Family Law Legislation Amendment (Family Violence) Bill 2011

Submission to Senate Committee on Legal and Constitutional Affairs

Prof. Patrick Parkinson, University of Sydney

There are many features of this Bill which I consider will lead to an improvement of the law as it affects victims of violence. In particular, I support the removal of the friendly parent provision in s.60CC(3) and the costs provision in s.117AB, not because I think the courts have improperly applied these provisions over the past four years but because advocacy groups have been worried by them and these groups have offered anecdotal evidence to the effect that lawyers have advised clients not to raise domestic violence issues because of these provisions. The removal of such provisions will not in any way impair the capacity of the courts to resolve cases justly, but will have benefits in terms of community understanding of the legislation.

The Bill is greatly improved from the Exposure Draft and some of my comments on that Draft have been taken on board by the Attorney-General's Department. There are a few matters nonetheless that I think I need to draw to the attention of the Committee. In summary, my recommendations are

Recommendation 1

Item 8:

(a) Rewrite the opening words of the definition of family violence in s.4AB(1) as follows:

"***family violence*** means aggressive, threatening or other such behaviour by a person that is intended to coerce or control a member of the person's family (the ***family member***), or that causes the family member to be fearful."

(b) In s.4AB(2), delete subsection (g).

Recommendation 2

Item 19: Change to:

Repeal the paragraph, substitute:

"(k) any concerns a parent has for the child's safety."

Recommendation 3

Item 21: Proposed section 60CI. Delete all references to 'notifications' or 'reports' with the effect that the duty is to inform the court if they know that a matter has actually been investigated by the prescribed State or Territory agency.

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1. Definition of family violence

This definition is greatly improved from the version in the Exposure Bill. A few problems remain.

a) <u>The problem of tortology</u>

The Department has gone with a formulation that was used by the Australian and New South Wales Law Reform Commissions. As it has been translated into the Bill, the definition now reads in part: "***family violence*** means violent, threatening or other behaviour...."

In my view, it is not a good idea to include in a definition the word that one is defining, or a slight variant of it. To say that violence means 'violent' behaviour indicates that the word 'violent' in the definition is being given some more limited meaning than 'family violence' as a whole, without stating what is meant by 'violent' in this more limited sense. Given the level of definition inflation associated with the word 'violent' these

days, I suggest the opening words be amended to: "aggressive, threatening or other such behaviour."

b) <u>The issue of coercion and control</u>

The opening words of the definition require that the behaviour complained of "coerces or controls" a family member. It does not specifically say that the person accused of such behaviour needs to have the intention of coercing or controlling. It would certainly be problematic if someone could be held to have engaged in 'violent' behaviour without intending to do so, because his or her former partner felt coerced or controlled.

It is also not clear how to prove that the behaviour had the effect of coercing or controlling. Does the person complaining of the behaviour need to demonstrate that she would have made different choices about something but for the alleged coercive or controlling behaviours, or is it sufficient that a person *says* that they felt coerced or controlled by the behaviour? If the latter, what if no reasonable person would have felt coerced or controlled?

I think it would be helpful for the Parliament to refine the definition further to indicate what needs to be proven here. In my view, it would make the law clearest to focus on intent, because intent can be inferred from the behaviour and this resolves the other problems of interpretation. For this reason I recommend the following formulation:

"...behaviour by a person that is intended to coerce or control a member of the person's family (the ***family member***), or that causes the family member to be fearful."

c) <u>Financial autonomy</u>

The proposed subsection (g) is as follows:

"unreasonably denying the family member the financial autonomy that he or she would otherwise have had".

The literature on coercive, controlling violence indicates that one aspect of coercion and control is 'financial abuse' or 'economic abuse'. The central meaning is that perpetrators

use financial control as a form of subjugation, along with physical violence or the threat of it, verbal abuse, social isolation and other intimidatory and controlling strategies. While that is what people generally mean by 'financial abuse', defining it is not straightforward.

I am concerned that subsection (g) is far too broad, even though it must also be shown that this behaviour was a form of coercion or control. The proposed clause raises all sorts of issues about control of finances in domestic relationships - what is reasonable, what is unreasonable, and what is 'violence'. Many women control the family finances and deprive men of the financial autonomy that they would have had by so doing. Many men control the family finances as well. It is very often one partner who takes responsibility for meeting the bills. While I have no doubt that the judges will do their best to try to interpret this provision sensibly, in my view it is preferable if the legislation does not open up endless arguments by self-represented litigants on such issues. In my view, this provision in the legislation has very little potential to be helpful and much potential for the opposite, and I would delete it.

The issue of financial abuse is addressed again in subsection (h), and this ought to be adequate as a way of including an example of financial abuse in this section of the Act.

