Submission to the Australian Law Reform Commission

Family Violence: Improving Legal Frameworks

June 2010

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About us

The Murray Mallee Community Legal Service ("MMCLS") is a community legal centre providing legal information, legal advice, advocacy, law reform and community legal education across the Northern and Southern Mallee regions of Victoria and the South West of New South Wales. The catchment area is a large one, approximately 80,000 square kilometres, and encompasses the local government areas of Wentworth, Mildura Rural City Council, Balranald and Swan Hill.

The MMCLS provides face to face appointments in our Mildura office and regular outreach appointments in Swan Hill, Robinvale, Dareton and Wentworth. We provide a freecall telephone advice line for the entire catchment area, a catchment wide community legal education program and an Intervention Order Support Service. We have been providing services to our community since 1996.

The majority of clients seen by the MMCLS are seeking our assistance with a range of family law matters. We also deal with administrative law, credit and debt law, consumer law, criminal law and a wide variety of other civil law matters.

Intervention Order Support Service

The Murray Mallee Community Legal Service provides an Intervention Order Support Service ("IOSS") in our area, offering free legal assistance and support to people who have experienced family violence and who are applying for an intervention order under the Family Violence Protection Act (Vic) 2008. This is done by way of a weekly duty lawyer service at the Mildura Magistrates' Court and a monthly service at the Swan Hill Magistrates' Court.

The IOSS includes providing advice on family violence and associated family law matters, acting for an applicant in negotiations with the other party, and appearing on their behalf in relation to Family Violence Intervention Order applications. MMCLS commenced the IOSS in its current form in February 2010 and on average three clients are seen per session. The majority of applicants seen are women seeking an intervention order against a male ex-partner.

Terms of Reference and the scope of this submission

The 2009 report of the National Council to Reduce Violence against Women and their Children, "Time for Action"[1], made a number of recommendations aimed at reducing the incidence of violence against women and children in Australian society. One of the high priority actions recommended in the report was that the Government direct the Australian Law Reform Commission (the "ALRC") to examine present State/Territory domestic and family violence, and child protection legislation, and federal family law.

The ALRC's current inquiry considers, among other things, the interaction of State and Territory family/domestic violence laws with the Family Law Act. The ALRC has also been directed to consider whether any improvements could be made to the relevant legal frameworks to protect the safety of women and their children. Our submission addresses these matters, in the context of Victorian family violence law. It covers a number, but by no means all, of the questions and proposals set out in the Consultation Paper released by the ALRC.

Family violence legislation in Victoria

In Victoria, the Family Violence Protection Act (Vic) 2008 (the "Family Violence Protection Act") deals with violence committed by a person against a member of their family. Its stated purpose is to keep women and children safe from family violence, by providing an effective and accessible system of family violence intervention orders[2]. Applications for Family Violence Intervention Orders under this Act are made in the Family Violence Division of the Magistrates' Court. The court may include any conditions in a Family Violence Intervention Order that it thinks necessary or desirable in the circumstances[3], commonly including conditions prohibiting the respondent from committing family violence against the protected person, contacting or communicating with them, or going within a certain distance of their home, school or place of work[4]. Breach of a Family Violence Intervention Order can result in a term of imprisonment of two years[5].

Although it is still quite new, in practice the Family Violence Protection Act appears to be achieving its aims. It provides an effective means of protecting women and children experiencing family violence by a

[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", March 2009
[2] Family Violence Protection Act (Vic) 2008, section 2
[3] Ibid, section 81(1)
[4] Ibid, section 81(2)
[5] Ibid, section 123

relatively simple process. However, where it interacts with the Family Law Act (Cth) 1975 (the "Family Law Act") its effectiveness is diluted; this is discussed below.

Definitions of "family violence" in the Family Violence Protection Act and the Family Law Act

Family violence is defined broadly in the Family Violence Protection Act. It includes physical and sexual abuse, emotional and psychological abuse, economic abuse, threatening, and coercive behaviour, or behaviour that in any other way controls or dominates a family member and causes them to feel fear for their safety or wellbeing[6]. It also includes exposing a child to the effects of the defined behaviour[7]. Terms such as "economic abuse" and "emotional or psychological abuse" are also defined, and examples given of the sorts of behaviour that this includes[8]. This broad definition of family violence is important in helping people who are experiencing family violence to obtain the protection of a legally enforceable intervention order.

However, the Family Law Act (Cth) 1975 defines family violence more narrowly:

"family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety."[9]

This narrow definition contains a number of shortcomings that the definition in the Family Violence Protection Act does not. Firstly, it appears to refer mainly to physical violence, and does not expressly include other types of family violence like sexual assault, emotional and psychological abuse or economic abuse. These other types of family violence should be expressly included in the definition.

