

Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

Submission to the Senate
Legal and Constitutional Committees

27 April 2011



Peninsula Community
Legal Centre Inc

1.0 INTRODUCTION

Peninsula Community Legal Centre (PCLC) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Committees with regard to the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (hereinafter referred to as 'the Family Violence Bill'). PCLC believes that the Family Violence Bill is an important move to address many of the problems raised by recent research and evaluations of the Family Law Act, which have evidenced the inadequacy of the existing provisions of the legislation in dealing with issues of family violence and child abuse.

In particular, PCLC applauds the revised definition of 'family violence', which addresses the recommendations of the Family Law Council¹ and the Australian and NSW Law Reform Commissions², to provide a general characterisation of prohibited behaviour, followed by some examples of the manifestations of these behaviours which are non-exhaustive.

In addition, PCLC supports the repeal of sections 60CC(3)(c) – the 'friendly parent' provision- and 117AB which have been shown to operate as disincentives to disclosures of family violence.³

Whilst PCLC broadly endorses and supports the aims of the Family Violence Bill, PCLC also believes that the response to the evaluations from research and the recommendations entailed therein could be strengthened and therefore advocates for further amendments and initiatives to enhance the response to family violence and the effectiveness of the legislation.

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.

¹ 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*, December 2009, p.27

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

³R. Chisholm, *Family Courts Violence Review*, 27 November 2009, pp110-123

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.

The most requested area of assistance for PCLC is in the area of family law and family violence. Within Victoria, PCLC's head office is located in Frankston, which has the highest per capita level of family violence incidences in the metropolitan region.⁴ PCLC therefore has extensive experience in assisting and advocating on behalf of victims of family violence, through both casework service provision and community education and law reform activities. This knowledge and practice makes PCLC well placed to comment on the proposed amendments to the *Family Law Act 1975*.

3.0 SUPPORTED AMENDMENTS

DEFINITION OF FAMILY VIOLENCE

The broader definition of family violence included in the Family Violence Bill incorporates the suggestions made in the submission of PCLC in response to the Exposure Draft in January 2011.

The proposed definition of family violence now includes 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. Following this contextual statement with a list of various behaviours as examples, allows 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 believes that the proposed definition adequately addresses this concern.

⁴ Victoria Police 2009/2010 Crime Statistics: Recorded Family Violence Incident Reports, <http://www.police.vic.gov.au/content.asp?a=internetBridgingPage&Media_ID=59800> at 27 April 2011

BEST INTEREST CONSIDERATIONS

PCLC supports the repeal of the existing section 60CC(3)(c) and welcomes the substituted paragraph. This substitution takes into consideration the matters raised in PCLC's previous submission, which discussed the importance of retaining considerations of parental responsibility 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.

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 violence⁵ and PCLC considers that the ordinary power contained in the legislation to make costs orders is capable of dealing appropriately with false allegations and false denials of family violence.

4.0 FURTHER CONSIDERATIONS

PRESUMPTION OF 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 PCLC's 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 1:

- Remove the presumption of Equal Shared Parental Responsibility.

BEST INTERESTS CONSIDERATIONS

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

⁵ R. Chisholm, *op cit*, n.3.

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.

Recommendation 2:

- Remove the distinction between the tiers of 'best interest' factors in s60CC to create a single list of factors in which the safety of children is given priority over all other factors.

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 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 Chisholm⁶:

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."⁷

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

⁶ R. Chisholm, *Op Cit*, n.3, p.13

⁷ Ibid, p.131

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. To this end it is necessary to give consideration to amending s63DA - "Obligations of Advisers".

Recommendation 3:

In relation to s65DAA:-

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

Recommendation 4:

- Remove the current guidance in sections 63DA and 65DAA regarding shared care arrangements for advisers.

COMMUNITY EDUCATION

One of the key themes emerging from the reports, and in particular the AIFS report, was that many of those seeking assistance from family law services came to the services with misunderstandings of the law.⁸ The most common misconception of the law in the experience of PCLC has been a failing to understand the difference between equal shared parental responsibility and equal time. This misconception is also reflected in the studies and has led to in many cases unreasonable expectations on the part of clients, which can create difficulties in the achievement of appropriate care arrangements in accordance with the developmental requirements of the children.

PCLC considers community education to be an important facet in addressing misconceptions of the law and in educating the wider community about the new provisions.

Recommendation 5:

- Commence a public education program to coincide with the introduction of the new provisions.

5.0 CONCLUSION

PCLC strongly supports the 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 Family Violence Bill are essential to place safety and protection of children as the primary consideration of the *Family Law Act*.

⁸ R. Kaspiew, et al, Australian Institute of Family Studies, *Evaluation of the 2006 family law reforms – Summary Report*, December 2009, pp24-25

Based on the experience of PCLC and the evidence based research commissioned by the Government PCLC strongly recommends the suggestions made in this submission in addition to the new provisions already sought in the Family Violence Bill.

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.

