

# Joint Submission to Public Consultation: Family Law Amendment (Family Violence) Bill 2010

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## Submitted by:

Federation of Community Legal Centres Victoria  
Domestic Violence Resource Centre Victoria  
Domestic Violence Victoria  
Women with Disabilities Victoria  
Victorian Women's Trust

## Contact:

Chris Atmore  
Policy Officer  
Federation of Community Legal Centres Victoria  
Phone: 03 9652 1506  
[policy@fclc.org.au](mailto:policy@fclc.org.au)

or

Libby Eltringham  
Community Legal Worker  
Domestic Violence Resource Centre Victoria  
Phone: 03 9486 9866  
[leltringham@dvrcv.org.au](mailto:leltringham@dvrcv.org.au)



## Introduction

This submission is the joint work of a number of family violence services and peak bodies in Victoria:

- **Federation of Community Legal Centres (Victoria)** - is the peak body for over 50 Victorian Community Legal Centres (CLCs). CLCs are independent community organisations that provide free legal advice, information, assistance, representation and community legal education to more than 100,000 Victorians each year. CLC work against family violence includes the provision of duty lawyer services in Magistrates Courts for victims of family violence. The Federation also conducts strategic research, casework, policy development and social and law reform activities.
- **Domestic Violence Resource Centre Victoria (DVRCV)** – is a statewide service that provides information, training and resources to improve service and policy responses to family violence to a wide range of sectors and professional groups; and also provides commentary and advice on policy initiatives and law reform.
- **Domestic Violence Victoria (DVVic)** – is the peak body for over fifty family/domestic violence services in Victoria that provide support to women and children to live free from violence. With the central tenet of DVVic being the safety and best interests of women and children, DVVic provides leadership to change and enhance systems that prevent and respond to family/domestic violence.
- **Women with Disabilities Victoria (WDV)** - is Victoria's peak body for women with disabilities. Our membership and staff represent the diversity of women with disabilities. WDV supports women with disabilities to achieve their rights through community education, peer support, research and systemic advocacy. WDV's priority areas are access to health care, parenting rights, and addressing the prevalence of violence against women with disabilities. WDV speaks for the human rights of women with disabilities on many of Victoria's key violence prevention and violence response committees.
- **Victorian Women's Trust (VWT)** - is a completely independent body working to improve conditions for women and girls in practical and lasting ways. The VWT has a funding program that invests in women and girls to effect social change; it advocates for women on key issues that affect their lives; initiates special projects that deliver real outcomes for women; and showcases women's talents, fostering networks for the exchange of skills, ideas and solutions.

Our services have been working collaboratively for many years on family violence systems reform in Victoria. As members of the first Statewide Steering Committee to Reduce Family Violence, established in 2002, we have worked in partnership with government and other non-government organisations, police, and courts to develop an integrated response to family violence.

This work included developing the vision for family violence systems reform and implementation of a range of policy, practice and governance initiatives. We lobbied for funding, and for a review of family violence legal responses in Victoria. This led to the Victorian Law Reform Commission (VLRC) review of family violence laws, which we worked on with some of us as members of the VLRC Advisory Committee. Our organisations and other NGOs later came together as a campaign group to lobby for adoption of the whole package of recommendations made by the VLRC, many of which are now part of legislation and practice in Victoria.

More recently, our work alongside Government has involved advising and assisting with the development and roll-out of a common approach to family violence risk assessment and risk management across sectors and settings in Victoria.

The Federation, DVVic, DVRCV and WDV (then VWDN) also made an extensive joint submission to the Australian Law Reform Commission and NSW Law Reform Commission review, *Family Violence: Improving Legal Frameworks*. While we welcome the Exposure Draft of the Family Law Amendment (Family Violence) Bill 2010, the Final Report from the ALRC/NSWLRC review, *Family Violence – A National Legal Response* (ALRC/NSWLRC Final Report) was released at the same time as the Exposure Draft.<sup>1</sup>

We therefore urge that recommendations in that report relating to family law be taken into account in any re-drafting of the Family Law Amendment (Family Violence) Bill 2010. Many of our comments below draw on and make reference to our feedback to the ALRC/NSWLRC review, and to the ALRC/NSWLRC Final Report.