The definition also does not include exposing a child to family violence as family violence in itself. Exposing a child to family violence, whether they hear or see the violence, or are otherwise involved, should be expressly included in any definition of family violence.

[6] ibid, section 5(1)(a)
[7] Ibid, section 5(1)(b)
[8] Ibid, sections 6 and 7
[9] Family Law Act (Cth) 1975, section 4

Further, the definition of family violence in the Family Law Act requires that any fear held by a person for their safety must be "reasonable". A requirement of "reasonableness" is not appropriate in a definition of family violence and should be removed from the Family Law Act. Family violence is about domination and control, and people who are victims of family violence may become so fearful of the perpetrator that they become simply unable to evaluate a situation "reasonably".

In order to overcome these serious shortcomings, the definition of family violence in the section 4 of the Family Law Act needs substantial amendment. Firstly, the "reasonableness" requirement, inserted into the definition in 2006, must be removed. Secondly, in order to provide the maximum protection to women and children, we believe that the broader, more detailed definition in the Victorian Family Violence Protection Act should be used, encompassing physical or sexual abuse, emotional or psychological abuse, economic abuse, threatening or coercive behaviour, and controlling or dominating behaviour.

Ideally, family violence would have a nationally accepted definition that could be used in the Family Law Act and in all the state and territory family violence legislation. This may be difficult to achieve and take some time, however it would be a good tool in combating family violence in Australia. It would be very helpful for the federal legislature to lead the way in enacting a broad clear definition of family violence in the Family Law Act.

We support the Family Law Council's view that section 4 of the Family Law Act should be amended to define family violence as in section 5 of the Family Violence Protection Act[10]. This view has support from other sources also; Professor Richard Chisholm AM expressed this same view in the recent review of the practices and procedures of the Family Courts in relation to family violence.

Family Law Act (Cth) 1975

The Family Law Act places a responsibility on the federal family courts to ensure people's safety from family violence[11]. Focusing on parenting proceedings, Part VII of the Family Law Act, which deals with children, states that its objects are to ensure that the best interests of children are met. This includes ensuring a relationship with both parents where this is in the best interests of the child. It also includes protecting them from

[10] 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
[11] Section 43(ca) of the Family Law Act

physical or psychological harm from being subjected or exposed to abuse, neglect or family violence.[12]

However, it appears that in practice the Family Law Act does not take family violence against women and children seriously. Those of our family law clients who experience family violence do not find that the Family Law Act protects them or their children. For example, in several clients' cases parenting orders have been made providing that children spend substantial amounts of unsupervised time with the other parent, despite the Family Court acknowledging that that parent was violent and abusive. Problematically, these orders are often made by consent; in some cases a parent who has been subjected to violence and has well founded fears for the safety of the children when they are in the care of the perpetrator agrees to parenting orders providing for some time spent with out of fear that the court might otherwise order the child spend even more time with the violent parent. This type of situation has been noted and described as "the victim's dilemma" in the 2009 Family Courts Violence Review[13].

In making a parenting order in relation to a child, the court must treat the best interests of the child as the "paramount consideration"[14].There are a number of factors the court must take into account in determining what is in the child's best interests, including two primary considerations; the benefit to a child of having a meaningful relationship with both parents, and the need to protect the child from harm including family violence[15].

In addition, in considering what the terms of a parenting order should be, the court must ensure "to the extent that it is possible to do so consistently with the child's best interests" that the parenting order is consistent with the terms of any family violence order, and that it doesn't expose a person to an "unacceptable" risk of family violence[16]. In our view this is an important requirement, as we believe Family Violence Intervention Orders made under the Family Violence Protection Act should always be considered in making parenting orders. However the Family Law Act does not go far enough in prioritising the safety of women and children. We believe that the word "unacceptable" is inappropriate here and should be deleted so that the phrase reads "... a risk of family violence". This would make it clear that it is of the highest importance that women and children are not subjected or exposed to family violence.

There are further ways in which the Family Law Act misses opportunities to protect women and children from family violence. There is no obligation on the federal family courts to ascertain whether a state or territory

[12] Section 60B ibid
[13] Professor Richard Chisholm AM "Family Courts Violence Review", November 2009, page 27
[14] Section 60CA, Family Law Act
[15] Section 60CC, ibid
[16] section 60CG ibid

family violence order exists that applies to either the parents or the child the subject of the parenting order. We believe the court should be obligated to inquire into this very relevant matter before making any parenting order (just as the Magistrates' Court is obligated to inquire into the existence of any Family Law Act orders under the Family Violence Protection Act[17]). The parties have an obligation to inform the court of any relevant family violence order[18], and any other party who is aware of it *may* choose to do so[19], but failure to do so does not affect the validity of a parenting order eventually made by the court[20]. We believe that a failure to inform the court that you have a family violence order preventing you from contacting, communicating with or approaching your family (including your child), for example, because you have subjected them to serious family violence should be grounds for review of any parenting order made, and the Family Law Act should specifically provide for this.

