Shared Parenting Council of Australia

# SUBMISSION

Senate Standing Committee on Legal and Constitutional Affairs

# INQUIRY

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

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# Background

> *"For many years the Australian community has been extremely concerned about contact and residency issues following marriage and relationship breakdown and their experiences with the Family Court and the Child Support Agency. These have been critical issues brought to the daily agenda of members of parliament by their constituents. Several major parliamentary inquiries and a number of other inquiries have looked into these matters, but the problems persist. Different solutions are obviously needed."*[1]

Prior to the 2006 Family Law Amendments, parliamentarians were dealing on a daily basis with constituent's complaints about unfair, life destroying and emotionally and financially devastating family law matters. Since the introduction of the revolutionary and sensible Family Law reforms arising from the House of Representatives Standing Committee on Family and Community Affairs Inquiry of December 2003, entitled 'Every Picture Tells a Story', family law issues have been subdued to such a point that parliamentarians have significantly fewer such issues brought to their attention from concerned constituents. On this evidence alone, the 2006 Family law Reforms have been an outstanding success.

As the leading expert representative body in these matters, the Shared Parenting Council of Australia has been at the forefront of receiving separating parent's assessments and commentary through face to face dealings with Litigants, Self Represented Litigants, Parents, Stakeholders in the family law area and through many other channels.

We had proposed additional measures in the enquiries that lead to the 2006 amendments and have been supportive of two key principles.

1. A presumption that, where there is no physical violence and abuse that the starting point when parents separate is equal time and that time is then adjusted to that which is workable and requested by the parents.
2. That the Parliament of Australia in recognising the fundamental right of every child to experience the love, guidance and companionship of both parents after their separation or divorce declares that it is the public policy of the Commonwealth to assure minor children of an equal opportunity and relationship with both parents, after the parents have separated or dissolved their marriage and to require parents to share the rights, duties and responsibilities of child rearing to affect this policy.

The Shared Parenting Council fully supported the extensive report of the House of Representatives Standing Committee on Family and Community Affairs, entitled *Every Picture Tells A Story* (The report). Whilst we were disappointed that a default equal parenting arrangement was not accepted by that committee, we did however agree with the overwhelming majority of its findings.

At that time the Government and Opposition had accepted the vast majority of those recommendations as detailed in the report and had accepted all the key recommendations that the Shared Parenting Council of Australia had put forward as sound logical amendments.

Although the 2006 amendments to the Family Law Act have had a significant impact on reducing issues with Family Law and parenting matters, complaints about the operation and procedural

[1] Parliament of Australia, House of Representatives Standing Committee on Family and Community Affairs, *"Every Picture Tells a Story"*, December 2003, p1

fairness of the Child Support Agency, have not reduced significantly and this is certainly an area needing further legislative revision.

However, with less than 5 years operations of the Family law Reforms, and with no community demand for further changes to the family law system, we are confronted with legislation that appears on face value to go a long way towards undoing all of the positive reforms achieved through the 2006 amendments and with potential to send the system back towards an operation reminiscent of the dark days of family law prior to 1995.

It is almost inconceivable that such circumstances could arise so quickly, and in getting to this point, the Government's own research, conducted by the Institute of Family Studies with over 20,000 respondents has been largely ignored.

We do note that the title of this Bill is specifically aimed at dealing with Family Violence, and the SPCA believe that this is an important issue in society and for this reason we contribute our submission to assist the Senate, and the Parliament to assist in finding workable reforms that have the desired effect of improving, where possible, legislation in this regard and ensuring that in doing so, we do not 'throw the baby out with the bath water'.

It is paramount that the best interests of the child remains the focal point of legislative reform, in all of the considerations that principle entails. On careful assessment of the Bill there are some aspects that the SPCA will support, however a number of the proposed reforms are unacceptable reforms that are either baseless or potentially damaging to what is now an effective family law system or are poorly crafted and not thought through.

The SPCA fully supports evidence based reforms and is sceptical and dismissive of anecdotal evidence when no empirical evidence of any kind supports unfounded assertions. We note that some interest groups are lobbying for change, but regrettably are unable to support such change with any empirical evidence. Some observers have made commentary there should be support for legislative change, not based on any facts and or real quantitative evidence, but simply that some vocal minority groups have raised "Anecdotal Evidence".

We believe it is important that the Parliament tread 'carefully' and with considered 'purpose' when accepting amendments to the Family Law Act, and we believe that the community should be again actively involved in any such deliberations.

