To: The Committee Secretary,

Legal and Constitutional Affairs Committee,

Parliament House,

Canberra ACT 2600

From: The Australian Family Association,

Victorian Branch,

35 Whitehorse Road,

Balwyn Vic 3103

SUBMISSION TO INQUIRY INTO THE FAMILY LAW LEGISLATION AMENDMENT (FAMILY VIOLENCE AND OTHER MEASURES) BILL 2011

1. Schedule 1, Item 1 – S.4(1) – proposed new definition of "abuse" in relation to a child. Contrary to the claim in the Explanatory Memorandum that the new definition will remove uncertainty about knowing the elements of an offence and whether an offence has been committed, the proposed new definition would create more uncertainty in;

    - Omitting from Sub-clause (b) the words "which is an offence under a law ….of a State or Territory…". At least the elements that constitute an offence under relevant State or Territory law gives some definition of "assault" and "sexual assault." The present definition gives more certainty. It does not seem to require a conviction under that State or Territory law but the elements of what constitutes an "assault" or "sexual assault" define what those words mean in the Family Law Act.

    - Proposing new Sub-clause (c) which introduces "serious psychological harm" as amounting to "abuse." The Explanatory Memorandum says this " … reflects current social science and approaches to child protection, which indicate that exposure to violence threatens a child's … psychological well being." There are two problems with this:

      There is no definition of what constitutes "serious psychological harm."

      The "serious psychological harm" does not have to be caused by violence to the child or even exposure to violence.

      The proposal extends the definition of abuse to being "subjected to, or exposed to, family violence."

The result is more uncertainty is created and more difficulty for parties, their legal advisers, counsellors, court officers and the justices of the Court in preparing, presenting and adjudicating a case. This would not aid in ensuring justice is seen to be done.

- Extending the definition of "abuse" to include "serious neglect." Again there is no definition of what constitutes "serious neglect."

2. Schedule 1, Item 3 – definition of "family violence." The proposal is to repeal the present definition of "family violence" in S. 4(1), which is clear and comprehensive, and replace it with a definition that is open ended, unclear and almost impossible to refute.

   The present definition is conduct actual or threatened towards the person or property of a family member that causes a family member reasonably to fear or be apprehensive about his or her personal wellbeing or safety. This definition is wide enough to cover physical or mental harm or the threat thereof. The test though is if a reasonable person in the circumstances would feel so fearful or apprehensive. This is a common and understood legal test.

3. Schedule 1, Item 8 –

   (a) The proposed new definition of "family violence" in proposed new S. 4AB(1) introduces the following lack of clarity and/or uncertainty into what would constitute "family violence:

   - What is the "other" behaviour? – there is no indication what is meant.

   - This is compounded by that behaviour merely having to coerce or control a family member or cause him or her to fear fearful. There is no requirement that the coercion or control be unreasonable or be exercised with the intent to cause harm to that family member or induce him or her to an act or omission that is not in the best interests of the family member. It may be to control or coerce a family member who is out of control and a danger to himself/herself and/or others to desist.

   - The "other" behaviour or behaviour that "coerces or controls" a family member would constitute "family violence" as long as it caused a family member to be fearful. There is no requirement that that fear has to be shown to be "reasonable" in all the circumstances. The test is completely subjective. A mere allegation that behaviour caused a family member to "be fearful" would be enough to constitute "family violence." This is not the usual legal test or standard of proof. Such an allegation would be impossible to refute.

   (b) Proposed new S.4AB(2) is to provide that: " Examples of behaviour that *may* constitute family violence include (*but are not limited to*)" the examples then enumerated. This again introduces uncertainty – how is a party to know if any such behaviour will or will not constitute "family violence" in his/her case? Again as proposed by proposed S.4AB (1) the only test would appear to be that in that Sub-section which is entirely subjective ie it causes a family member to feal fearful.

   (c) Proposed new S. 4Ab(3) proposes that a child would be taken as having been exposed to "family violence" if the child sees or hears it "*or otherwise experiences the effects of* family violence." What is meant by "otherwise experiences"? Again uncertainty is introduced as to what is needed to allege "family violence" or to refute it. Further, would this proposal include a child being told by someone that behaviour that could be caught by S-s (1) or (2) had occurred? What if that were not true? Has the child still been "exposed" to "family violence"?

(d) Proposed new S. 4AB(4)proposes situations in which a child *may* be taken to have been "exposed" to family violence. Again there is no certainty as to when those situations would amount to family violence.

4. Schedule 1, Item 13 – S.60B – proposed new S.60B(4) to add an additional object to "give effect to the Convention on the Rights of the Child … " What does it mean " … to give effect to … "? How can an Act of the Australian Parliament give effect to an international Convention? And even though a person reading the Act is directed by the Note to where the Convention can be accessed how will it be known how it will effect the meaning of the Family Law Act?