The court is empowered to make such orders as it sees fit with regard to children, if it is notified of an allegation of child abuse (or the risk of abuse) or family violence by one of the parties to the proceedings[21].

The Family Law Act provides that the court should consider allegations of child abuse or family violence made to it[22], and that it may order state or territory agencies to provide documents they possess relating to child abuse or family violence investigations[23]. Whilst we are not attempting to analyse the interaction of the child protection system with family law, we believe that the court should conduct a risk assessment of every parenting matter that comes before it for child abuse and family violence, and be empowered to order that allegations of child abuse and family violence be investigated by the relevant child protection agency or some other appropriate body. We believe that child abuse and family violence should always be ruled out before a parenting order is made. Appropriate arrangements should be made to ensure that this occurs.

Interaction of the Family Violence Protection Act with the Family Law Act

We believe that the objects of the Victorian Family Violence Protection Act and the Family Law Act are consistent with each other in regard to children, as only when a child is safe from violence can their best interests be met.

[17] section 89 Family Violence Protection Act
[18] section 60CF(1) Family Law Act
[19] Section 60CF(2), ibid
[20] section 60CF(3) ibid
[21] section 60K, section 68B ibid
[22] Section 60K ibid
[23] section 69ZW ibid

The legislation itself envisages interaction between the two systems. The Family Law Act sets out a requirement that the court take pre-existing family violence orders into account. This is entirely appropriate, as a previous order by a court prohibiting contact between a parent and child on the grounds of family violence, for example, should be used to inform a subsequent court's consideration of contact arrangements. However we do not believe that Family Violence Intervention Orders made under the Victorian Family Violence Protection Act are being given much weight by the family court in many cases. This needs to be addressed. We note here that Family Violence Intervention Orders made by consent carry little evidential weight as they do not involve a finding of fact. Contested orders do however involve a finding of fact by the court, and should be accorded more weight.

In addition, as discussed earlier we believe that there should be a specific obligation on the court to determine whether a family violence order exists.

The Family Violence Protection Act sets out clear and appropriate guidance for its interaction with the Family Law Act. It sets out a mechanism for varying existing Family Law Act orders providing for time spent with, as part of the process of making family violence protection orders to protect affected persons who are children. Where there is a pre-existing Family Law Act order regarding time spent with the child that is inconsistent with a subsequent Family Violence Intervention Order, the Family Violence Protection Act provides that the court granting the intervention order can "revive, vary, discharge or suspend" the Family Law Act order(s) to the extent of the inconsistency[24].

In our experience, Family Law Act orders are not revived, varied, discharged or suspended in a Family Violence Intervention Order. Rather, Family Violence Intervention Orders made by the courts in this area commonly include a provision that the respondent does not contravene the order "by doing anything that is permitted by a Family Law Act order", as long as the respondent does not commit family violence while doing so.

We note that the Family Law Act empowers a court making a subsequent Family Violence Intervention Order to do this *only* where there is new material before the court that was not before the court that made the Family Law Act order, and only to suspend the Family Law Act order if the Family Violence Intervention Order is an interim one[25].

The Family Violence Protection Act provides that in deciding the conditions to be included in a family violence protection order, the court must give

[24] Section 90, Family Violence Protection Act
[25] section 68R Family Law Act

"paramount consideration" to the safety of the affected family member and any children who have been subjected to the family violence[26]. In our view this properly prioritises the safety of women and their children who have been subjected to family violence. However, it appears that in practice Victorian courts are reluctant to make orders that might be seen to intrude into the family courts' jurisdiction. It is important that final intervention orders are made where they are warranted. This should be addressed by education programs directed at practitioners and magistrates working in the jurisdiction.

Conclusion

The Family Violence Protection Act provides women and children with valuable protection from family violence. We have suggested several ways in which the Family Law Act could provide more protection for women and children.

In addition, we suggest that the Family Courts and the Family Violence Courts, and all those working within these systems, also be provided with education about family violence issues in order that the current legislative regime will work better. This education should cover issues like the effect of family violence on women and children and how the various legislative regimes are intended to interact.

[26] Section 80 Family Violence Protection Act