## **Amendments proposed in the Bill**

### Convention on the Rights of the Child

We commend the inclusion of a new object in the Act confirming that the Act gives effect to the Convention.

### Prioritising safety in the two primary considerations

We agree with the Consultation Paper that the Family Law Act needs to be amended to ensure that the safety of children and their protection from physical and psychological harm is paramount.

The two primary criteria in the Family Law Act in determining children's best interests - that children should have a meaningful relationship with both parents, and that children should be protected from physical and psychological harm - can conflict with each other. We believe that many of the problematic orders made since the *Family Law Amendment (Shared Parental Responsibility) Act 2005* commenced have arisen out of this conflict.

We are concerned that the present Act, in its emphasis on shared parenting, often leads to contact orders that are inconsistent with expert knowledge about child development. Worse, where family violence is present, a child's right to safety can often come second. In practical effect, the Act currently tends to prioritise the first principle of meaningful involvement with each parent at the expense of children's and women's rights to safety. The framing of these criteria take the focus away from the best interests of the child, and places the emphasis on parental rights.

We endorse the Women's Legal Services Australia recommendation, in their submission on the Exposure Draft, that:

- there should be no primary considerations at all but one list of factors for consideration;
- the safety of children should be listed as the first consideration and given priority;
- the principle of meaningful involvement with both parents should be listed as one of the many factors to consider;

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<sup>1</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010).

- the courts should weigh up all of the factors in the list, depending on the circumstances of each individual case.

If the primary considerations are to be retained, there should only be one primary consideration, that is about the safety of children.

### Redefining 'family violence'

We support the rationale for the redefinitions proposed in the Bill. As the ALRC/NSWLRC Final Report recommends<sup>2</sup> a common interpretive framework across Australian jurisdictions will allow the courts to send clear messages about what constitutes family violence, and will have a positive flow-on effect in the gathering of evidence of family violence for use in more than one set of proceedings.

A common understanding of family violence will facilitate the effective operation of the proposed scheme for national registration of protection orders, and will result in more useful and comprehensive data to inform policy and practice.

As we submitted to the ALRC/NSWLRC Review, achieving core consistencies in protection of family members from violence is also necessary for Australia to honour its international human rights obligations to respect, protect and fulfil women and children's rights to be free from violence, and to uphold the right of all persons to equality before the law.<sup>3</sup>

We strongly support the removal of the semi-objective test of reasonableness as to whether a person feels fear, in the interests of not only consistency and reducing complexity for victims and other non-perpetrator parties pursuing Family Court matters, but also victim protection.

We particularly commend the broadening of the definition of family violence and the expansion of the categories of people included as family members. However, it is unclear to us that Aboriginal and Torres Strait Islander understandings of family are appropriately encompassed by the Bill. We suggest the *Family Violence Protection Act 2008* (Vic) s 10(1)(b) as an appropriate model in this respect.

In addition, and consistent with our support for a common cross-jurisdictional interpretive framework, we believe that the proposed definition should go further, as recommended by the ALRC/NSWLRC Final Report,<sup>4</sup> to include:

- additions to the conduct listed as family violence of:
  - stalking
  - kidnapping or deprivation of liberty
  - exposure of a child by the perpetrator of the violence to any of the (now revised) conduct listed or its effects;
- an express provision that family violence 'includes but is not limited to' the conduct listed.

<sup>2</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), Recommendations 5-1-7-6.

<sup>3</sup> *Convention on the Elimination of all Forms of Discrimination Against Women*, opened for signature 18 December 1979, [1983] ATS 9 (entered into force 27 August 1983); *Declaration of the Elimination of Violence Against Women*, GA Res 48/104, UN Doc A/RES/48/104 (1993); *Convention on the Rights of the Child*, Opened for signature 20 November 1989, [1991] ATS 4 (entered into force 2 September 1990) art 19(1); *International Covenant on Civil and Political Rights*, opened for signature on 16 December 1966, [1980] ATS 23 (entered into force 23 March 1976) arts 2(1), 7, 24, 26; UN Human Rights Committee, *General Comment 18: Non-Discrimination* (1989).

