Submission

on the

Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011

to the

Senate Legal and Constitutional Affairs Committee

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1. Introduction

On 25 March 2011 the Senate referred the *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (the "Family Violence Bill") for inquiry and report.

The Bill would amend the *Family Law Act 1975* (Cth) to give greater weight in parenting orders to protection for children and families at risk of violence and abuse. The Bill would also make some other technical and procedural changes.

The Family Violence Bill responds to reports received by the Government into the 2006 family law reforms and how the family law system deals with family violence. The reports claim that the Act fails to adequately protect children and other family members from family violence and child abuse. These reports are the *Evaluation of the 2006 family law reforms* by the Australian Institute of Family Studies (AIFS); *Family Courts Violence Review* by the Honourable Professor Richard Chisholm AM; and *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues* by the Family Law Council.

Submissions were due by 29 April 2011 but FamilyVoice Australia was given an extension to 6 May. The reporting date is 23 June 2011.

2. Family violence doesn't discriminate

In November 2010 the Attorney General Hon Robert McClelland released for public consultation an exposure draft of a *Family Law Amendment (Family Violence) Bill 2010*. The exposure draft would have given effect to some of the recommendations of the Australian Law Reform Commission (ALRC)'s Final Report, *Family Violence—A National Legal Response*.[1]

The ALRC report's recommendation 7-3 was to incorporate into the Family Law Act 1975 "*a provision that explains the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men.*"

The Bill does not seek to implement this recommendation. The following comments are made to oppose any suggestion from others that the Bill include such a provision. The proposed statement is prejudicial and unhelpful.

The Australian Bureau of Statistics 2005 Personal Safety Survey reports the following data[2]:

- 73,800 women (77.7%)and 21,200 men (22.3%) were physically assaulted in the previous 12 months by a current or previous partner;[3]

- 125,100 women (67.3%) experienced physical assault by a male perpetrator in a home in the previous 12 months while 60,900 men (32.7%) experienced physical assault by a female perpetrator in a home in the previous 12 months;[4]

- Since the age of 15 years, 105,600 women (69.6%) had experienced physical assault by a current male partner and 46,200 men (30.4%) had experienced physical assault by a current female partner;[5]

- Since the age of 15 years, 674,700 women (72.2%) had experienced physical assault by a previous male partner and 259,300 men (27.7%) had experienced physical assault by a previous female partner;[6] and

- Children of 463,300 women (84.3%) witnessed their mother being subjected to violence by a partner and children of 86,500 men (15.7%) witnessed their father being subjected to violence by a partner.[7]

Overall nearly one in three victims of domestic violence is a male victim of a female perpetrator. In over one in six cases it is "men and their children" who need protection from a female perpetrator.

David Fergusson and his colleagues have reported on an in-depth analysis of women's and men's experience of domestic violence at age 25 as part of the Christchurch longitudinal study.[8] Their findings include:

- 37.4% of women reported that they perpetrated acts of domestic violence compared to 30.9% of men;

- 3.9% of women were injured as a result of domestic violence compared to 3.3% of men;

- 2.5% of women reported being fearful as a result of partner violence compared to 0.3% of men;

- Women were more likely than men to initiate physical assault;

- Overall adverse mental health outcomes (depression, anxiety and suicidal ideation) are as frequent for men as for women, although women are more likely than men to suffer depression and anxiety;

In many cases there was mutual violence leading Fergusson and his colleagues to observe that "*commonly occurring domestic violence may be better conceptualized as an issue relating to violent partnerships rather than violent individuals*".

In considering the policy implications of this study the authors note:

> *The present study has a number of implications for policies relating to domestic violence. First and foremost, the results provide a further challenge to the dominant view that domestic violence is a "women's issue" and arises predominantly from assaults by male perpetrators on female victims.*
>
> *What the findings suggest is that among young adult populations, men and women are equally violent to intimate partners on the basis of reports of both victimization and perpetration for the range of domestic violence examined within this study. Furthermore, the spectrum of violence committed by men and women seems to be similar and there is evidence suggesting that both men and women engage in serious acts of physical violence against their partners. Finally, the consequences of domestic violence in terms of injury and psychological effects were similar for both men and women.*

In 2006-07 of a national total of 65 intimate-partner homicides 21 victims were male (32.3%).[9]

In the light of this data it would be completely inappropriate to incorporate in legislation an "explanation" that family violence is "predominantly committed by men".

Both men and women are victims of family violence. Both men and women are perpetrators of family violence.