Lastly in relation to the legislative landscape, numerous judgements provide case law and also expand further in detail on the aspect of "Unacceptable Risk" and the evidentiary standard of proof which the Legislation does not deal with in any significant way. [2]

## The Family Courts and Violence

There is a contemporary but out of date view held, that men are the only primary perpetrators of domestic violence; notwithstanding the 2005/06 ABS Safety Survey shows that statistically the female-to-male and male-to-female rates are nearly equal. Clearly both men and women are found to be perpetrators of family violence.

[2] Kings & Murray [2009] FamCA 565, Briginshaw v Briginshaw [1938], M&M [1988] 166CLR69, ***Amador*** and ***Amador*** [2009] FamCAFC 196 [78] to [97]

The, widely used, Duluth model of family violence has been proved flawed by findings from Professor Dutton[3] and others, yet Governments appear to take no notice of such studies.

The ABS studies show that a singular focus on the violence of men means that other groups have no similar programs and no voice that speaks for them. These are male victims and women affected by the violence of other women. Instead of concentrating effort into strategies for reducing male-only violence in the community, typically resources would be better spent addressing the following:-:

- Reducing conflict and anxiety by efforts to improve and streamline the long waiting times for mediation when families have separated and one parent is waiting for the other to allow contact.
- Education for young people leaving schools about relationships and the zero tolerance for violence in the community at large. On-going school based relationship programs to educate years 11 & 12 students about family relationships.
- Much earlier intervention programs "early intervention measures should be mandatory for separating parents where escalating conflict is often caused by one partner withholding contact from the other."
- Programs which examine the viability of the marriage or de facto relationship, as some couples' relationships are still viable and should not be automatically channelled into dissolution processes. We understand that marriage counselling was meant to be part of the 1974 divorce reforms to help prevent unnecessary dissolutions but was never implemented contrary to the expectations of various Churches and relationship counselling organisations.
- More intensive psycho-educational programs such as those operating in the United States
- More referral and interaction with Churches and other pro-marriage organisations to provide "engagement encounter" and "marriage enrichment" workshops such as run by the Catholic Church, the Fatherhood Foundation and others.
- A serious effort at educating and improving men's health and a holistic program aimed at men and employers to reduce marital stress (night shift and fly-in, fly-out mine workers) stress levels if employees are working long hours and health related programs in relation to alcohol and substance availability and taking.

That there is a view in some quarters that the Family Courts are not able to deal with matters of family violence is worrying. That is not a view shared by the SPCA.

Child homicide has reduced by almost 50% since the introduction of the much fairer 2006 reforms according to NSW figures. The NSW Child Death Team Annual Reports stated:

- In 2005, twelve children aged between 0-17 died by fatal assault
- In 2007, nine children aged between 0-17 died by fatal assault. 2007 had the lowest child mortality rate observed over 1996-2007. This is the year directly after the reforms were instigated.
- In 2009, seven children aged between 0-17 died in six incidents.

The fact is that the current Domestic Violence Interventional Programmes encourage the breakup of families and reinforce blame, and have resulted in women fleeing relationships and put their

[3] Transforming a flawed policy: A call to revive psychology and science in domestic violence research and practice, Donald G. Dutton, Kenneth Corvo, University of British Columbia, Syracuse University.

children at risk with new and unknown partners and this is an empirically observable major factor in the numbers of DV child deaths where children suffered at the hands of their mother or mother's de facto new partner. Statistically, after the safety of home of the intact family, the next safest place for children is with their biological father.

When it comes to child deaths in families, it is proved that women and new partners are the main perpetrators yet the framework of the legislation dispenses with any real evidence, real facts and manages to simply find it more expedient and easier to take any other approach than address the problem.

In a significant New Zealand study[4] men and women reported similar experiences of victimisation and perpetration of domestic violence. This is a critical and key study that covers a range of violence issues in much detail.

In a 2008 article Michael Green QC comments, *"...the incidence of maternal violence to children, both physical and emotional, is especially worrying yet attracts no media attention. Media reports are often grossly misreported and do not show the real position in the courts.*

*The media have a duty of care to report accurately and the public have a right to know who are the real perpetrators and the real victims. Claims by SMH journalist Ruth Pollard (Courts put kids at risk, 25/11/08), that changes to the Family Law Act are compelling courts to hand children over to violent fathers are false and scurrilous. These claims are an insult to judges and magistrates who apply the law and deal daily with serious relationship issues.*

*There are precise safeguards in the Act to exclude shared parenting and joint parental responsibility in cases where there are real issues of violence, conflict or abuse. The allegation that women are being "forced" into mediation with violent ex-partners is particularly mischievous. The Act does nothing of the kind, and mediators and community agencies have screening strategies to identify cases in which mediation is inappropriate.*