<sup>4</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), Recommendation 6-4.

We are also concerned to ensure that the definition of ‘family member’ be broad enough to encompass any same sex relationships coming within the jurisdiction of the Family Law Act. If any same sex couple or same sex parented family has a dispute in the Family Court, that couple or family should also fall within all of the family violence provisions if those would otherwise be relevant.

At present, for example, same sex couples and other couples without children are not able to seek an injunction for personal protection. While we acknowledge that to make the family violence provisions in the Family Law Act fully inclusive of all families, reforms outside the province of the Exposure Draft, such as amendment of the *Marriage Act 1961* (Cth), would be required, the *Family Violence Protection Act 2008* (Vic) nevertheless provides an instructive contrast (see especially ss 8-9). The Victorian Act’s more inclusive approach is also more compatible not only with the goal of achieving core consistencies but also with Australia’s international human rights obligations, as we submit above.

We also support the ALRC/NSWLRC Final Report’s recommendation that provisions explaining the nature, features and dynamics of family violence, and its impact on particular vulnerable social groups, should be included in the Family Law Act.<sup>5</sup> This would be consistent with the Victorian approach which fulfils an important educative function for all engaged in the family violence integrated response, as well as for the general community.

We believe that the Preamble to the *Family Violence Protection Act 2008* (Vic) provides a useful approach to the issues which should be covered, with two main differences. First, in the Family Law Act, the dynamics and impact should be framed as guiding principles. Second, given the key principle of the best interests of the child, the interpretive context of the Act supplied by guiding principles in relation to family violence must include, as part of the iterated dynamics and characteristics, a recognition that family violence can have a significant impact on victims who are caregivers and who therefore require both protection and parenting support.

The guiding principles should also include, or be located within the broader statutory context of, express references to relevant human rights instruments, such as the Convention on the Elimination of all forms of Discrimination Against Women, in the same manner as the Bill gives effect to the Convention on the Rights of the Child. This approach also therefore requires a radical revision of the Exposure Draft’s proposed Item 11.

In our experience it has been especially important to spell out in the legislation examples of family violence that impact particularly on victims from Indigenous, CALD and/or LGBTI communities, as well as on those who are aged or live with a disability – particularly women - because despite the fact that these groups often suffer higher rates of violence than the rest of the population, this violence is not commonly understood to fall under the legal definition of family violence, and therefore these victims are under-served in policy and practice.<sup>6</sup>

With the social context of family violence as background, it therefore also makes no sense in the Exposure Draft’s definition to refer to (in (e)) ‘controls, dominates,

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<sup>5</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), Recommendation 7-3.

<sup>6</sup> National Crime Prevention Program, *Violence in Indigenous Communities* (2001); Healey, L et al, *Building the Evidence: A Report on the Status of Policy and Practice in Responding to Violence Against Women With Disabilities in Victoria* (2008), especially Recommendations 1.1, 1.2; Dwyer, Evelyn, ‘Same-Sex Domestic Violence Project – AIDS Council of NSW’, Australian Domestic and Family Violence Clearinghouse (2004); MacDonald, H (ed), *Not the Same: Conference Proceedings and a Strategy on Domestic Violence and Sexual Assault for Non-English Speaking Background Women* (1996).

deceives or coerces the second person *unreasonably* (our emphasis), and this word should be deleted.

The Bill should also include more examples of particular forms of conduct. As one example we refer to sections 5-7 of the *Family Violence Protection Act 2008* (Vic).

### Identifying 'abuse' of a child

We support the proposed broadening the definition of child abuse, with the proviso that examples of exposure to family violence in s 4(1AD) should include seeing, hearing or otherwise experiencing non-physical forms of family violence.

We are also concerned that the proposed definition does not include as exposure, the experience of a child living in a situation where their parent is a victim of family violence. The impact on the parent, and thereby on the child, goes further than simply the identified examples of proposed provision 4(1AD)(a)-(e). Even though those examples are expressly non-exhaustive, the definition needs to be supported by the redrafted definition of family violence and principles concerning recognition of the context and dynamics of family violence that we discuss above.

