system pertaining to protection orders.

Removing impediments to information sharing

Question 10-12

Where s60I certificates are issued with respect to mediation, it would be useful if more information pertaining to the reasons why mediation was considered inappropriate was included in the certificate. PCLC is aware that such a proposal may lend to concern from FDR practitioners that they may be required to testify with respect to their reasons, however there is no need for the material included on the certificate to be considered as evidence of the allegation, rather the information could be used for the purposes of screening and risk assessment by the Court.

Communications to family counsellors and FDR practitioners

Questions 10-13 and 10-14

Professor Richard Chisholm noted that "the court's ability to conduct a risk assessment process, and its capacity to protect the children and families that come before it, would almost certainly be enhanced if it had access to relevant information held by external

agencies, including dispute resolution agencies."[17] PCLC supports the Chisholm Report's recommendation, 2.5:

> That the Government consider amending provisions of the Act relating to the confidentiality of information held by agencies outside the court, including dispute resolution agencies, so that information relevant to the assessment of the risks from violence or other causes could be more readily available to the courts.[18]

PCLC agrees with the ALRC's assessment that family violence can manifest over a number of years in a number of forms. Although the threat of family violence is serious, it may not be imminent as required by the *Family Law Act 1975* (Cth) to permit disclosure of otherwise privileged communications. ALRC Proposals 10-8 and 10-9 would in PCLC's belief address these concerns.

Admissibility of communications to family counsellors and FDR practitioners

Questions 10-15 and 10-16

Pursuant to ss. 10E and 10J *Family Law Act 1975* (Cth), counselling with a family consultant or attendance upon an FDR practitioner is generally privileged with the exception of corroborated disclosures of child abuse or risk of abuse. s10E(1) specifically provides that nothing said in counselling can be admitted in any court or any proceedings. Thus, there is a very significant distinction between disclosure and admissibility. s10D(6) deals with the potential conflict between ss10D and 10E, "evidence that would be admissible because of s 10E is not admissible merely because this section requires or authorises its disclosure".

PCLC endorses both the Family Law Council's recommendations pertaining to broadening the scope of s10E to enable the admissibility of evidence when an adult or child discloses that a child has been exposed to family violence and the ALRC proposal 10-10 which broadens both ss10E and 10J to enable the admissibility of evidence in these circumstances.

Agency Information

Question 10-20

Provision of agency information is of critical importance where the federal family courts are reliant on the resources of State agencies to fill evidentiary gaps not met by the parties and in situations where there appears to be no suitable parent and maybe no agency intervention. One possible legislative solution would be to provide for an exchange of information between those agencies and the federal family courts in a single streamlined

[17] R. Chisholm, *op cit* p.79

[18] *Ibid*, p.80

manner. It would also be desirable to ensure that the courts have recourse to State based foster care should there be a finding in the best interests of the children that there is no suitable parent.

PCLC believes that consideration should be given to amending s69ZW to remove any ambiguity in the requirement of agencies to produce documents, reports or information which is relevant to any issue requiring determination by the federal family courts.

In addition, it may be beneficial to develop protocols for the management of information sharing in relation to both child protection and family violence more generally.

The evidentiary burden of proof for victims of family violence requires a more open sharing of agency information. PCLC supports ALRC proposals 10-11, 10-12 and 10-13.