*Reducing mothers to 'victim' status is a favoured strategy of radical feminists opposed to men and does nothing for the protection and welfare of women and children."*[5]

There are numerous judgements that support this view.[6] Recent judgements show clearly that it is a nonsense to suggest that the Family Law Act has in any way softened the approach of the judicial officers to cases of family violence and alleged violence and in evidence we refer to Miller & Brass [2008] FamCA 944 (30 September 2008) and Short & Trevilian (No. 2) [2008] FamCA 215 (25 March 2008). In both judgements, reference is made to the new Act, particularly with regard to the impacts of s60cc in these cases. The court acted to prevent exposure of the children to potential violence even though it was considered improbable that any violence would occur. The judgements in those cases make it crystal clear that safety and the interests of the child continue to be paramount.

[4] Partner Violence and Mental Health Outcomes in a New Zealand Birth Cohort. DAVID M. FERGUSSON, L. JOHN HORWOOD, AND ELIZABETH M. RIDDER Christchurch School of Medicine & Health Sciences.
[5] Almost the last word on Family violence familylawwebguide.com.au/news/pg/news/view/502/index.php&filter=10
[6] Secretary SPCA comments in relation to a Safety First campaign petition to amend laws to better protect children familylawwebguide.com.au/forum/pg/topicview/misc/3904/index.php&start=0#post_24292

We can therefore conclude from the cases mentioned that where there are factors relating to Family Violence that the Family Law Courts are in fact already operating with safety as a paramount factor.

The changes in the Amendment Bill will hardly, if at all, reduce the incidences of actual violence and will simply make matters more complex and time consuming for all parties involved.

### Existing legislation

What appears to have been entirely overlooked is the wide range of legislation already available to assist the courts in looking into issues and making determinations where there is Family Violence. There are also a large number of case law precedents for the making of orders in such cases.[7]

- A regime exists that already allows family courts to take into account relevant considerations in matters relating to violence in s60CG,60E,
- s68R and s61DA 2(a). **Division 12, 60B(1)(a) and (b)60CC 2(b)**, 2(a) s61DA ***69ZP,60CC(3)(k)*, 60CC(3)(k)**, under **s60CC(j)**, a court can also take into account "any family violence that applies to the child or a member of the child's family" **,60K Court to take prompt action, *60CA,***
- Subsection **60K(3)** provides that when considering what order (if any) should be made under paragraph **60K(2) (b)** to enable appropriate evidence about the allegation to be obtained as expeditiously as possible.
- One of the matters the court must consider is whether it should make orders under new section **69ZW** to obtain reports from State and Territory agencies in relation to the allegations. **69ZW** and **60K(3)** does not limit subparagraph **60K(2)(a)(i)** and the court may make other orders under that subparagraph as it considers appropriate.
- Subsection **60K(4)** provides that when considering what order (if any) should be made under subparagraph **60K(2)(a)(ii)** to protect the child or any of the parties to the proceedings, the court must consider whether orders should be made or an injunction granted under section **68B**.
- Section **68B** sets out the types of orders and injunctions the court may make for the welfare of a child. Subsection **60K(4)** does not limit subparagraph **60K(2)(a)(ii)** and the court may make other orders under that subparagraph as it considers appropriate.
- Rule 10.15A of the Family Law Rules 2004 (Cth) casts upon the Court a mandatory obligation to be satisfied that orders reached by consent deal with allegations of abuse and family violence in an appropriate way

## Format of this Submission

Due to the very lengthy list of amendments and to provide clarity for the Senate Legislative Committee, we have prepared this submission based on recommendations covering items in the Amendment Bill that we submit requires further adjustment, or deletion.

In brief, we list here the items that we will be addressing in this submission and follow this list with our recommendation for each item separately.

[7] Chranley & Smart (No.2) [2010] FamCA 301, Corling & Franklin [2010] FamCA 402, Patino & Griego [2010] FMCAfam 1422 (2 December 2010), Raymond & Choate [2010] FMCAfam 451, Speltis & Roland [2010] FamCA 343

## Amendment Items Covered by this Submission

The following items are not supportable by the SPCA in their current form and require either substantive amendment or deletion in the legislation:

**Item 1** Subsection 4(1) Definition of abuse; we support provisions (a) (b) and (d) with revisions, we do not support (c) and propose additional new provisions

**Item 2** Subsection 4(1)20 Definition of 'exposed' to family violence

**Item 8** 4AB Definition of 'family violence'; in its present form it is unworkable with no prescriptive judicial test. A "reasonable fear" and "other behaviour" are undefined.