It would be profoundly unfair, and disempowering for male victims of family violence, for the law to incorporate a gendered discourse about family violence that minimises men as victims and casts them primarily in the role of perpetrators.

Recommendation 1:

No provision reflecting recommendation 7-3 of the ALRC report that would highlight men primarily as perpetrators of family violence should be included in the Bill.

3. Broadened definition of abuse

Schedule 1 of the Bill defines proposed amendments relating to family violence. Taken together, items 1 (definition of *abuse*), 2 (definition of *exposure* to family violence), 3 (definition of *family violence*) and 8 (definition of *family violence*) would significantly expand the current definition of abuse in the *Family Law Act 1975*.

The net effect of these changes could be to include some relatively trivial matters within the definition of abuse.

For example, item 8 would provide that a child has been exposed to family violence if the child is involved in "cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family".

Suppose one parent deliberately breaks a favourite tea cup of the other parent when the child is not present. Later the child helps clean up the broken cup, perhaps never being informed by either parent as to how the cup came to be broken.

The proposed definition could result in the child being considered to have been "exposed to family violence".

Similarly a child could be held to have been exposed to family violence if he or she were to hear one parent seeking to prevent the other parent keeping connections with her family, perhaps refusing to allow an interfering mother-in-law from visiting the family home too frequently.

A child exposed to family violence – even in these trivial ways – would be held to be subject to "abuse".

Broadening the definition of abuse in this way is unhelpful in protecting children who are at risk of serious actual abuse.

Recommendation 2:

The proposed definitions of abuse, exposure to violence and family violence should be greatly restricted to ensure that they only apply to situations where real and serious harm is involved.

4. Best interests of the child: tilting the balance against a meaningful relationship with both parents

In Schedule 1 of the Bill, item 17 would change the import of Section 60CC (2) of the *Family Law Act 1975*, which currently provides that two matters are to be treated by the court as primary considerations in determining the best interests of a child:

> *(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and*

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The proposed change would add as new Section 60CC (2A):

If there is any inconsistency in applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

The phrase "any inconsistency" virtually invites the court to ignore completely the requirement to consider "*the benefit to the child of having a meaningful relationship with both of the child's parents*" once it decides to entertain an allegation of any kind about abuse or exposure to family violence.

There is no reason to think that the courts are not able to adequately balance the two primary considerations.

Taken in conjunction with the proposed broadened definitions of abuse, family violence and exposure to family violence this provision would significantly tip the scales against court orders that ensure that a child has the opportunity to have *"a meaningful relationship with both of the child's parents"*.

The proposal fails to appreciate that depriving a child of a meaningful relationship with one of his or her parents may in itself be a form of abuse.

4.1 Fatherlessness

Boys growing up without a father are at higher risk of adverse health outcomes.

Experiments in Living: the Fatherless Family, by social scientist Rebecca O'Neill, reports a range of findings about the adverse health impacts on children, teenagers and young adults associated with fatherlessness.[10]

"After controlling for other demographic factors, children living in lone-parent households were 1.8 times as likely to have psychosomatic health symptoms and illness such as pains, headaches, stomach aches, and feeling sick."[11]

According to the National Survey of Sexual Attitudes and Lifestyles, boys from lone-parent households were 1.8 times more likely to have had intercourse before the age of 16 when compared with boys from two-natural-parent households. After controlling for socio-economic status, level of communication with parents and educational levels, the comparative odds of underage sex actually increased to 2.29.[12]

"In a sample of British 16-year-olds, those living in lone-parent households were 1.5 times as likely to smoke. Controlling for sex, household income, time spent with family, and relationship with parents, actually increased the odds that a teenager from a lone-parent family would smoke (to 1.8 times as likely)." [13]

"A Swedish study found that children of single parent families were 30% more likely to die over the 16-year study period. After controlling for poverty, children from single-parent families were: 70% more likely to have circulatory problems, 56% more likely to show signs of mental illness, 27% more likely to report chronic aches and pains, and 26% more likely to rate their health as poor."[14]

Male adolescents in all types of families without a biological father (mother only, mother and step-father, and other) were more likely to be incarcerated than teens from two-parent homes, even when demographic information was included in analyses. Youths who had never lived with their father had the highest odds of being arrested.[15]

Incarceration is associated with poorer health outcomes. "The results of one major Australian study showed the overall death rate for men with a prison history was 4 times that of men in the general community. Most of these extra deaths result from suicide, drug and alcohol abuse and homicide, and occur within the first few weeks of release from prison."[16]

