Chambers of the Hon. Diana Bryant
Chief Justice, Family Court of Australia

Response to the exposure draft of the Family Law Amendment (Family Violence) Bill 2010 and consultation paper

11 January 2011

Introduction

Thank you for the opportunity to comment on the exposure draft of the Family Law Amendment (Family Violence) Bill 2010 ("the Bill") and the accompanying consultation paper. I am responding to both in my capacity as Chief Justice of the Family Court of Australia, as advised by the Family Court's Law Reform Committee. The views contained in this response are my own and do not reflect those of the Family Court more broadly.

I have had the opportunity to consider the response to the exposure draft prepared by Professor Patrick Parkinson from the University of Sydney, an advance copy of an article by Professor Richard Chisholm entitled 'Legislating about Family Violence: the Family Law Amendment (Family Violence) Bill 2010', which I believe will be published in the forthcoming edition of the *Australian Journal of Family Law*, and Professor Chisholm's submission on the exposure draft itself. I have also been provided with a copy of the submission prepared by Professor Belinda Fehlberg of the University of Melbourne and Associate Professor Juliet Behrens of the Australian National University. I understand that copies of these documents have been provided to the Attorney-General's Department. I am in agreement with them in some respects, which I will detail in my submission.

I join with Professors Parkinson and Chisholm in congratulating the Government for its commitment to addressing the impact of family violence and particularly to protecting vulnerable children caught up in the family law system. I appreciate that the Government has invested considerable time and resources in evaluating the effect of the 2006 shared parenting reforms and in commissioning dedicated research into family violence. The AIFS report *Evaluation of the 2006 Family Law Reforms*, the Chisholm report arising from the *Family Courts Violence Review*, the Family Law Council's report *Improving Responses to Family Violence in the Family Law System* and, most recently, the ALRC/NSWLRC's report *Family Violence: a national legal response*, make an important contribution to understanding the aetiology, dynamics and effects of family violence.

My submission addresses those clauses of the Bill that I consider warrant discussion. Where I have not referred to a particular clause, it is because I am generally in agreement

with it. I have also commented on some of the text of the consultation paper; particularly that pertaining to the reference to the United Nations Convention on the Rights of the Child (UNCROC) in section 60B of the Family Law Act ("the Act").

Schedule of amendments

Clause 3, sub-section 4(1) – definition of family violence

I note that this definition appears to be substantially based on that contained in the Victorian *Family Violence Protection Act 2008* (Vic). I urge caution in adopting this definition wholesale, which is one developed for a very different purpose to that of making orders that are in the best interests of a child.

Indeed, the proposed broadening of the definition of family violence in the Act has been the subject of detailed discussion by Professors Parkinson and Chisholm. As noted by Professor Chisholm, the proposed new definition omits the requirement that fear of actual or threatened conduct must be reasonable and enumerates behaviours that the term includes. Both commentators have observed that, in their respective views, the proposed new definition is too wide and the family law courts will be "overwhelmed" by claims of violence. As currently drafted, the definition captures behaviour that would not ordinarily or sensibly be considered to constitute family violence, with the effect that (as Professor Parkinson says) "the voices of the most vulnerable women and children may be lost in the cacophony." I share this concern.

I also agree with both Professors that the proposed definition is problematic in lacking context, insofar as it does not contain a unifying theme of behaviour that is designed to coerce or control the other party. As the materials issuing from the Wingspread conference made clear, differentiation is critical to understanding family violence. This is embodied in the Family Court's Family Violence Best Practice Principles, which in their revised form will identify four types of family violence and observe that coercive controlling violence is the most severe type of family violence. The Best Practice Principles will also repeat the statement made by the Family Law Council that "It is no longer scientifically or ethically acceptable to speak of domestic violence without specifying loudly and clearly, the type of violence to which we refer."

Professor Chisholm has suggested that the aforementioned difficulties could be overcome by redrafting the definition along the lines suggested in the ALRC/NSWLRC report. I am favourably inclined towards the structure of that definition and support Professor Chisholm's recommendation.

Clause 13, section 60B – inclusion of reference to UNCROC

The consultation paper accompanying the exposure draft of the Family Violence Bill discusses UNCROC at pages 3 and 27. It is proposed that a new object would be inserted into section 60B of the Family Law Act to provide that a further object of Part VII of the Act is to give effect to UNCROC.