2. Family Violence Orders

The proposed s.60CC(3)(k) is as follows:

(k) any family violence order that applies to the child or a member of the child's family;

This reverts the subsection to what it was prior to 2006.

In his report on family violence, Prof. Chisholm recommended the deletion of this paragraph on family violence orders entirely. He considered that while the Court needs to know about the existence of a family violence order, "what is important is that the court should learn about the *factual circumstances* that might suggest a risk to the child or other person, regardless of what was the basis of a previous family violence order."[1]

[1] The Hon. Richard Chisholm, *Family Courts Violence Review* (Canberra: Attorney-General's Department, 2009) at p.140.

I made a similar recommendation in my response to the Exposure Draft.

The Attorney-General's Department has not accepted Prof. Chisholm's recommendation, or mine, but I respectfully suggest this needs to be reconsidered by the Parliament. Indeed, I think it is very important to delete s.60CC(3)(k) in order to increase public confidence in state and territory family violence orders.

There is now a very widespread view in the community that some family violence orders are sought for tactical or collateral reasons to do with family law disputes. People have bcome very cynical about them. A national survey conducted in 2009, with over 12,500 respondents, found that 49% of respondents agreed with the proposition that 'women going through custody battles often make up or exaggerate claims of domestic violence in order to improve their case', and only 28% disagreed. While it might be expected that men would be inclined to believe this, 42% of women did so as well.

The view that some family violence order applications are unjustified appears to be shared by state magistrates in New South Wales and Queensland. Hickey and Cumines in a survey of 68 NSW magistrates concerning apprehended violence orders (AVOs) found that 90% agreed that some AVOs were sought as a tactic to aid their case in order to deprive a former partner of contact with the children. About a third of those who thought AVOs were used tactically indicated that it did not occur 'often', but one in six believed it occurred 'all the time'.[2] A similar survey of 38 Queensland magistrates found that 74% agreed with the proposition that protection orders are used in Family Court proceedings as a tactic to aid a parent's case and to deprive their partner of contact with their children.[3]

In research that our research team recently published on the views of 40 family lawyers in NSW, almost all solicitors thought that tactical applications for AVOs occurred, with

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[2] J Hickey and S Cumines, Apprehended Violence Orders: A Survey of Magistrates, Judicial Commission of New South Wales, Sydney, 1999, p 37.

[3] B Carpenter, S Currie and R Field, 'Domestic Violence: Views of Queensland Magistrates' (2001) 3 *Nuance* 17 at 21.

the majority considering it happened often.[4] In another study based upon interviews with 181 parents who have been involved in family law disputes, we found a strong perception from respondents to family violence orders (both women and men) that their former partners sought a family violence order in order to help win their family law case.[5] This is a quote from one of the women in our study. Her former husband, who we also interviewed, sought an apprehended violence order (AVO) to keep her away from the house after she had left it. She said this:

> I thought this is ridiculous. What's he giving me an AVO for? I haven't done anything to him. I haven't hit him, kicked him. We never had any violence in our marriage. Why have I got an AVO? And apparently the AVO was ... you can put an AVO on someone and say that they're violent, and the only way you can get a child off their mother is because they're violent. And that's why I think he gave me the AVO.

The belief that family violence orders are a weapon in the war between parents is fuelled by the fact that judges are required under the Family Law Act to consider such family violence orders in determining the best interests of the child. The proposed clause in this Bill takes the law back to what it was before 2006, without any explanation for why Parliament should reverse its previous decision at least to limit the provision. It really doesn't matter whether this belief that family violence orders are used tactically is true or not. The fact is that the perception is out there and it is held by state magistrates and family lawyers, as well as the wider community. The retention of this provision in the Family Law Act simply fuels the suspicion that family violence orders are being misused. This is damaging to the credibility of the family violence order system and the courts.

The second reason why the requirement to consider family violence orders ought to be removed is that this serves absolutely no purpose. Yes, the court needs to know about the existence of a current family violence order in order to consider how to frame its

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[4] Parkinson, P, Cashmore J and Webster A, "The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation" (2010) 24 *Australian Journal of Family Law* 313.

[5] Parkinson P, Cashmore J and Single J, 'Post-Separation Conflict and the Use of Family Violence Orders', *Sydney Law Review* (2011, in press).

own orders (s.60CG), but that is dealt with by requiring people to inform the court of such orders (s.60CF). Why consider them again in deciding what is in the best interests of a child (s.60CC(3))? The court is already required to consider the history of violence. What does it add to require the court also to consider a family violence order? The impression given by the legislation is that these orders are somehow evidence that there has been violence. However, that is a misunderstanding.

