



National Legal Aid

Public Consultation: Family Violence Bill
Family Law Branch
Attorney-General's Department
familyviolencebill@ag.gov.au

14 January 2011

Dear Attorney-General,

**Re: National Legal Aid submission
Family Law Amendment (Family Violence) Bill 2010**

Thank you for the invitation to provide comments on the Family Law Amendment (Family Violence) Bill 2010.

About National Legal Aid and Legal Aid Commissions

National Legal Aid (NLA) represents the Directors of each of the 8 State and Territory Legal Aid Commissions. The Legal Aid Commissions (Commissions) are independent statutory authorities established under respective State or Territory enabling legislation. The Commissions are funded by Federal and State or Territory governments to provide legal assistance to disadvantaged people.

The experience of family violence is common in our client base, and the Commissions each provide legal representation, advice, information, education and referral services including to non-legal support services, on a daily basis to many people who experience family violence.

NLA made a submission to the recent review of family violence laws and legal frameworks by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (NSWLRC). That submission is referred to in these comments and a copy of the submission is therefore enclosed for your ease of reference.

Comments

NLA is generally supportive of the proposed amendments, which if introduced should help to protect people. Our comments are therefore relatively brief and are directed to those few proposed amendments where we perceive that there are/might be issues. Our comments follow:

Item 1 - Subsection 4(1) - Definition of *abuse* - New Provision

Proposed s. 4(1)(c) appears to require proof of actual harm to the particular child in the circumstances of each case, and that the harm be "serious". This could have the effect of delaying proceedings to enable psychological assessments of the child to be carried out and the incurring of the additional expense associated with that process.

There is a substantial research base which confirms the psychological harm to children of being subjected to, or exposed to family violence. Consequently, it should not be necessary to subject children to psychological assessment in these circumstances. The focus should be on whether or not the conduct occurred rather than whether it has had a psychological impact on the particular child. In the circumstances it is suggested that the definition in subsection 4(1)(c) should be expressed as "**conduct which is likely to cause a child to suffer psychological harm**".

Item 2 - Subsection 4(1) - Definition of *exposed* in relation to family violence - New provision

NLA supports the insertion of the word "exposed" in subsection 4 (1)(c) but please refer to our comments in relation to Item 8 in respect of the examples used in proposed provision 4(1AD).

Item 3 - Subsection 4(1) - Definition of *family violence* - New provision

NLA has some concern about the complexity and structure of the proposed definition. In particular there is concern that, as a consequence, the examples provided may be considered to be exhaustive rather than illustrative.

As NLA indicated in response to the ALRC/NSWLRC Consultation *Family Violence; Improving Legal Frameworks* (July 2010) examples can be useful to ensure that certain types of behaviours or situations are correctly interpreted as constituting family or domestic violence. It is also possible that examples could also assist in achieving more consistent responses from the justice system in responding to family violence. However it must be clearly stated that the examples used are not exhaustive and merely describe some of the types of abuse that constitute family violence.

In this regard NLA prefers the approach that was used in the drafting of the definition of family violence in sections 5, 6 and 7 of the *Family Violence Protection Act 2008* (Victoria) and refers also to the proposed definition in Recommendation 6-4 of the ALRC and NSW Law Reform Commission Report *Family Violence - A National Legal Response* (October 2010). The recommendation was that the *Family Law Act 1975* (Cth) definition should be consistent with that contained in state and territory family violence legislation. The recommended definition for state and territory family violence legislation was set out in Recommendation 5-1 of the Report

The inclusion of economic abuse in the definition of family violence is supported but, as suggested in the NLA response to the ALRC/NSWLRC Consultation *Family Violence; Improving Legal Frameworks* (July 2010), it may be difficult to succeed on the allegation of such conduct in isolation, because of the possible alternative explanations for the controlling financial behaviour. The alleged perpetrator might, for example, argue that they are simply frugal and have different spending habits and attitudes towards saving and lifestyle. There is also a concern as to the extent to which it is reasonable to control a family member in certain ways, such as circumstances where one party takes control of the finances because the other party is a problem gambler or suffers from a mental illness or disability.