**Item 13** At the end of section 60B - give effect to the Convention on the Rights of the Child. This is not supported due to Constitutional issues and its ability to reduce family authority and other issues.

**Item 17** After subsection 60 CC (2A) Determining child's best interests; Judgements show the courts already favour protecting the child over the benefit to the child of having a meaningful relationship with both of the child's parents.

**Item 18 - 20** 60CC – Friendly parent provisions; Replacing (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; WITH the extent to which each of the child's parents has taken, or failed to take, the opportunity: AND (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parents obligations to maintain the child is extremely problematic and will not reduce family violence.

**Item 23** repeal section

**Item 32** 67Z4 (c) Any other persons prescribed by the regulations

**Item 33** At the end of subsection 67ZA (3)

**Item 38** Before paragraph 69ZQ(1)(a) – Courts must enquire about Family Violence

**Item 39** At the end of subsection 91B (2)

**Item 40** 42 Subsection 117 (1), Subsection 117 (2) and after subsection 117 (4)

**Item 43** Repeal the section (117AB); Allegations that are proved false should have a penalty applied.

# SPCA Recommendations

## Recommendation 1

### Item 1 – Subsection (4) (1)

The SPCA supports provisions (a), (b) and provisions (c) and (d) with removal of the word serious, rejects the definition of family violence in clause (c) and proposes amendments.

### Issues

- Inclusion of qualifier "Serious" will cause interpretative issues.
- The definition of 'Family Violence' is not accepted in its present vastly expanded and non-qualified form.
- Additional provisions are required to deal with

SPCA Amendments (insertions and ~~deletions~~) to this section of the Bill are suggested as follows:

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**1 Subsection 4(1) (definition of *abuse*)**

Repeal the definition, substitute:

***abuse***, in relation to a child, means:

(a) an assault, including a sexual assault, of the child; or

(b) a person (the ***first person***) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer ~~serious~~ psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

~~(d) serious neglect of the child.~~

(d) causing the child to suffer physical or psychological harm by the intentional production or feigning of physical or psychological signs or symptoms in the child; or

(e) where there is no physical violence or abuse, withholding the child from contact with the other parent or family member; or

(f) neglect of the child including (but not limited to)

(i) Prenatal exposure of a child to harm due to a parents use of an illegal drug, excessive use of alcohol or other harmful substance;

(ii) Manufacture of a controlled substance in the presence of a child or on the premises occupied by a child;

(iii) Allowing a child to be present where the chemicals or equipment for the manufacture of controlled substances are used or stored;

(iv) Selling, distributing, or giving drugs, alcohol or harmful substance to a child.

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The inclusion of the qualifier ***serious*** in parts C & D of the government's proposal minimises the consequences of child maltreatment particularly in situations of neglect.

Additionally, how “serious” does “serious” have to be? The inclusion of the qualifier *serious* creates a litigious bonanza for lawyers and confusion for other agencies that deal with first line response to such incidents. The Police in the field, who in the main, deal with the first response to allegations of assault and abuse, will not be suitably qualified to interpret just how serious the abuse is before having to take actions. In the family law context, actions that deliberately exacerbate conflict and increase children's exposure to conflict are not uncommon and could be reasonably assessed as abusive and harmful to children.

**(d) Paediatric Condition Falsification (PCF)**

Another area of concern in relation to abuse is when a parent or carer unnecessary subjects the child to unwarranted medical examinations or procedures and this issue is addressed in part (d) of our proposal.

Some parents deliberately fabricate and/or lie about physical illness and/or injury. According to research the fabrication almost always involves a mother (very rarely a male relative or caregiver) manufacturing symptoms in her child in order to serve her own emotional needs. The perpetrator may give exaggerated reports of an existing illness, or physically induce symptoms in an otherwise healthy child through starvation, poisoning, secret administration of emetics, etc. The victim receives repeated (unavailing) treatments that may include unnecessary surgeries and other mutilating procedures. Main stream research in the U.S indicates approximately ten percent of victims die annually. Perpetrators usually present themselves as devoted parents closely involved in their child’s treatment. They are eager to communicate with the healthcare team, and often have enough knowledge either as medical professionals themselves or as well informed laypeople and do so on a sophisticated level. It is widely agreed that the disorder centres on the perpetrator’s need for positive attention from physicians. As one survivor put it, “My mother was courting the doctors, and my body was the frail gift she offered to attract them.”

We raise this medical and psychological malady as an issue that is being reported to us by litigants and others who are separating in conflictual cases.