Family violence orders have absolutely no evidential value in the vast majority of cases. This is because, in the vast majority of cases, ***they are consented to without admissions.*** The hearings in these uncontested cases are very brief indeed. Prof. Rosemary Hunter, in observations in Victoria in 1996–97, found that the median hearing time for each application was only about three minutes.[6] Applications were typically dealt with in a bureaucratic manner, with magistrates being distant and emotionally disengaged.[7] To the extent that applicants were asked to give oral evidence, they were typically asked to confirm the content of their written application, and very little exploration of the grounds for the application took place.

Dr Jane Wangmann, in a recent analysis of court files in NSW, reached finding very similar to Hunter's. In her observations of AVO matters in 2006–7, she found, like Hunter, that cases were dealt with in three minutes or less.[8] She also noted that the information provided in written complaints was brief and sometimes vague. [9]

It is hardly surprising, then, that judges in family law cases draw no inferences from the mere existence of a family violence order. This has been the clear view of family lawyers for the last 15 years.[10] Indeed, in the research we recently published on the views of 40

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6 Rosemary Hunter, *Domestic Violence Law Reform and Women's Experience in Court: the Implementation of Feminist Reforms in Civil Proceedings* (2008), at 77, 81–2.

7 Hunter, ibid 84–8.

8 Jane Wangmann, *'She said...' 'He said...': Cross Applications in NSW Apprehended Domestic Violence Order Proceedings*, PhD thesis, University of Sydney, (2009), at 98–100.

9 Ibid 104–5.

10 Rosemary Hunter, above note 6 at 256; Tom Altobelli, 'Family Violence in Children's Cases: Implications in Practice Pt I,' (1998) 13 *Australian Family Lawyer* 6 at 12; John Dewar and Stephen

family lawyers in NSW, none of the lawyers who responded to the question believed that judicial officers gave AVOs much consideration in determining parenting disputes. Judges, they indicate, want to evaluate the evidence of violence itself, not the fact that another court has made an order about it by consent and without admissions.[11]

Thirdly, it is quite likely that many state family violence orders will have been based upon allegations of conduct that fall outside of the definition of family violence in this Bill. The grounds upon which such orders may be sought vary from one jurisdiction to another. In some states and territories, the grounds for family violence orders could cover a wide range of behaviours. In Tasmania's *Family Violence Act* 2004, for example, the definition of family violence includes "verbal abuse", which is not defined.[12] There is also no need to show that this was part of a pattern of coercive control or caused fear, as the new definition in the Family Law Act will require. Similarly, Victoria's *Family Violence Protection Act* 2008 offers a broad definition of family violence which includes emotional, psychological and economic abuse.[13] Emotional or psychological abuse includes behaviour that is 'offensive to the other person'.[14] In the Australian Capital Territory, conduct which is offensive to a relevant person is also termed 'domestic violence'.[15] It follows that even where a family violence order has been contested, the grounds for the application may not constitute 'family violence' under the Family Law Act.

In the light of these considerations, I think a compelling case has to be presented for the continuing inclusion of this provision about family violence orders in the Family Law Act. I recommend that this para be replaced instead with a paragraph that requires the court to consider 'any concerns a parent has for the child's safety'. This goes beyond concerns about violence and abuse to require consideration also of other threats to

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Parker, 'The Impact of the New Part VII Family Law Act 1975' (1999) 13 *AJFL* 104 at 110; Rae Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration', (2005) 19 *AJFL* 112 at 119.

[11] Patrick Parkinson, Judy Cashmore & Atlanta Webster, 'The Views of Family Lawyers on Apprehended Violence Orders after Parental Separation' (2010) 24 *AJFL* 313.

[12] *Family Violence Act 2004* (Tas) s 7.

[13] *Family Violence Protection Act 2008* (Vic) s 5.

[14] Ibid s 7.

[15] *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1).

safety as a consequence of mental illness, drug and alcohol abuse or even concerns about issues such as driving. The source of the threat is less important than the fact of it, and parents may be particularly concerned about safety issues with young children, as a parent's protective instincts are very strong.

Reporting notifications of abuse

Proposed section 60CI provides that the Court be informed about notifications of abuse as well as investigations of abuse. It seems to me that what the court really needs to know is whether there has been a child protection investigation, not whether there has been a notification. In Australia, hundreds of thousands of notifications or reports now occur each year (339,454 in 2008-09). Only about half are investigated and in some cases even that investigation may be cursory. There is a great deal of room for argument about what is a notification and what is not. Does it have to meet the statutory criteria to be classified as a notification or report? Is any phonecall expressing concern about a child a notification or report? I think it is best to avoid that conundrum and also avoid swamping the court with information it may be able to do little with. Often one parent has made a report about the other, and there is no shortage of complaints of abuse in parents' affidavits. They will tell the court without being mandated.

I trust this is of assistance.

Patrick Parkinson
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