



Australian Government

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Submission to the Senate Standing Committee on Legal and Constitutional Affairs—Inquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill

The Australian Law Reform Commission (ALRC) welcomes the opportunity to comment on the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (the Family Violence Bill).

Family Violence Inquiry

In 2009–10, the ALRC, in conjunction with the NSW Law Reform Commission (NSWLRC), conducted a major inquiry regarding family violence (the Family Violence Inquiry). The Inquiry examined the interactions in practice between state and territory family violence and child protection laws with the *Family Law Act 1975* (Cth) and relevant Commonwealth, state and territory criminal law. The resulting report, *Family Violence—A National Legal Response* (ALRC Report 114 and NSWLRC Report 128, hereinafter referred to as ALRC Report 114) was extensive and contained 187 recommendations for reform.

ALRC Report 114 was tabled in Parliament out of sitting on 11 November 2010 to coincide with the launch of the report by the Australian Attorney-General, the Hon Robert McClelland MP, together with the then NSW Attorney General, the Hon John Hatzistergos. For your convenience, we enclose two copies. An electronic version of ALRC Report 114, as well as associated materials such as the Summary Report, the preceding Consultation Paper and media releases, are freely available on the ALRC's website at www.alrc.gov.au

Prior submission to the Attorney-General's Department

In November 2010, the ALRC made a submission to the Australian Government Attorney-General's Department regarding the Exposure Draft Family Law Amendment (Family Violence) Bill 2010 (the Exposure Draft Bill). The ALRC based this submission on our experience and findings in the Family Violence Inquiry. The submission was therefore limited as the ALRC and the NSWLRC (the Commissions), in accordance with their Terms of Reference, considered the *Family Law Act* not 'at large', but only insofar as its provisions interacted in practice with family violence laws and child protection laws. The ALRC's comments on the proposed amendments to the *Family Law Act* are thus made through the lens of interaction with these state and territory legislative schemes.

The Family Violence Bill substantially reflects the preceding Exposure Draft Bill. We therefore attach the ALRC's submission regarding that Bill and request that the attached submission be treated as a submission to the Senate Standing Committee on Legal and Constitutional Affairs. The ALRC's overall position in relation to the proposed amendments to the *Family Law Act* is summarised at paragraph [1.6] of the attached submission.

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A major difference between the Exposure Draft Bill and the Family Violence Bill is the proposed amendment to the definition of family violence. We therefore update our comments to focus on this change, outlined below.

Definition of family violence

A common interpretative framework

By way of background, a key concept underlying a number of recommendations in ALRC Report 114 is that of a common interpretative framework in relation to family violence.¹ Such a framework would establish a shared understanding of family violence across relevant jurisdictions, based primarily on the same core definition of family violence. The Commissions recommended that a common core definition should be adopted in:

- state and territory family violence legislation;²
- the *Family Law Act*;³ and
- criminal law—in the limited circumstances where family violence is defined in the context of defences to homicide.⁴

Some comments below reflect the Commissions' views on the definition of family violence that were expressed in the context of family violence legislation in ALRC Report 114. In many cases these views apply equally to the *Family Law Act*—for which the Commissions recommended the same core definition.

Definition

The Family Violence Bill does not specifically take into account the Commissions' recommendations in ALRC Report 114. The Explanatory Memorandum states that the Family Violence Bill responds to the following reports:

- *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies (AIFS),⁵
- *Family Courts Violence Review* by Professor Richard Chisholm,⁶ and
- *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* by the Family Law Council.⁷

Nonetheless, the Family Violence Bill amends the definition of family violence in the *Family Law Act* and the Exposure Draft Bill to substantially implement the definition recommended by the Commissions in ALRC Report 114.⁸ Recommendation 6–4 of ALRC Report 114 states that family violence should be defined in the *Family Law Act* as

violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- a. physical violence;
- b. sexual assault and other sexually abusive behaviour;
- c. economic abuse;
- d. emotional or psychological abuse;
- e. stalking;
- f. kidnapping or deprivation of liberty;

1 The common interpretative framework is discussed in Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010) at Chs 5 to 7.

2 Ibid, Rec 5–1.

3 Ibid, Rec 6–4.

4 Ibid, Rec 6–1.

5 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009).

6 R Chisholm, *Family Courts Violence Review* (2009).

7 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* (2009).

8 The definition also aligns with the definition of family violence recommended by the Victorian Law Reform Commission in its 2006 report on family violence, which was considered by the Commissions in formulating a recommended definition of family violence in ALRC Report 114. Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006).

- g. damage to property, irrespective of whether the victim owns the property;
- h. causing injury or death to an animal, irrespective of whether the victim owns the animal; and
- i. behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h).