**(e) Where there is no physical violence or abuse, withholding the child from contact with the other parent or family member**

One of the largest complaints we receive when parents are separating or have separated is that one parent is withholding contact from the other or one parent relocates until such time as Federal Magistrates orders can be obtained. A previous Senate review of the legislation said, “actions that deliberately exacerbate conflict and increase children's exposure to conflict are not uncommon and could be reasonably assessed as abusive and harmful to children".

**(f) Drugs and Alcohol abuse**

Neglect also occurs when the parent or carer allows the child to be harmed, or to be at risk of harm when the parent or carer misuses drugs or alcohol. Abuse of drugs or alcohol by parents and other caregivers can have negative effects on the health, safety, and well-being of children. Two specific areas of concern are the harm caused by prenatal drug exposure and the harm caused to children of any age by exposure to illegal drug activity in their homes or environment. These are covered in recommended new provision. (f)

## Recommendation 2

### Item 2 – Subsection (4) 20

The SPCA believes the principle of 'exposed to' requires qualification and relative contextualisation restrictions to ensure that its use is not unreasonable in family law abuse provisions. If this is not achieved, than the SPCA recommends this provision be deleted.

### Issues

- Additional provisions are required to deal with the lack of clarity of this amendment

This amendment inserts a 'signpost' or 'marker' to new subsection 4 (AB3) of the Family Law Act under the definition of Family Violence.

It is one thing to be "**involved"** in family violence and another to be "**exposed to"** family violence**.**

The words **"exposed to"** now captures a very much wider definition and will most certainly result in many more situations being viewed as family violence incidents than has been the case.

Inclusion in this context leads to potential escalation and proliferation of subjective and not necessarily relevant matters of definition for other State Acts looking to the Family law Act for legislative guidance. These include:

- Crimes (Domestic and Personal Violence) Act 2007 (NSW)
- Family Violence Protection Act 2008 (Vic)
- Domestic and Family Violence Protection Act 1989 (Qld)
- Domestic Violence and Protection Orders Act 2008 (ACT)
- Domestic and Family Violence Act 2007 (NT)
- Intervention Orders (Prevention of Abuse) Act 2009 (SA)
- Domestic Violence and Protection Orders Act 2008 (ACT)

It is unclear as to how the Police intend to deal with this in the numerous allegations and incidents that are responded to when couples are separating and is yet to be determined, but certainly there is no clarity in this section, as to what constitutes being "exposed to" in an exact sense.

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**2 Subsection 4(1)**

~~Insert:~~

~~***exposed*** to family violence, in relation to a child, has the meaning given by subsection 4AB(3).~~

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## Recommendation 3

### Item 8 – Section 4AB

The SPCA recommends retaining the current definition of Family Violence, preserving in law the judicial test of "reasonable grounds to fear" for a person's safety.

### Issues

- Complete erasure of any judicial and qualifying test replaced with open ended subjective view.
- Removal of any judicial or qualifying test will mean all allegations will have to be accepted on "face value"
- Any claims made where a party to the claim feels threatened or unsafe will be relevant regardless of whether such behaviours has actually caused any harm.
- Vastly extended definition of what constitutes 'Family Violence'
- Requirement to bring to Family Court issues of family violence will most certainly increase the use of AVO and ADVO orders.
- Probable burden to fall on Magistrates Courts
- Definition of coerces and or controls is problematic at best.
- Will create an increase in allegations and counter allegations
- It will hamper the courts ability to get to the bottom of real and dangerous family violence

### Current Definition

The current definition of family violence in the Act is:

> **family violence** means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.
>
> Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety

The Family Violence Bill proposes a completely new definition of 'family violence' that specifies the types of behaviour that constitute family violence.

The proposed definition recognises that family violence can take the form of physical assault, harassment, emotional manipulation, financial abuse and threatening behaviour.

The background to the new definition of family violence is part of a recommendation by the ALRC in its report 128 released in October 2010 in a joint release with the then, NSW Attorney General John

Hatzistergos and the Federal Attorney General, Robert McClelland, to bring all States and Federal Government definitions of Family Violence into one concise definition.

The NSW State Government did not get time to put this new definition before the Parliament before they were removed from office. Now the Federal Attorney General has been left on his own to deliver a hastily drafted Bill before the Parliament.

The SPCA fully supports measures that will reduce family violence. There is certainly no issue with exposure to real, ongoing or sustained physical assault, and threatening behaviour but the current definition is simply too wide and will capture almost every event in difficult family situations. Simply changing the definition of family violence to capture many more incidents will not radically reduce family violence but substantially increase the instances of notifiable offences.