The Bill's overall approach to the issue of a child's exposure to family violence is problematic. As we suggest above, exposure of a child to family violence is in itself family violence, as for example defined in the *Family Violence Protection Act 2008* (Vic) s 5(1)(b). The Consultation Paper (p4) acknowledges that such exposure has serious negative effects on a child's physical and social development. This serious psychological harm should not therefore be required to be proven under the Family Law Act, given that other forms of family violence proposed in the Bill do not require proof of harm.

However, not requiring proof of harm has flow on effects for defining the two primary considerations when determining the best interests of the child (discussed above). Irrespective of how the final Bill frames the two considerations in relation to one another or other factors (see above), the difficulty lies in the phrase 'the need to protect the child from. . . psychological harm from being subjected to, or exposed to. . . abuse...or family violence'.

As we have argued, and the ALRC/NSWLRC Final Report reinforces, exposure of a child to family violence not directly against them is in itself both a form of family violence, and as the proposed provision defines it, child abuse. Assuming then that the harm of the family violence/child abuse is not required to be proven, the issues for consideration in determining the best interests of the child become, at least in relation to the need to protect the child, a matter of *how protection from the abuse/family violence, rather than from the harm, is to be achieved*.

The Bill should make this clear, and in so doing, should include additional factors in section 60CC that assist the Court to consider the specific family violence context at issue. As part of its assessment, the Court should be required to consider the guiding principles pertaining to family violence, discussed above.

If the re-drafted Bill does require proof of psychological harm to be established, we believe that 'psychological harm, rather than the qualification of 'serious', should be sufficient. We note that in the Act, assault is not required to be 'serious' to qualify as child abuse, and we believe that the impact of psychological harm on children is sufficiently documented in research and practice experience for the rejection of any automatic hierarchy of physical over psychological harm to fall within the doctrine of judicial notice.

### Strengthening adviser obligations

We support the need to strengthen advisers' obligations regarding the best interests of the child. However, we also refer to our previous comments and concerns with the application of the present Family Law Act in relation to the 'twin pillars' guiding decisions about the best interests of the child. We believe that there should only be one primary consideration, which is the need to protect the child from abuse, incorporating the relationship we discuss above between child abuse and family violence.

Requiring advisers to decide which consideration should have more weight poses the risk of them dismissing or minimising allegations of abuse raised by women, leading to a prioritising of the benefit of the child having a meaningful relationship with both parents.

Amending the Act to include one primary consideration would clarify the role of advisers, and would ensure that safety of children came first every time. In contrast, continuing to include two 'primary considerations' in the Act is likely to lead to ongoing risks of harm to many women and children.

We refer also to our comments below regarding the need for comprehensive family violence training for advisers.

### Bringing evidence of violence and abuse to court

We support the proposed amendments regarding the bringing of evidence of family violence to court. However, we emphasise that this obligation must be located within a system that also supports the person making the allegation, through effective risk assessment and risk management arrangements; and also in the context of other amendments including the removal of barriers to disclosure of violence (discussed below).

### Removing disincentives to disclosing violence

#### *Friendly Parent Provision*

We support the removal of the friendly parent provision which has acted as a barrier to disclosure for many women experiencing family violence. The removal of this section will allow women who are victims of family violence to act protectively when they have concerns for the safety of their children, rather than fearing negative consequences from the court in making such disclosures.

#### *False Allegations Provision -Costs*

We support the removal of the mandatory costs provision in section 117AB of the Family Law Act, as it acted as an additional barrier to disclosure for women experiencing violence. Its removal, along with that of the friendly parent provision, goes some way to addressing many women's fears that the system is suspicious of those who allege violence.

### Immunity from costs orders for state and territory child welfare authorities

We support the amendment of section 117 to provide immunity from cost orders to child welfare authorities and officers of the State, Territory or Commonwealth who

become party to proceedings under the Family Law Act at the request of the Court. Given the need identified in the Consultation Paper for better evidence of family violence and abuse being presented to the courts so that they can protect women and children at risk of violence, this amendment should assist courts to make decisions that offer that protection.