5. Schedule 1, Items 18, 20 and 26

   (a) Items 18 and 20 - Proposed new Ss60CC (3) (c) and (ca)are to replace present Ss60CC (3) (c) and (4) and (4A). The effect of these proposed amendments is to exclude from the court's consideration when determining what is in the best interests of a child the willingness and ability of a parent to facilitate and encourage a close relationship with the other parent and the extent to which each parent has facilitated the other in fulfilling the responsibilities of being a parent. The rationale for this given is that these "friendly parent" provisions discourage disclosure of abuse and family violence for fear of being seen as an 'unfriendly parent." The word "disclosure:" implies that the abuse or family violence has actually happened rather than that allegations of such have been made. The only allegations of abuse or family violence that would result in a parent being seen as an "unfriendly parent" would be those found to be unsubstantiated or vexatious. A parent's willingness to encourage a child's continuing relationship with the other parent and to facilitate the other parent's fulfilling his/her parental responsibility are highly relevant to what is in the child's best interests. And in fact, absence of such willingness to or actual facilitation of the other parent could substantiate allegations of abuse or family violence. It is an unfounded fear.

   Contrary to what is stated in the Explanatory Memorandum Ss 60CC(3)(ca)does not require the court to inquire the extent to which a parent has facilitated or failed to facilitate *the other parent* in fulfilling his/her responsibilities as a parent. It only requires the court to inquire into "the extent to which each of the child's parents has fulfilled or failed to fulfil the parent's obligations to maintain the child."

   The injustice that could occur if these provisions are repealed and amended as proposed is further exacerbated by the proposed amendments to S117AB (see below).

   (b) Item 26 – Proposal is to repeal Note 1 to S65DAA(5)which provides for the willingness of each parent to facilitate and encourage a close and continuing relationship with the other to be taken into account by the court when deciding what is in the best interests of the child under the Equal Time /Shared Parenting provisions. The same comments apply as in (a) above.

The court should have regard, in investigating what is in a child's best interests, to all relevant circumstances. The extent to which each parent has encouraged and/or facilitated a close and ongoing relationship with the other has to be relevant to a child's best interests – a healthy relationship with both parents would have to be best for the child. These amendments would preclude the court from inquiring into or having regard to very pertinent circumstances in regard to the very matter it must make a decision on. If a parent really had reason to be concerned about the child's suffering or being exposed to abuse or family violence from the other parent, fear of being

perceived as an "unfriendly parent" surely would not hold back disclosure of those reasons for concern.

6. Schedule 1, Item 21

(a)Proposed new Ss60CH(2) – "a person who is not a party to the proceedings" may inform the court he/she is aware the child or a member of the child's family is in care. There is no indication of who would be a "person" within the meaning of the Ss. Nor is there any indication what "aware" means – is believing or having been told that is the case enough? In the case of a party to the proceedings his/her legal adviser would be able to weigh the evidentiary value of the information the party gives him/her. A person not a party may not have a legal adviser so information could be put to the court that may not have any evidentiary value.

(b) Proposed new Ss 60CI (2) – Again there is no indication who can inform the court of the relevant matters set out by the Section. Nor of what is meant by "aware." Further a notification, report or inquiry that can be brought to the court's attention can relate to a mere "allegation, suspicion or risk of abuse." It should be the relevant child protection and child welfare authorities who present such information to the court, not just a "person" who is "aware." Immediately any allegation of abuse or family violence in relation to a child is made all child protection and child welfare agencies should be informed and asked to inform the court of any dealings with the child or any member of the child's family.

7. Schedule 1, Item 38 – Proposed new Ss69ZQ(1)(aa) would require the court, pro-actively, before any other inquiry, to ask each party if he/she considers the child to have been or be at risk of abuse, neglect or family violence.

This is an open invitation to the parties to make allegations against each other. This would not be conducive to decreasing friction between the parties nor to reducing the likelihood of violence between them. It would if anything increase bad feeling between them, especially as a party against whom allegations are made will find it almost impossible to refute them and will probably be deprived of access to his/her children as a result. It would also have the potential to result in much more of the court's time being taken up with investigating allegations made by the parties without any requirement that reasons be given and substantiating evidence produced that the allegations are true. The overall scheme set up by these proposed amendments treats allegations of abuse or family violence as true until disproved by inquiry of the court or by the party against whom the allegations are made .

Further there is no need for this as the Act has adequate provisions alerting parties and their legal advisers that abuse and family violence are relevant to proceedings in relation to a child. There is also provision for child welfare and protection authorities to provide evidence of matters that could amount to abuse or family violence, eg care or protection orders in relation to the child or the child's family.

There is no need to impose an obligation on the court to ask the parties if they have any allegations to make. This will increase the opportunity for inflated or exaggerated claims of suspected abuse or family violence or the risk thereof to be made. The result would be further adding to the court's and the registry's workload. As a consequence acutely dangerous situations could be missed or hearing of them delayed with tragic consequences.

The amendments proposed are restricted to requiring the court to proactively inquire of the *parties* if there is abuse or family violence or a risk of. The Explanatory Memorandum advises that : "The duty does not *currently* extend to requiring the court to proactively inquire about other information which

might be useful evidence from people or agencies *other than parties to the proceedings*." This seems indicate an intention to extend further the persons the court would be required to inquire of as to information that "might be useful."