## New Definition

The new definition of family violence has been extensively extended from the existing definition in the Family Law Act 2007

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**4AB Definition of *family violence* etc.**

(1) For the purposes of this Act, ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

(2) Examples of behaviour that may constitute family violence include (but are not limited to):

(a) an assault; or
(b) a sexual assault or other sexually abusive behaviour; or
(c) stalking; or
(d) repeated derogatory taunts; or
(e) intentionally damaging or destroying property; or
(f) intentionally causing death or injury to an animal; or
(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.

(3) For the purposes of this Act, a child is ***exposed*** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

What is disturbing is that any judicial test or "reasonable grounds to fear" for a person's safety have been completely erased from the landscape. There is no longer any test whatsoever and nebulous words are inserted 'coerces',' controls' or 'causes a family member to be fearful' are all that is required to meet the requirements.

This is simply unacceptable in any other law jurisdiction.

There is no rational basis at all for the removal of any test that can qualify and give courts guidance in relation to matters of Family Violence. Rather than eliminate the test and hence hamper the court from applying scrutiny of the veracity of allegations and their basis in reality or perception, more evidence and testing of evidence should be the rule to enable judges to accurately assess the real risks faced by children.

Dumbing down the court's ability to deal with allegations not only burdens the court but potentially leaves children more exposed to danger.

## Family Violence

The words and sentences in the definition are critically important in the interpretation and operation of the law. Judicial officers interpret the law and interpret the meaning not in any literal or lay sense but in a legal and precise sense.

The definition of 'Family Violence' has been so vastly widened as to capture many ordinary events in the everyday life of Australians and their families.

The new definition will surely capture most day to day arguments in non-separating households. For example:

> 4AB Definition of *family violence* etc.
>
> (1) For the purposes of this Act, *family violence* means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the *family member*), or causes the family member to be fearful.

**Issues Arising: No Judicial test**

Coerces or controls will result in large numbers of allegations of family violence.

*(2) Examples of behaviour that may constitute family violence include (but are not limited to):*

*(a) an assault; or*
*(b) a sexual assault or other sexually abusive behaviour; or*
*(c) stalking; or*
*(d) repeated derogatory taunts; or*
*(e) intentionally damaging or destroying property; or*

**Issues Arising: Doesn't differentiate between transitional and prolonged conduct**

In the lead up to a separation there are many words said in intact and separating families. Where a partner in sheer frustration kicks the letter box or slams the door and perhaps the door handle breaks or is grasping to be united with his/her children after a period of denial of contact. Is that sort of activity sufficient damage to warrant the application of the definition so precisely?

*(f) intentionally causing death or injury to an animal; or*
*(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or*
*(h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support;*

**Issues Arising: Doesn't provide for modern varieties in individual banking arrangements**

There are many examples where one parent has taken large sums of money from a joint account and then closed the account by way of withdrawing approval at the Bank to operate the account leaving the other parent without funds. In a number of families it is quite usual for only one parent to control the payments and monthly bill payments and bank accounts.

*or*
*(i) preventing the family member from making or keeping connections with his or her family, friends or culture; or*
*(j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.*

*(3) For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.*

*(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:*

*(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or*

*(b) seeing or hearing an assault of a member of the child's family14 by another member of the child's family; or*
*(c) comforting or providing assistance to a member of the child's*
*family who has been assaulted by another member of the child's family; or*
*(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or*
*(e) being present when police or ambulance officers attend an*
*incident involving the assault of a member of the child's family by another member of the child's family*

Simple old spousal unfaithfulness is now sufficient to trigger a no fault divorce or separation with allegations of Partner Violence and unsuitability of Fatherhood because of it. There is no issue other than personal effrontery or "narcissistic grieving" offered as reasons to destroy families. No external threats, no security issues, just paranoid fear of a partner in a stressful time for all concerned and use of the children as pawns in a power struggle, enabled by affluence and consumerism. Criminalisation of human behaviour characterises this whole sad and failed paradigm.

As Professor Dutton Reports in the 25 JCC paper for the Journal of Child Custody "The Domestic abuse literature is misleading in setting a framework for abuse incidence and threat source for children. Males are represented as primary perpetrators of physical abuse although from meta-analytic studies show otherwise. Indirect aggression is scarcely mentioned in the literature, although prevalent in research on aggression. Physical violence directed towards children is actually more likely to be mother-perpetrated. Child safety may be compromised is focused solely on the possibility of abuse from a male perpetrator. This is wrong.[8]

The Attorney General's comments on domestic violence have conveyed the unfortunate impression that this type of violence only affects women and children.