Specific comments in support of the Family Violence Bill definition of family violence

We welcome the substantial implementation of this recommendation in the Family Violence Bill. In particular, we strongly support the following elements of the Family Violence Bill definition of family violence:

- the definition is broadened, and includes a non-exhaustive list of types of the behaviour that may fall within it;
- the context in which the conduct occurs is described; and
- the semi-objective test of reasonableness is removed.

A broader definition

The Family Violence Bill significantly broadens the definition of family violence. The list in cl 4AB(2) sets out the types of physical and non-physical violence that may fall within the definition—importantly, in a non-exhaustive manner. In ALRC Report 114 the Commissions stated that the definition of family violence in the *Family Law Act* is too narrow, and recommended that it should be expanded to include specific reference to a non-exhaustive list of certain types of physical and non-physical conduct.⁹

Context of family violence

The context in which violence occurs is provided upfront—forming the core definition in cl 4AB(1). This definition of family violence is appropriately expressed as ‘violent, threatening or other behaviour by a person that coerces or controls a [family member] or causes the family member to be fearful’. In ALRC Report 114, the Commissions expressed the view that the definition of family violence should describe the context in which behaviour takes place, rather than merely listing specific incidences of violence or abuse.¹⁰ The report further states that

emphasising the coercive, controlling nature of family violence and how it engenders fear serves an important educative function, as well as a dual pragmatic function. First, it allows new behaviours—including seemingly ‘minor’ events which may have a particular significance to victims—to be included, provided that they meet this definition. ... Secondly, it can filter out instances of abuse committed outside the context of controlling or coercive behaviour ...¹¹

The ‘filter’ provided by a contextual background is particularly important in the context of an expanded definition of family violence, where non-physical forms of violence are specifically included.¹²

Removal of reasonableness test

The definition removes the semi-objective test of reasonableness. In ALRC Report 114, the Commissions expressed the view that the reasonableness test in the *Family Law Act* should be removed, as it is inappropriate to apply such a test to the experience of fear in determining whether conduct is violent. To do so ignores the psychological impact of family violence, especially within the context of a controlling relationship.¹³ This approach is consistent with that of the Family Law Council in its 2009 advice to the Australian Government Attorney-General.¹⁴

9 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [6.102]–[6.106], Rec 6–4.

10 Ibid, [5.166], [6.105].

11 Ibid, [5.168]–[5.169].

12 Ibid, [5.166].

13 Ibid, [6.107].

14 Ibid, [6.108]. 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* (2009), [3.3.1].

Specific qualifications with respect to the Family Violence Bill definition of family violence

The Family Violence Bill does not contain all components of Recommendation 6–4, in particular, in the types of conduct listed in cl 4AB(2) as examples of family violence. The ALRC has several comments and concerns in relation to cl 4AB(2):

- economic abuse should be expressly recognised as a type of behaviour within the definition of family violence;
- the broader category of emotional or psychological abuse is preferable to ‘repeated derogatory taunts’, and examples of emotional or psychological abuse should be provided;
- kidnapping should be recognised as an example of family violence, alongside unlawful deprivation of liberty;
- it should be clear that property damage is relevant irrespective of who owns the property, and similarly, that injuring an animal is relevant whether or not the victim owns the animal; and
- behaviour by the person using violence that causes a child to be exposed to the effects of family violence should be included in the definition of family violence.

Economic abuse

Economic abuse should be expressly recognised as a type of behaviour that may fall within the definition of family violence.¹⁵ The definition should ideally set out non-exhaustive examples of economic abuse, including the examples provided in cl 4AB(2)(g)–(h) of the Family Violence Bill. Other examples may include: coercing a partner to relinquish control over assets; coercing a person to claim social security payments; preventing a person from seeking or keeping employment; and the practice of ‘humbugging’ in Indigenous communities—that is, demanding money from relatives, often by the use of standover tactics.¹⁶

Emotional or psychological abuse

In ALRC Report 114, the conduct listed in cl 4AB(2)(d), that is, ‘repeated derogatory taunts’, was characterised more broadly as emotional or psychological abuse. The ALRC considers that a broader definition than provided in cl 4AB(2)(d), such as emotional and physical abuse as recommended by the Commissions, is preferable. Concerns that specifying emotional or psychological abuse as a type of family violence may lead to misuse are addressed by placing this conduct in the context of behaviour that is violent, threatening, coercive, controlling or causing fear—as recommended by the Commissions and adopted in the Family Violence Bill in cl 4AB(1).¹⁷

The Commissions recommended (in the context of a discussion on the definition of family violence in family violence legislation) that legislation should include examples of emotional and psychological abuse that illustrate conduct that would affect—although not exclusively—certain vulnerable groups, including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual, transgender and intersex communities.¹⁸ As noted above, the Commissions also recommended that the same definition of family violence be adopted in the *Family Law Act*. Accordingly, other examples of emotional or psychological abuse should be included in the definition as illustrations of behaviour that affect particular groups, for example:

- a. threatening to institutionalise a person;
- b. withdrawing care on which the person is dependent;
- c. withholding medication or preventing the person from accessing necessary treatment or aids and equipment used in the person’s daily life;
- d. threatening to disclose a person’s sexual orientation against the person’s wishes; and

15 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.181].