In respect of financial autonomy and support, there is also some concern about the potential for overlap between proceedings in relation to children's matters and property issues where the family violence conduct alleged is limited to that set out in the proposed economic abuse provisions.

NLA also notes that the wording of the proposed section would not include threats to an animal, but rather requires that the animal has to have been injured or killed for the definition of family violence to be met. In our family violence casework and advice experience "threats to harm" pets are common and have been effectively used to prevent victims from leaving relationships involving family violence. Threats to commit suicide or self harm are also common and reference to such threats should also be included in the definition.

Item 4 - Subsection 4(1) - Definition of member of the family

Supported

Item 5 - Subsection 4 (1) - Paragraph (a) of the definition of Registry Manager - Revised provision

Supported

Items 6 & 7 - Paragraphs 4(1AD) (a) and (c) Definition of member of the family - Revised provision

Supported

Item 8 - Paragraph 4 (1AB)(c) - Definition of *exposed* - New provision

NLA refers to Item 3 above and the preference for the broader definition of family violence set out in **Recommendation 6–4 of the ALRC and NSW Law Reform Commission Report Family Violence-A National Legal Response (October 2010)**. NLA is concerned that the examples currently set out in the definition are too specific and may be interpreted as exhaustive rather than illustrative. As suggested by NLA in the response to the ALRC/NSW Consultation in relation to Family Violence, examples can be useful to ensure that certain types of behaviours or situations are correctly interpreted as constituting family or domestic violence. If examples are to be included, then it should be made very clear that they are not exhaustive.

We have some concern that the proposed provision not discourage a victim family member from disclosing family violence for fear that this may lead to a finding that they had exposed children to family violence.

Item 9- Subsection 12E(3)(note) - Obligations on legal practitioners - Revised provision (note only)

Supported.

Item 10 - Subsection 12G(1) (note) - Obligations on family counsellors, FDR practitioners and arbitrators - Revised provision (note only)

Supported.

Item 11 - Paragraph 43(1) (ca) - Principles to be applied by the courts- Revised provision

Supported.

Item 12 - Section 60CA - What division 1 of Part VII does - Revised provision

Supported.

Item 13 - Section 60B - Objects of Part VII- Revised provision

NLA supports, in principle, some recognition of the United Nations Convention on the Rights of the Child (UNCROC) in the proposed legislation, particularly Articles 12 and 19.

There is, however, some concern about how best to achieve this and the ramifications of the proposed inclusion of section 60B(4) as an object, giving effect to **all** of the UNCROC articles, particularly as there is no qualification of "subject to the best interests of the child". This provision may have some unintended and far reaching consequences which will need to be considered. For example, Article 12 may have the effect of requiring children to be directly, as well as separately, represented in all Part VII Family Court proceedings which is likely to have significant implications for the complexity, length and funding of proceedings. This might adversely impact on the best interests of children, particularly, for example, in medical intervention cases such as those involving gender change.

Items 14 and 15 - Section 60C (cell at table item 1, column headed 'Divisions and coverage') - Revised provision

Supported.

Item 16 - Subdivision BA of Division 1 of Part VII - (heading) Best interests of the child: Court proceedings - Revised provision

NLA queries the appropriateness of the inclusion of the words "Court proceedings" in the heading to this subdivision of the Act. It is possible that the inclusion of the words "Court proceedings" at the commencement of the subdivision may cause some uncertainty as to the relevance of the provisions of section 60CC in family dispute resolution processes or negotiations taking place when court proceedings have not yet commenced. The provisions of Section 60CC are relevant to the consideration of the best interests of the child, whether or not the matter is the subject of court proceedings.

Item 17 - Subsection 60CC(2A) - Determining a child's best interests - New provision

NLA supports the proposed provision as it gives clear guidance to prioritise a child's safety where there is conflict between the considerations. The amendment requires that a determination in relation to a child's exposure to abuse, neglect or family violence be made before consideration is given to the benefit to the child of having a meaningful relationship with both parents. The need for this determination should logically lead to a hearing under Section 60K, as where family violence or the risk of

family violence has been alleged, the procedure for the filing of a form outlined in the proposed amendment in Item 29 (s.67ZBA) would be triggered.