## **Further changes needed**

### Implement the concept of 'one court'

We strongly support the recommendations of the ALRC/NSWLRC Final Report that all efforts be made to achieve appropriately corresponding jurisdictions so that federal, state and territory courts responding to family law, family violence and child protection issues expand their jurisdiction and approaches to information sharing and evidence, in order to implement in law the concept of 'one court'.<sup>7</sup>

We support the Commissions' view that the seamlessness of the 'one court' concept would greatly enhance protection of victims of family violence, as well as more generally improving access to justice by 'avoiding the personal and financial impacts of repeated proceedings and consequent reiteration of the same facts before different courts'.<sup>8</sup>

### Skills and tools for all staff in the family law system

Changes to the Family Law Act designed to better protect children from physical and psychological harm will only be effective if all those involved in the family law system undertake training to build a shared understanding of the nature and dynamics of family violence and its effects, and to acquire skills and tools for screening for family violence and undertaking risk assessment.

#### *Training on family violence and child abuse*

This is discussed comprehensively in the ALRC/NSWLRC Final Report.<sup>9</sup> All staff in the family law system (including judicial officers, family consultants, FDR practitioners, family law advisers and lawyers) need comprehensive and on-going training to ensure common understandings inform their work with their clients.

In our submission to the ALRC/NSWLRC review, we also noted the excellent judicial education resource, *Domestic Violence and Family Law in Canada: A Handbook for Judges*, which was showcased at the Australian Institute of Judicial Administration conference held in Brisbane in October 2009. The social context information in that bench book is comprehensive, interactive and sets an extremely high standard.<sup>10</sup> The ALRC/NSWLRC Final Report has recommended that an Australian bench book be developed along similar lines.<sup>11</sup>

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<sup>7</sup> See with particular relevance to the Exposure Draft, Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), Recommendations 16-1-16-13, 17-1-17-6, 30-1-30-8, 30-14-30-19.

<sup>8</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), Summary Report 21.

<sup>9</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), Recommendations 31-1-31-5.

<sup>10</sup> L. Neilson, *Domestic Violence and Family Law in Canada: A Handbook for Judges* (2009).

<sup>11</sup> Australian Law Reform Commission and NSW Law Reform Commission, *Family Violence – A National Legal Response* (2010), Recommendation 31-2.

### *Family violence risk assessment*

We also recommend that there be a standard risk assessment tool to be used by all staff in the family law system. Common risk assessment frameworks, tools and procedures assist support staff and decision makers to recognise 'red flags' and take action to enhance safety. Risk assessment and screening tools should not only focus on physical aspects of family violence, but also explore the range of other behaviours that have the impact of intimidating, controlling and humiliating the victim.

Victoria's common risk assessment and risk management framework, for example, is based on shared understandings of family violence and risk. The framework, like the whole Victorian approach to family violence, prioritises victim safety and accountability of perpetrators. It has been a key component in building a systems approach to responding to family violence, and has been supported by a program of training that is being rolled out across the state.

Another good example is the Victorian Roundtable Dispute Management's family violence screening tool (Victoria Legal Aid). This was developed in collaboration with a domestic violence service (DVRVCV), and was also accompanied by extensive training of FDR practitioners. Training in the use of any tool is critical, as the most important aspect of risk assessment and screening is the way in which the assessment is conducted.

### Resources and support for families, parents and children

It is crucial that legal assistance is genuinely accessible to all parties in the Family Court, particularly where family violence and child abuse are involved or are a risk. Legal Aid funding, including for separate representation for children where appropriate, must be available.

More broadly, our suggested changes to the Family Law Act, particularly the prioritisation of child safety, the statutory recognition of exposure of children to family violence as a form of child abuse, and an 'anti-silo', 'one court' approach, mean that child protection and welfare agencies will interface more closely with the family law system.

It therefore becomes increasingly important for parents and children to be able to access appropriate support services, so that the present over-representation of disadvantaged families in the child protection system does not continue without attention to the basis for that over-representation, alongside systematic efforts to ensure that the disadvantage is not exacerbated by legal and welfare responses.

More generally, these strategies will only be successful if, as we discuss more broadly above, state and territory child protection and family violence systems and the family law system are able to interact seamlessly where circumstances demand it.