I support this recommendation in principle. However, I wish to make some observations about the text accompanying this recommendation on page 3 of the consultation paper. Paragraph 2 on page 3 states:

> *Item 13 of the Family Violence Bill would place a new object in Part VII of the Family Law Act confirming that the Act* ***gives effect*** *to the Convention.* ***The effect is that decision-makers, including family courts, must take account of the Convention of the Rights of the Child when dealing with matters in relation to children under Part VII of the Act .***(emphasis added)

With respect, I query whether this is a correct statement of the law. In Australia, ratification of a treaty does not have the effect of incorporating the treaty into domestic law. As the High Court said in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR 353:

> *It is well established that the provisions of an international treaty to which Australia is a party do not form part of Australian law unless those provisions have been validly incorporated into our municipal law by statute. This principle has its foundation in the proposition that in our constitutional system the making and ratification of treaties fall within the province of the Executive in the exercise of its prerogative power whereas the making and the alteration of the law fall within the province of parliament, not the Executive. So, a treaty which has not been incorporated into our municipal law cannot operate as a direct source of individual rights and obligations under that law.* (per Mason and Deane JJ at 362)

A valid enactment of an international treaty into municipal law, as I understand it, would require legislation to be made under the external affairs power of the *Constitution*. Such legislation must, in the ordinary course of events, conform to the treaty and be reasonably appropriate and adapted to giving effect to the treaty. In my view, the inclusion of reference to UNCROC in section 60B of the Act does not satisfy the above criteria and thus it is inaccurate to state that the proposed amendment to section 60B "gives effect" to UNCROC.

If the foregoing is correct, I also doubt whether the effect of the inclusion of reference to UNCROC in section 60B of the Act is to require courts exercising jurisdiction under the Act to take account of the Convention when hearing matters under Part VII. The High Court in *Teoh* (supra) said:

> *Where a statute or subordinate legislation is ambiguous, the courts should favour that construction which accords with Australia's obligations under a treaty or international convention to which Australia is a party, at least in those cases in which the legislation is enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument. That is because Parliament, prima facie, intends to give effect to Australia's obligations under international law.* (per Mason and Deane JJ at 362)

Absent a valid enactment of an international treaty into domestic law (as has occurred with the *Racial Discrimination Act 1975* (Cth), the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth) and the *Age Discrimination Act 2004* (Cth)), it seems to me that UNCROC could only be persuasive in the event of ambiguity in Part VII.

I further note that section 60CC(3)(m) permits courts exercising jurisdiction under the Act to have regard to "any other fact or circumstance that the court thinks is relevant" and that UNCROC may be able to be considered in this context. I refer you to the Full Court of the Family Court's decision in *B & B: Family Law Reform Act 1995* (1997) FLC 92-788 for further discussion of this issue.

I also wish to emphasise that Family Court judges are well aware of the existence of UNCROC and its significance in domestic law. In *B & B* (supra), the Full Court held that UNCROC must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends. In *KN & SD* (2003) FLC 93-148 the Full Court of the Family Court found that UNCROC was a source of fundamental rights and freedoms. The Full Court further found that UNCROC and section 60B of the Act confer significant rights upon a child.

I reiterate that I am not averse to including reference to UNCROC in section 60B. However I believe it is important that, should the proposed amendment be pursued, the legislature is clear as to the nature and effect of the amendment. In particular, the Explanatory Memorandum and Second Reading Speech should not in my view claim or suggest that the inclusion of UNCROC in the objects of the Family Law Act "gives effect" to the Convention in domestic law. On that basis I submit that the description on page 27 of the consultation paper, which refers to an obligation on decision makers to interpret the Family Law Act, to the extent its language permits, consistently with Australia's obligations under the Convention, should be preferred to that on page 3.

I also agree with Professor Parkinson and Professor Chisholm that the proposed note to section 60B(4) should be deleted, on the basis that it is not the task of legislation to serve as a research assistant.

Clause 17, section 60CC(2A) – prioritising safety in the event of a conflict

This appears to be a simple solution to a perceived problem, but as both Professors Parkinson and Chisholm point out, the solution compounds the problem of interpretation which has bedevilled the concept of primary and additional considerations. There remains uncertainty as to the relationship between the various considerations and the proposed amendment will only add to that uncertainty.

I note that Professor Parkinson encourages the Government to explain what it understands the differentiation between the primary and additional considerations. I note also Professor Chisholm's recommendation that the distinction between the 'primary' and

'additional' considerations be dispensed with. I would not urge the Government to dispense with the primary considerations because they give context to the determination of "best interests" in section 60CC(3). However, it seems that the provision in sub-section 60CC(2)(a) has been interpreted by many groups to mean that the maintenance of this relationship is to be achieved at almost all costs.

Professors Parkinson and Chisholm describe the problems arising from this and your proposed amendment by including sub-section (2A) overcomes these problems where the conflict is between meaningful relationship and protection from violence. However, even absent issues of family violence, there are other considerations that might suggest that the benefit of a meaningful relationship should not be an overriding factor if it is otherwise contrary to a child's best interests.

Rather than dispensing with the distinction between 'primary' and 'additional' considerations, I would submit that a better outcome may be achieved by adding to section 60CC(2)(a) the words "to the extent that it is consistent with the best interests of the child."

Clause 19, section 60CC(3)(k) – family violence order

I am conscious of the fact that Professors Parkinson and Chisholm do not support the proposed amendment and favour a provision in section 60CC(3) that is directed towards evidence of family violence (Professor Chisholm) or concerns about a child's safety (Professor Parkinson). With respect to them, I do not think a provision drafted in those terms would be particularly helpful. Judges routinely 'look behind' state family violence orders to consider evidence of family violence and as such the orders serve as a useful trigger for that inquiry. I support the amendment in its present form.