More than 200 serious social-scientific studies conducted in the English-speaking world over the last 30 years have, however, made it abundantly clear that women are just as violent as men in the home - albeit women are more likely to be concerned about violence.

The NSW Government was "Caught Out"[9] publishing completely erroneous figures on family violence.

In errata published on the Office for Women's Policy webpage, the Government admits errors that clearly over-inflate the female victimisation rate from partner assault by at least 65 per cent while downplaying the prevalence of violence against men by their former partners.

Advertising campaigns run by both the present and previous Governments purporting to show that only men are perpetrators are very seriously misleading, and lacking in honesty. By encouraging false

[8] Dutton and Corvo, Transforming a flawed policy
[9] Call to Stop Demonising Men and Boys (NSW), www.familylawwebguide.com.au/news/pg/news/view/730/index.php&filter=

allegations, and wasting scarce judicial and community resources, these campaigns make it more difficult to protect women and children in cases where there genuinely is abuse occurring.

Reducing mothers to “victim" status is a favoured strategy of radical feminists opposed to men and does nothing for the protection and welfare of women and children. Battering of wives by husbands is indeed a serious matter, deserves condemnation and merits protective programs.

However, family violence is a more complex issue and also includes serious instances of female violence towards men, women and children. The incidence of maternal violence to children, both physical and emotional, is especially worrying yet attracts little media attention. The media have a duty of care to report accurately and the public have a right to know who are the real perpetrators and the real victims. Reporting only “men’s violence against women” ensures that the other groups affected by violence remain hidden from public view and leaves the vast majority of victims of violence without a voice and a campaign that speaks for them.

Clearly the battering of husbands and children by mothers deserves condemnation and the merits of protective programs as well, if not more so considering their virtual non-existence.

The other mistake made by many people in this field, including lawyers, judicial officers, mediators and commentators, is to misunderstand the phenomenon of conflict in human relations. They treat conflict as a homogeneous concept, as if it occurs in the same form, on the same scale, of the same nature and with the same deleterious consequences.

Common sense tells us that this is absurd. There is some conflict in all relationships, in intact families as well as separated.

Men, women and children learn to cope with this in their everyday lives[i]. But conflict, like violence, is infinitely varied. It can range from dislike, arguments and disagreements to serious bodily harm.

It is therefore submitted that to argue that conflicted divorced parents, even highly conflicted parents, should not engage in shared parenting is illogical and wrong.

The research evidence shows that shared parenting can diminish conflict between parents, especially when supported by psycho-educational programs. Moreover, common sense indicates that the first step to apply to a troubled parenting arrangement is not to limit either parent’s time with the children, but to ask *what is going wrong?*

In our experience, it is rarely the shared parenting, but some element or combination of elements in the parenting program or in one or other of the parties[ii]. This can often be cured through counselling, mediation or therapeutic parenting program. It is submitted that the above erroneous approach appeared in Dr McIntosh’s paper on her research into levels of stress in children subject to shared parenting following court decisions and mediated agreements. She concluded that shared parenting may be (i.e. the research does not conclusively show, in fact it doesn’t even show a greater rather than lesser chance of stress levels higher than the average child, it actually says nothing substantial at all) contra-indicated in high conflict families. This, of course, may well be the conclusion in some cases. However, such conclusion should only be arrived at following a proper investigation and application of appropriate remedies.

The other problems we identified in her paper were her comparison of levels of stress in children in shared parenting situations with the same levels in the general population of children.

The more useful comparison would have been with stress in children of separated families generally. All children typically suffer stress following the separation of their parents. Moreover, the McIntosh study was confined to children's stress only three, six and twelve months after separation. As other commentators have pointed out, children's anxiety - and their parents' - generally reduces after the first year.

**ALRC Report**

In the ALRC report of October 2010 Recommendation 75 said:

State and territory family violence legislation should adopt the following alternative grounds for obtaining a protection order. That is:

(a) the person seeking protection has reasonable grounds to fear family violence; or
(b) the person he or she is seeking protection from has used family violence and is likely to do so again.

It is unfortunate that the legislators decided to remove the objective test "Reasonable Grounds" which may well result in a significant increase in ADVO and Intervention proceedings.

## Recommendation 4

### Item 13 – Section 60B - Convention on the Rights of the Child

The SPCA recommends against the inclusion into domestic law (the Family Law Act 1975), of the Convention on the Rights of the Child ("The Convention").