"Virtually every major social pathology has been linked to fatherlessness: violent crime, drug and alcohol abuse, truancy, teen pregnancy, suicide—all correlate more strongly to fatherlessness than to any other single factor. The majority of prisoners, juvenile detention inmates, high school dropouts, pregnant teenagers, adolescent murderers, and rapists all come from fatherless homes. The connection is so strong that controlling for fatherlessness erases the relationships between race and crime and between low income and crime...." [17]

4.2 Adviser's obligations in relation to best interests of the child

Schedule 1, Item 22 would impose on advisers (that is legal practitioners; family counsellors; or family dispute resolution practitioner; and family consultants) the obligation to encourage any person they are assisting or advising to act "*on the basis that the child's best interests are best met:*

(i) by the child having a meaningful relationship with both of the child's parents; and

(ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(iii) if there is any inconsistency in applying the considerations set out in subparagraphs (i) and (ii)—by giving greater weight to the consideration set out in subparagraph (ii).

This provision would further entrench the bias against giving equal weight to the "*the child having a meaningful relationship with both of the child's parents"* and could operate to encourage the making of false allegations about abuse or exposure to family violence.

Recommendation 3:

Schedule 1, Item 17 and the parallel provision in item 22 of the Bill should not be pursued and "the benefit to the child of having a meaningful relationship with both of the child's parents" should continue to be treated as a primary consideration to be given equal weight with any other primary consideration when determining the best interests of a child.

5. Repeal of 'friendly parent provision'

Schedule 1, Item 18 would repeal Section 60CC(3)(c) of the Family Law Act 1975, which provides as follows:

60CC How a court determines what is in a child's best interests

Determining child's best interests

Additional considerations

(3) Additional considerations are:

(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

This valuable provision encourages each parent of a child to cooperate with the other parent to serve the best interests of the child in accordance with the objects and underlying principles of the Act set out in paragraph 60B.

The justification for proposing the repeal of Section 60CC(3)(c) given in the explanatory memorandum for the Bill is this:

> The AIFS *Evaluation of the 2006 Family Law Reforms* and the Family Law Council report to the Attorney-General, *Improving responses to family violence in the family law system*, noted the impact this provision had in discouraging disclosures of family violence and child abuse. These reports indicate that parties were not disclosing concerns of family violence and child abuse for fear of being found to be an 'unfriendly parent'.[18]

The critical question is whether these "disclosures" are substantiated cases of family violence and child abuse or only unsubstantiated or vexatious allegations.

If they are substantiated cases, a court is required by Section 60CC(2) of the Act to give *primary consideration* to "the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence." Section 60CC(3)(c) is only an "additional consideration" and could not be used to override a primary consideration.

However, if the "disclosures" would be merely unsubstantiated allegations, Section 60CC(2) is serving the valuable purpose of discouraging false or vexatious allegations against a potentially innocent party.

The serious consequences of unsubstantiated allegations was highlighted in the submission by the Shared Parenting Council of Australia to the 2003 Inquiry Into Child Custody Arrangements In The Event Of Family Separation. This submission addresses the question of protecting children at risk as follows:

> The problem that the Family Law system faces ... is how to best balance the custodial needs of the child against the responsibility of the state to protect the child...
>
> In the past the Family Court has generally ... restricted contact to that parent pending further investigation and the preparation of a Child Welfare Agency report and/or a Family Assessment.
>
> Regrettably, when these investigations result in an unsubstantiated or false accusation finding from the applicable Child Welfare Agency, there has usually been many months that have passed whereby the child has been forced to suffer the deprivation or loss of relationship with one of their parents. This issue has caused much grief and angst amongst separated parents who, along with the child, have suffered an injustice and an interruption to their parenting roles - with little or no recourse against the false accuser.
>
> On this issue, Brown (2003) in her investigation of abuse allegations said, "It is clear that allegations are made against fathers more frequently than against any other family member and that the person making these allegations is most commonly the mother. Furthermore, many fathers are found not to be the perpetrator as alleged. This gives some support to the belief of fathers that their former partners pursue them with malicious allegations of child abuse".[19]

Family law professor Patrick Parkinson identifies community concern that family violence allegations are being used for tactical advantage in court proceedings. He says: "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."[20]

Recommendation 4:

Schedule 1, Item 18 and related items 20 and 26 of the Bill should not be pursued and "friendly parent provision" should be retained in order to encourage each parent of a child to cooperate with the other parent to serve the best interests of the child in accordance with the objects and underlying principles of the Act set out in paragraph 60B.