Items 18, 19 and 20 - Section 60CC - "Friendly parent provisions" - Revised provision (revision and repeal)

NLA welcomes the proposed removal of paragraph 60CC(3)(c) and subsections 60CC(4) and (4A) of the Family Law Act 1975. As NLA indicated in its submission to Professor Chisholm's *Family Courts Violence Review* (27 November 2009), NLA considers that the 'family friendly' provisions have acted as a disincentive to full disclosure of evidence of family violence and abuse. It is noted that a parent's attitude to the development of the child's meaningful relationship with the other parent can still be properly considered by the Court under s60CC(2)(a) – the benefit of a meaningful relationship with both parents – and under s60CC(3)(f) – which requires the Court to consider the parent's capacity to provide for the child's needs.

NLA supports the deletion of paragraph 60CC(3)(k) and its replacement with a similar provision that removes the requirement for family violence orders to have been final or contested. This is the approach that was suggested in our response to the options set out in Proposal 8-5 of the ALRC/NSWLRC Consultation *Family Violence; Improving Legal Frameworks* (July 2010).

Items 18, 19 and 20 - Section 60CC - "Friendly parent provisions" - Revised provision (revision and repeal)

NLA indicated in its submission to Professor Chisholm's *Family Courts Violence Review* (27 November 2009), NLA considers that the 'family friendly' provisions have acted as a disincentive to full disclosure of evidence of family violence and abuse.

The Chisholm Report notes that the 'family friendly' provisions are appropriate in many situations, however recommends that, where there is violence and abuse, the 'family friendly' provisions need to be qualified¹.

The Chisholm report states:

On the material available, it seems likely that the friendly parent provision, s 60CC(3)(c), while it might have had a beneficial effect in many situations, has had the undesirable consequence in some cases of discouraging some parents affected by violence from disclosing that violence to the family court. It is appropriate, therefore, to consider whether some amendment would remove this undesirable consequence while retaining the value of the provision in encouraging parents in ordinary circumstances to facilitate the child's relationship with the other parent.

NLA considers that the proposed amendments to the 'family friendly' provisions, as outlined in items 18 and 20, go beyond the Chisholm Report's recommendation as they do not retain the value of the provisions in situations where family violence and abuse do not exist.

¹ Chisholm Report, p. 102

It is suggested that an appropriate alternative would be to amend rather than delete sections 60CC(4) and(4A) and for the proposed Section 60CC (2A) to provide as follows:

(2A) If there is any inconsistency in applying the considerations set out in subsection (2) , the court is to give greater weight to the consideration set out in paragraph (2)(b) and, in respect of family violence, to:

- (i) any family violence involving the child, a member of the child's family **or other member of the family in the household;**
- (ii) any family violence order that applies to the child or a member of the child's family **or other member of the family in the household;**

Section 60CC(3) should then commence " Additional considerations, **which are subject to the primary considerations in section 60 CC (2)**, are:"

Section 60CC(4) would provide that "**In determining the weight to be given to the additional considerations** in Section 60CC(3) (c) and (i) the Court must consider the extent to which ..."

These amendments would be consistent with the priority that has been given to the consideration of family violence in the rest of the Bill in that reference to family violence as an "additional consideration" in subsections (j) and (k), would be removed and more appropriately incorporated into the primary considerations set out in section 60 CC(2) and (2A). It would also be clear that Sections 60CC(3) and 60CC(4) are subject to the primary considerations in section 60CC(2) and the effect of section 60CC(2A).

Item 21 - Subdivision BB and sections 60CH and 60CI - New provision

NLA supports the introduction of these new provisions. The requirement for parties to provide the family courts with information in relation to the existence of child welfare orders or arrangements relating to other children will facilitate the ability of the courts to identify and assess any risk of harm to the children the subject of proceedings, including the question of whether child protection authorities should be invited to intervene in proceedings.

However, as proposed in our response to Proposal 8-2 of the ALRC/NSWLRC Consultation *Family Violence; Improving Legal Frameworks (July 2010)*, there must be processes (including memorandums of understanding, with other courts, child protection authorities and the police) to obtain copies of relevant orders. From experience, courts should not rely on self-disclosure. Access to information of this kind will ensure more appropriate decisions.