16 *Ibid*, [5.183].

17 *Ibid*, [5.185].

18 *Ibid*, Rec 5–2.

- e. racial taunts; and preventing a person from making or keeping connections with the person's family, friends or culture, including spiritual ceremonies or practices.¹⁹

We note that the Family Violence Bill includes at cl 4AB(2)(i) 'preventing the family member from keeping connections with his or her family, friends or culture' as an example of family violence. The ALRC supports the inclusion of this behaviour in the definition of family violence—whether listed as an example of emotional or psychological abuse as in the Victorian family violence legislation²⁰ and recommended by the Commissions, or as a stand-alone example of family violence.

A further example contained in the Exposure Draft Bill was threats of suicide or self-harm with intent to torment or intimidate. While the ALRC does not consider that this example was appropriately placed in the Exposure Draft Bill—it was positioned as a stand-alone example of family violence—the ALRC considers that this example may usefully illustrate emotional or psychological abuse within the definition of family violence. In conducting the Family Violence Inquiry, the Commissions heard of particular examples of threats of suicide having occurred in Indigenous family relationships, in the context of exercising coercion and control over a family member—although such threats can occur more broadly.

Kidnapping

Consistent with Recommendation 6–4 of ALRC Report 114, the ALRC considers that kidnapping should be included as an example of family violence, alongside the example of unlawful deprivation of liberty.

Property damage and harm to animals

The ALRC strongly supports the position taken in the Family Violence Bill in distinguishing harm to animals from damage to property, particularly in light of research that indicates the particular impacts on victims' behaviours arising from fear of an animal being harmed.²¹ However, the reference to property damage or destruction in the Family Violence Bill in cl 4AB(2)(e) should make it clear that this is relevant irrespective of who owns the property. As stated by the Commissions in ALRC Report 114, if a person violently smashes a chair against a wall in the presence of a spouse or child, and that conduct causes fear, it is irrelevant that the person who smashed the chair owns the chair.²² Similarly, this qualification should be made to the reference to 'causing death or injury to an animal'—that is, it should apply irrespective of whether the victim owns the animal.²³

Exposure of children to violence

ALRC Report 114 recommended that behaviour by the person using violence that causes a child to be exposed to the effects of family violence should be included in the definition of family violence. In making this recommendation, the Commissions referred to the 'considerable amount of research documenting the fact that exposure of children to family violence causes long-term emotional, psychological, physical and behavioural issues'.²⁴ Further reasons for including this in the definition are canvassed in ALRC Report 114.²⁵

The ALRC notes that the Family Violence Bill includes exposure to violence in the definition of 'abuse' in relation to a child in cl 4(1), but urges that the legislation include such exposure in the definition of family violence. Clearly, certain behaviour can constitute both family violence and child abuse. Further comments on the definition of 'abuse' are in the attached submission at paragraph [1.20].

The definition of family violence should also clarify that a child is exposed to the effects of family violence by the behaviour of the person using family violence, and not due to the failure of the victim parent to protect that child from such exposure.²⁶

19 Ibid, [5.188].

20 *Family Violence Protection Act 2008* (Vic) ss 5, 7.

21 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence—A National Legal Response*, ALRC Report 114; NSWLRC Report 128 (2010), [5.200].

22 Ibid, [5.198].

23 Ibid, [5.200].

24 Ibid, [5.209].

25 Ibid, [5.204]–[5.212].

26 Ibid, [5.205]–[5.206].

Nature, features and dynamics of family violence

In ALRC 114, the Commissions recommended that the *Family Law Act* be amended to include a provision explaining the nature, features and dynamics of family violence.²⁷ There is no such provision in the Family Violence Bill. Such a provision—where also included in family violence legislation—would complement a common core definition of family violence in establishing a common interpretative framework. More detailed comment on the recommended *Family Law Act* provision regarding the nature, feature and dynamics of family violence is in the attached submission at paragraphs [1.17]-[1.19].

We hope this submission assists you. If you require further information, please contact me on

Yours sincerely,

²⁷ Ibid, Rec 7–3. See also [7.45]–[7.49].