6. Invitation to allege child abuse or family violence

Schedule 1, Item 38 would impose on the court a duty to solicit allegations of child abuse or family violence.

Division 12, Subdivision B, Section 69ZN of the Act establishes principles for conducting child-related proceedings. Subdivision C defines the duties and powers of the court related to giving effect to the principles, and section 69ZQ sets out the general duties.

The proposed amendment would impose on the court the following duties:

69ZQ General duties

(1) In giving effect to the principles in section 69ZN, the court must:

(aa) ask each party to the proceedings:

(i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and

(ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence; and

This proposal would require the court, in conducting child-related proceedings, to seek allegations of child abuse or family violence. This process could create an impression in the minds of the parties that allegations of child abuse or family violence are expected. It would be an open invitation for parties to make allegations against each other and could inflame antagonism and possibly provoke violence between them.

Allegations made in such circumstances may not be easily refuted at the time they are made. The process could result in an assumption that the accused party is guilty, contrary to the normal presumption of innocence under Australian law.

The Act has adequate provisions[21] for allowing parties to submit allegations or evidence of child abuse or family violence. The proposal is unnecessary. It is also potentially dangerous since it could encourage parties to make ill-considered claims or to exaggerate risks of child abuse or family violence and thereby foment avoidable strife between the parties.

Recommendation 5:

Schedule 1, Item 38 of the Bill, that would impose on the court a duty to solicit allegations of child abuse or family violence, should not be pursued since it is both unnecessary and dangerous, with the potential to aggravate antagonism and provoke strife between the parties.

7. Repeal of mandatory costs for false allegations

Schedule 1, Item 43 of the Bill would repeal Section 117AB of the Family Law Act 1975 which provides as follows:

> **117AB *Costs where false allegation or statement made***
>
> *(1) This section applies if:*
>
> *(a) proceedings under this Act are brought before a court; and*
>
> *(b) the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.*
>
> *(2) The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.*

It is noteworthy that this provision applies to all "knowingly made" false allegations or statements, not specifically to knowingly made false allegations or statements relating to family violence or abuse of a child. The provision also only mandates that the court order the offending party to pay "some" of the costs of another party.

The repeal of this provision would allow a court, despite being satisfied that a party had knowingly made a false allegation, to order the perjuring party's costs to be paid by the party maligned by the false allegation. The victim of false allegations could be ordered to pay costs of the perjurer!

There is no valid reason to accept that this provision discourages the making of truthful statements about family violence or child abuse. Even if a court is not persuaded of the truthfulness of those statements, the mandatory cost order is required only if the court is positively persuaded that the statements were knowingly false.

Repealing this provision would be likely to increase the incidence of knowingly false allegations and statements that one party believes may advance its interests.

Matters relating to abuse and family violence could be seen by unscrupulous parties as useful for this purpose, especially in the light of the proposed broader definitions of abuse and family violence, as well as the proposal, when determining the best interests of the child, to give greater weight to protecting the child from abuse or exposure to family violence than to the "benefit to the child of having a meaningful relationship with both of the child's parents".

Recommendation 6:

Schedule 1, Item 43 of the Bill should not be pursued further and Section 117AB of the Family Law Act 1975 should be retained as an important disincentive for making knowingly false allegations or statements.

8. Convention on the Rights of the Child

The ordinary rules of legal interpretation already allow a court to take into account relevant international instruments when interpreting the common law or ambiguous provisions in statute law.

Schedule 1, Item 13 of the Bill would amend Section 60B of the *Family Law Act 1975* by providing that one of the objects of Part VII of the Act dealing with children:

> "*is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.*"

This could lead to the courts giving more weight to the Convention when interpreting provisions in Part VII of the Act than would currently be justifiable under the standard rules of interpretation.

This could be problematic and lead to a significant change in practice.

For example, The Committee on the Rights of the Child 2005 "*Concluding observations: Australia*" among other findings objected to the laws in various Australian States and territories that permit parents to use corporal punishment for the purpose of "*reasonable chastisement*". The Committee formally called on Australia to "*take appropriate measures to prohibit corporal punishment at home*".

Many Australian families use reasonable physical discipline from time to time. There is a significant body of research confirming its utility in raising children well.[22]

It is one thing for there to be an internal domestic debate within each State and territory on the merits or otherwise of banning the use of corporal punishment within the home. It is quite another thing to have an international committee seeking to interfere in the laws of our States and territories on a matter such as this.