In Western Australia the Family Court of WA (FCWA) has memorandums of understanding (MOU) in place with the Department of Child Protection (DCP) and Legal Aid WA (LAWA) for information sharing in relation to child welfare issues and with the Department of the Attorney General, the magistrates courts, the Department of Corrective Services and Legal Aid Western Australia for information sharing in relation to family violence issues. The experience of LAWA is that these memoranda of understanding work well, particularly with respect to the FCWA access to

information from DCP and the Magistrates' Court's database. In addition, DCP now has an officer permanently located at the FCWA to facilitate the information sharing process.

Item 22 - New subdivision BB (after Subdivision BA) - Best interests of the child: adviser's obligations - New provision

Supported.

Items 23 and 24 - Section 63DA including new subsection 63DA(1A) and repeal of paragraph 63 DA (2) (c) - Obligations of advisers - New provision

NLA supports the deletion of Section 63DA(c) and the inclusion of the new provision contained in section 63DA(1A) with the addition of the word "primary" before the word obligations, so that the provision would set out that "The obligations on an adviser under this section are in addition to the adviser's **primary** obligations under section 60D." This would ensure that there will be no misunderstanding as to the priority to be given to those provisions.

NLA suggests that the amendments to this section could also include specific reference to family violence and its significance. For example, similar to the approach used in the drafting of the proposed section 69ZQ(1)(aa), an obligation could be imposed on an advisor to inform a party that a parenting plan may not be appropriate if one party considers that the child concerned, or a party, has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence.

Items 25 and 26 - Repeal of Note 1 of subsection 65DAA (5) and revision to Note 2 - Court to consider equal time or substantial and significant time in certain circumstances - Revised provision (notes only)

Supported.

Item 27 - New paragraph 67A (ca) - What Division 8, Part VII deals with - Revised provision

Supported.

Item 28 - New note to subsection 67ZA(3) - Suspicion of abuse - Revised provision (note only)

Supported.

Item 29 - Subdivision D of Division 8 of Part VII - Allegations of family violence - New provision

NLA supports this new provision but considers that the issue that must be addressed is what is to be expected from child welfare authorities by way of response, taking into account their traditional agency policies and thresholds for investigation of family violence as a child welfare concern. For example, in WA the MOU in place between FCWA, DCP and LAWA specifically sets out the reporting requirements of DCP in response to Form 4s alleging family violence.

Item 30 - Note in section 68N - Purposes of Division 11 - Repealed provision (note only)

Supported.

Item 31 - New paragraph 69ZN(5)(a) - Principles for child related proceedings - Revised provision

Supported.

Item 32 - New paragraph 69ZQ(1)(aa) - General duties of the court - New provision

NLA supports the introduction of the requirement of a more proactive approach from the Court in relation to making enquiries into the existence of abuse or family violence. In LAWA's experience the MOUs referred to above are being used proactively and effectively by FCWA for such enquiries.

NLA suggests that consideration should be given to the inclusion of "other member of the family in the household" in paragraph 69ZQ(1)(aa)(i) and (ii).

Item 33 - New note at end of subsection 91B(2) - Intervention by child welfare office - New provision (note only)

Supported.

Item 34, 35, 36 - Subsection 117AB costs - New provision and revisions

Supported.

Item 37 - Section 117AB - False allegations and statements - Repealed provision

Supported.

Additional comments

NLA suggests that, consideration could be given to strengthening the provisions of Section 60K using as a model Sections 59 – 61 of the *Care of Children Act 2004 (New Zealand)* ("the Act") which requires early determination of violence allegations (the definition of "violence" is limited to physical or sexual abuse by section 58 of the Act) by the Court with consequential provisions relating to the care of children, in the event that the allegations are proven or there is considered to be an unacceptable risk to the child's safety. There is currently some debate in New Zealand as to the appropriateness of broadening the definition of violence in respect of the application of sections 59 -61 of the Act, which would seem to be appropriate in the event that similar provisions were to be introduced into the *Family Law Act 1975*, given the proposal to broaden the definition of "family violence" in the draft legislation.