Clause 20, section 60CC(4) and (4A) – removing 'friendly parent' provisions

Having had the opportunity to read Professor Parkinson's and Professor Chisholm's comments about this proposed amendment, I am in agreement with them. I too fail to understand what benefit would accrue from deleting section 60CC(4) in its entirety. It seems to be entirely appropriate for courts exercising jurisdiction under the Act to have regard to the extent to which each parent has participated in decision making about the child, spent time and communicated with the child, and provided financial support for the child. I agree with Professor Chisholm that if the object of the proposed amendment is to remove disincentives to disclosing violence, that could be achieved through a more judicious amendment to section 60CC(4) that does not interfere with the beneficial aspects of that section. One approach, which I support, would be to include that which is currently contained in section 60CC(4) as one of the 'additional' factors in section 60CC(3). This could be in substitution for section 60CC(3)(c) which, pursuant to clause 18 of the exposure draft of the Bill, is to be deleted.

Clause 29, section 67ZBA – party to the proceedings makes allegations of family violence

I have three concerns about this proposed amendment.

The first is structural. It seems to me to be unnecessarily cumbersome to enact a new section, and prescribe a new form, when conceivably section 60K could be broadened to achieve the same ends. It is also not apparent why section 67ZBA(2) is proposed given that it seems to cover the same ground as the existing section 67Z. It appears that the authors of the consultation paper contemplate that the existing form 4 Notice of Child Abuse or Family Violence could be employed for the purposes of the new section 67ZBA process. I do not agree. The Family Law Rules were amended and the existing form was substantially modified in 2006 to accommodate the requirements primarily of section 60K and to a lesser extent section 67Z. For example, consistent with section 60K(1)(c), the form 4 requests the person completing the form to identify the relevance of the allegations of violence or risk of violence to the orders sought. There is no comparable requirement in the proposed section 67ZBA.

The second is procedural. It is not abundantly clear to me what follows from engaging section 67ZBA if abuse or risk of abuse of a child is not alleged. All that the section would appear to achieve is that a notice alleging family violence or the risk of family violence would be filed and served on the other party. As currently expressed there would be no obligation imposed on the Court to take further action upon filing of the notice, as occurs when a notice is filed pursuant to section 60K. If it is intended for a section 60K-type process to become operative under section 67ZBA, then in my view the section will need to be redrafted.

I believe that a new rule and form, and indeed process, would be required to support section 67ZBA. I suggest this could lead to confusion, particularly for litigants in person, and could defeat the objective of encouraging parties to disclose family violence. Consideration should instead be given to expanding the ambit of section 60K or indeed combining sections 60K, 67Z and 67ZBA.

My third concern is one of resourcing. This matter is also alluded to in the submissions of Professor Parkinson and Professor Chisholm. The combination of an expanded definition of family violence and a legislative requirement to file a notice if allegations of violence or risk of violence are raised, and presumably the expectation that the Court will respond in some particular way upon a notice being filed, would require what Professor Chisholm describes as “special measures” being applied to the vast majority of children’s cases. I agree with him that the result would be that scarce resources would be diverted away from the most needy cases; those that actually require the most attention.

Clause 32, section 69ZQ(1)(aa) – asking parties to the proceedings about violence or risk of violence

I confess I do not understand what is expected to be achieved through the inclusion of section 69ZQ(1)(aa) in the Act. It would be of assistance if the Explanatory

Memorandum accompanying the Bill detailed with some specificity what the intention of section 69ZQ(1)(aa) is; particularly at what stage of proceedings the inquiry should be made and what the judge is expected to do following an affirmative response.

It would appear that the intention is that section 69ZQ(1)(aa) be confined to the conduct of child-related proceedings. According to the consultation paper, "[i]mposition of this duty would implement the family courts' obligation under subsection 69ZN(5) to conduct proceedings in a way that will safeguard the child and the parties to the proceedings from harm." However, if family violence has already been raised, there would be material before the Court which would enable the Court to act protectively as required. This section seems to imply that in a case in which there has been no allegation of family violence or material filed which would support a consideration of whether there has been family violence, that a judge would (presumably at a procedural hearing) ask the parties whether they consider the child or a party has been or is at risk of being subjected to family violence.

It is also important to articulate when this question is to be asked. As it is obviously procedural, it would seem to arise at the early stages of a hearing and not be something the judge should raise at a final hearing where it has not otherwise been raised. Is this what was intended?

Other matters

I note that part 3 of the submission prepared by Professor Fehlberg and Associate Professor Behrens discusses 'issues still to be addressed'. I wish to make two comments about matters raised in this part. First, as I have previously expressed, I support their submission that Part VII requires redrafting and simplification. Secondly, I agree with the statement that any amendment to the Act to improve the responsiveness of the family law system to family violence should be accompanied by ongoing research and evaluation.

Conclusion

I trust that my comments have been of assistance. I would be pleased to discuss any aspect of my submission with officers of the Attorney-General's Department and can be contacted on (03) 8600 4355. I look forward to being consulted after comments on the exposure draft have been received and during the development of a Bill for introduction into federal Parliament.