Any person who has information on matters pertaining to a child's welfare or safety, if that person is to present that information to the court to be taken into consideration, should surely be made a party to the proceedings so that all the rights and responsibilities of a party apply to them. The relevance of the information, its accuracy, its being provided to the parties, standards of proof, liability for false and misleading statements – all these checks and safeguards would then be in place.If not then justice will not be seen to be done.

8. Schedule 1, Items 39 to 43

Item 43 - repeal of S117AB – is the operative proposed amendment here. It removes the court's ability to order costs against a party who "… knowingly made a false allegation or statement in … proceedings." According to the Explanatory Memorandum S117AB has acted as a disincentive to vulnerable parents disclosing family violence for fear of having costs awarded against them if they cannot substantiate the allegations. This is not convincing. Not being able to substantiate an allegation does not necessarily amount to having made a "false" allegation. Further, an allegation made on a misapprehension or mistaken view of another party's words or behaviour does not necessarily amount to a false allegation. This proposed amendment would allow false allegations to be made without any penalty which would only encourage such allegations to be made if it would be to the advantage of the party making them. Also, where a party is in receipt of legal aid any possible award of costs would not be of such serious concern that he/she would feel real apprenhension about reporting abuse or family violence.

Taken together with the elevation of allegations of abuse or family violence to be treated as found until it can be proved otherwise, the extension of the meaning of family violence and the opening up of proceedings to any person who may have information that he/she considers is pertinent to the child's safety or well being, the repeal of S117AB would reduce further any protection for a party to proceedings from false much less vexatious allegations by removing a reasonable and surely obvious disincentive to the making of such allegations. This amounts to injustice. S117AB should be retained.

Items 39 and 42 seek to give even more extended immunity to an "officer of a State or Territory." Not only would such officer, as would all parties, not be liable to costs for knowingly making a false allegation or statement if S117AB is repealed, but under proposed new S117(4A) would also not be liable for costs under S117(2) if he/she "acts in good faith."

9. General Comments -

(a) Abuse or family violence does not just suddenly raise its head at the point orders are sought as to parenting arrangements. If an allegation is genuine the party making it must have expressed concerns about it, told others (friends, family members, doctor, child welfare authorities) and shown signs (if not psychical then anxiety, depression for eg). There would have to be some prima facie evidence of it. The party's legal representative surely has responsibility for gathering that evidence. The Act should not require the court to invite bald allegations of abuse or family violence at the outset before any claim or prima facie evidence of such has been presented. The onus of proof should remain on the party making the allegations and penalties should apply to discourage false allegations. A court cannot act as a commission of inquiry into whether child abuse or family violence exists or not, which seems to be the overall effect sought by the main thrust of the amendments. That is the function of child protection and child welfare authorities.

The court should only make orders on the evidence presented to it by the parties. The parties' legal representatives should take instructions from their clients in relation to abuse and family violence, as with all issues relevant to the orders sought in relation to a child, and gather all relevant evidence to be presented to the court. If the court is required to invite all who may have some information, even bald allegations of suspicion or risk or being "aware" of matters relevant to a child's safety or welfare, it will be seen as conducting a fishing expedition or, at worst, a witch hunt. Justice may not be done and certainly it will not be seen to be done.

(b) Financial Impact – The Explanatory Memorandum states: "The amendments in this Bill have negligible financial implications." However the Recommendations of the Family Violence Committee of the Family Law Council, 9.5, note: "Current memoranda of understanding and protocols focus primarily on child protection rather than family violence more generally. The focus of the protocols should be expanded to include the sharing of information in respect of family violence. *The federal family courts and legal aid agencies be resourced to undertake the additional workload generated by these families.*" The Family Law Council doesn't expect the financial impact to be negligible. The financial implications of the "additional workload" are obvious .The time and cost of dealing with cases will be greatly increased, and is expected to. The cost to the taxpayer of the operation of the family court and all the associated agencies it is being recommended to be involved or allowed to put material before the court will increase. Legal aid and supervised contact centres for children where abuse/family violence allegations are being investigated will also greatly add to the cost.

(c) The protection and safety of children and their welfare is of paramount importance. However allowing mere allegations or suspicion of abuse or family violence against a parent, without at least prima facie evidence, to result in denying or restricting access to the child is not necessarily in the child's best interests. The court cannot carry out the sort of investigation required to ascertain whether accusations are true. It is like expecting the Supreme Court in its criminal jurisdiction to do the job of the police in investigating whether a crime has been committed by gathering the evidence. That is the function of the police and then it is presented to the court to decide whether on the evidence the standard of proof has been met. Child protection and child welfare authorities, together with the police where appropriate, are the main line of defence against a child being abused or exposed to family violence. Where those agencies have information relevant to a particular proceeding under the Act the parties' legal advisers should seek that information on instructions from their client and present it to the court which can then take it into account when exercising its function of making orders in the child's best interests. A court is not an investigation agency and it is absurd and can only result in injustice if it is required to act as such.

And the Committee is asked to consider this Submission.

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