The strengthening of section 60K in this way would be consistent with the NLA submissions to Professor Chisholm's *Family Courts Violence Review (27 November 2009)* in respect of the challenges associated with the current approach of the family courts to the operation of section 60K.

The wording of sections 59-61 of the *Care of Children Act 2004 (New Zealand)* is attached to these comments.

Conclusion

Should you require any further information please do not hesitate to contact us.

Thank you again for the opportunity to comment on these proposed amendments.

Yours sincerely,

A. KIRKLAND
Chairperson
NATIONAL LEGAL AID

Section 59 Allegations of violence made in proceedings relating to parenting orders

- (1) Section 60 applies to proceedings—
 - (a) relating to an application under this Act for any of the following:
 - (i) an order about the person or persons who have the role of providing day-to-day care for a child;
 - (ii) an order about contact with a child;
 - (iii) the variation or discharge of, or of any condition of, an order in subparagraph (i) or subparagraph (ii); and
 - (b) in which an allegation is made that a party to the proceedings has used violence—
 - (i) against the child or a child of the family; or
 - (ii) against the other party to the proceedings.
- (2) Section 60 applies to proceedings specified in subsection (1) whether or not those proceedings also relate to any other matter (whether arising under this Act or any other enactment).

Compare: 1968 No 63 s 16B(1), (2)

Section 60 Procedure for dealing with proceedings in section 59(1)

- (1) In proceedings to which this section applies in accordance with section 59 (the **proceedings**), the court must, as soon as practicable,—
 - (a) consider whether to appoint a lawyer to act for the child under section 7(1); and
 - (b) determine, on the basis of the evidence presented to it by, or on behalf of, the parties to the proceedings, whether the allegation of violence is proved.
- (2) Nothing in subsection (1) requires the court to make any inquiries on its own initiative in order to make a determination on the allegation.
- (3) If the court is satisfied that a party to the proceedings (the **violent party**) has used violence against the child or a child of the family, or against the other party to the proceedings, then, unless subsection (4) applies, the court must not make—
 - (a) an order giving the violent party the role of providing day-to-day care for the child to whom the proceedings relate; or
 - (b) any order allowing the violent party contact (other than supervised contact) with that child.
- (4) In the situation in subsection (3), the court may make an order in subsection (3)(a) or (b) if, after complying with section 61, the court is satisfied that the child will be safe while the violent party—
 - (a) provides day-to-day care for the child; or (as the case may be)
 - (b) has contact with the child.
- (5) If, in the situation in subsection (3), the court is not satisfied as provided in subsection (4), it may make an order for supervised contact between the child and the violent party, and, if it does so, the court must specify in the order whether the supervised contact is to occur—
 - (a) under the supervision of an approved provider; or

- (b) in the immediate presence of a person approved by the court (for example, a relative, a friend of the family of the child, or any other person whom the court considers suitable).
- (6) Despite subsection (1), the court may make any order under this Act that it thinks fit in order to protect the safety of the child if the court—
- (a) is unable to determine, on the basis of the evidence presented to it by, or on behalf of, the parties to the proceedings, whether the allegation of violence is proved; but
 - (b) is satisfied there is a real risk to the child's safety.

Compare: 1968 No 63 s 16B(2)–(6)

Section 61 Matters relevant to question in section 60(4)

In considering, for the purposes of section 60(4), whether a child will be safe if a violent party provides day-to-day care for, or has contact (other than supervised contact) with, the child, the court must, so far as is practicable, have regard to the following matters:

- (a) the nature and seriousness of the violence used:
- (b) how recently the violence occurred:
- (c) the frequency of the violence:
- (d) the likelihood of further violence occurring:
- (e) the physical or emotional harm caused to the child by the violence:
- (f) whether the other party to the proceedings—
 - (i) considers that the child will be safe while the violent party provides day-to-day care for, or has contact with, the child; and
 - (ii) consents to the violent party providing day-to-day care for, or having contact (other than supervised contact) with, the child:
- (g) any views the child expresses on the matter (as required by section 6):
- (h) any steps taken by the violent party to prevent further violence occurring:
- (i) all other matters the court considers relevant