Specifying that one object of Part VII of the *Family Law Act 1975* is to give effect to the Convention could lead to a court deciding that a parent who supported the use of physical discipline would be violating a child's rights and so should be deprived of contact with that child.

During the debate in 1990 on whether Australia should ratify the Convention on the Rights of the Child its proponents pilloried pro-family groups that asserted that the Convention undermined parental rights.

However, the official view was made clear in the 1995 "*Concluding Observations of the Committee on the Rights of the Child: Holy See*". The Committee took the Holy See to task over its formal reservation to Article 5 and Articles 12 through 16 of the Convention in which the Holy See states that it will interpret these articles in accordance with parents' inalienable rights and prerogatives. The Committee stated that it was "*concerned about [these] reservations ... in particular with respect to the full recognition of the child as a subject of rights… In this respect, it wishes to recall its view that the rights and prerogatives of parents may not undermine the rights of the child as recognized by the Convention, especially the right of the child to express his or her own views and that his or her own views be given due weight*".[23]

8.1 A charter for child autonomy?

Article 5 of the Convention states that:

> *States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.*

This phrase effectively limits the obligations of States Parties to respect parental rights only when parents are considered by the State to be acting "*in a manner consistent with the evolving capacities of the child*".

By requiring the courts to consider the need to give effect to the Convention the proposed provision in the exposure draft could potentially undermine parental efforts to supervise the upbringing of their own children according to their best judgement.

The autonomy model of children's rights is further expressed in Articles 12 through 16 of the Convention which require States Parties to recognize children's rights to have:

- *their views expressed and taken into account in all matters concerning them (Article 12)*

  The weight to be given to these views is to be in accordance with the age and maturity of the child. While 12.2 deals with judicial and administrative proceedings, article 12.1 is unlimited in application. It could be held to require parents and educational authorities to give more weight to a child's views than they might otherwise do.

- *freedom of expression, including seeking and receiving information through any media (Article 13).*

  The only limitation is by the laws usually considered necessary to place limits on freedom of expression. This Article could be applied to prevent parents from effectively controlling information available to their children.

- *freedom of thought, conscience and religion (Article 14)*

  Under this article parental supervisory rights must only be respected by the State when exercised in a manner consistent with the evolving capacities of the child. In other words, children have a right to freedom of thought, conscience and religion to be exercised independently of their parents' direction with the full legal protection of the State whenever the child is judged to have the capacity to do so.

- *freedom of association and peaceful assembly (Article 15)*

  This freedom is only to be limited by the usual limits permitted to restrict these rights for adults (eg protection of public order). This Article could also be cited to prevent parents from effectively supervising their children's relationships with others.

- *freedom from arbitrary interference with privacy (Article 16)*

  Privacy rights are used to ground alleged rights to sexual activity, access to contraception and abortion. This Article could be held to endorse children's rights to such things without parental knowledge or supervision whenever the child is judged to have the capacity to exercise these "rights" independently.

In each of these Articles children are said to possess autonomous rights. Either through Article 5 or through explicit statements in these Articles, parental supervisory rights are to be exercised only in a manner consistent with the evolving capacity of the child.

This represents a decisive move away from age-based criteria for minority status to capacity-based criteria. The obvious difficulty with this is that once it is held to be an obligation under international law (as opposed to simply being expressed as a suggestion for how parents ought to fulfil their supervisory responsibilities) is that someone must make judgements as to:

- the current capacity of the child to exercise a particular right independent from parental supervision;

- the extent to which parental action infringes the child's valid, autonomous exercise of a right; and

- any remedy necessary to enforce or uphold the child's rights and to restrain the parents from infringing those rights.

In the context of decisions being made by a court under Part VII of the Act this could lead to a substantial disadvantage for any parent who was less inclined than the court to acknowledge the "evolving capacity" of a child and his or her right to exercise autonomy rights in defiance of parental wisdom.

Recommendation 7:

Schedule 1, Item 13, which would make giving effect to the Convention on the Rights of the Child an object of Part VII of the Act, should not be pursued as to do so could lead to unforeseen outcomes in the interpretation and application of the provisions of Part VII, including outcomes that could significantly undermine parental rights and responsibilities.

9. Endnotes

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23. http://www.unhcr.org/refworld/pdfid/3ae6aec910.pdf , paras 7 and 13.