### Issues

- The Convention will operate to create a parental rights free zone in Family Law.
- The Convention establishes a de facto Bill of Rights (the Articles) without proper Parliamentary review and/or Constitutional Amendment.
- An unelected and foreign 18 person UN Committee governs interpretations of The Convention Articles and hence has the authority to issue official interpretations of the treaty which are entitled to binding weight in courts and legislatures.
- Religious freedom and Homeschooling, particularly by Christian parents is at risk. Freedom of conscience, freedom to raise children in their parents religion, and parental protection of children from harmful ideologies and exposure to unchristian lifestyles would be over-ridden by The Convention. The minds of Children are not protected by the Convention.
- The Convention would extend the right to reproductive health including contraception and abortion to children without necessitating parental permission or even notification
- Allowing parents to opt their children out of sex education has been held to be out of compliance with The Convention.
- The ability of the Australian Government to improve Family Law in future would be constrained by the weight of The Convention; the changeable interpretations of the UN Committee and legal precedents overseas in other jurisdictions. National sovereignty and self-determination are impaired by The Convention.

### Convention on the Rights of the Child

In relation to children, the object is to ensure that children receive adequate and proper parenting to help them achieve their potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of the children. The Convention alienates parental authority from decisions affecting their children. The Government is embarking on a vast social experiment that will affect the privacy, the rights and autonomy of all families in Australia both inside and outside of Family Law.

The proposal is not new. It is significant that both the 1995 and 2006 legislation is prefaced by a statement of general principles drawn in substances from the UN Convention on the Rights of The Child declaring, the child's right to know, to be cared for by and to have contact with both parents, and the parents' obligations to share responsibilities over their children. However, the real experience of countries with The Convention has been that parents have been jailed for trying to protect their children. Mental and Physical protection of children by their parents is not guaranteed under The Convention.

Contrary to the denial within the Explanatory Memorandum that this inclusion of The Convention into legislation would not form part of Australia's domestic law, it is patently clear that it does

exactly that.[10] Furthermore, the passing of The Convention into Federal Law would also precipitate the passing of The Convention into Western Australian State Law as any Family law Amendment would need to pass through both houses of the WA Parliaments before taking effect in the separate Western Australian Family Court system.

The Convention would, if enacted, create a "parental rights free zone" in Family Law rather than a healthy balance between the rights of children and parents inside the family which is touted as one of the 'pillars' of the Bill. In fact it does more harm and undermines the safety of children by undermining the autonomy of the family. The fact that the United States Senate opposed The Convention as recently as March 2011 would suggest greater scrutiny of the societal impacts of The Convention in Australian Law is warranted. [11]

We believe that the minds of children should be protected as well as children being physically safe. The Convention when applied through the ideological lens of the small 18 person United Nations Committee responsible for scrutinizing Nation States is already harming children, parents and families in other countries.[12]

Australia ratified The Convention in 1990 with reservations. This Treaty informs signatory countries about their obligations to respect a list of children's rights as per the Articles of the Treaty. The rights framework of The Convention is based on the concept of the Autonomous Child where parents are deemed to be more of hurdle or hindrance to their children's best interests.[13] Incorporation of the whole of the Treaty into the Family Law Act 1975 would effectively create a Bill of (Children's) Rights in law.

Australia has no legislated Federal Bill of Rights - no Bill of Rights currently exists for children, for parents, nor for all Australians. The Family Law Legislation Amendment (Family Violence And Other Measures) Bill 2011 should not be used as a mechanism to create a Bill of Rights within Australian law without proper scrutiny of the Parliament and its Committees and the minimum acceptable standard would properly be to send such a list of rights to the people for a vote as a Constitutional Amendment.[14]

Our further objections to the wholesale inclusion of The Convention into the Family law Framework of Australia are described below:-

**Responsibility but no Authority – the Loss of Parental Authority to Protect**

1. The Convention usurps the authority of Parents to guide their children's formation spiritually, culturally and according to the values and morals held by the family,

[10] Explanatory Memorandum - Family Law Legislation Amendment (Family Violence and Other Measures Bill 2011, House of Representatives, 2010-2011; Item 23, P6

[11] SENATE RESOLUTION S. RES. 99: 112th Congress (2011-2012) IN THE SENATE OF THE UNITED STATES, March 10, 2011

[12] C-FAM: Catholic Family & Human Rights Institute; SUSAN YOSHIHARA PH.D., Rhode Island Judiciary Committee, CRC Testimony

[13] C-FAM: Catholic Family & Human Rights Institute; SUSAN YOSHIHARA PH.D., Rhode Island Judiciary Committee, CRC Testimony, P2;"*The committee ... recommended children confide in their partents only "when feasible". This reflects the view that parents are more of a hurdle to be overcome rather than the children's primary care givers."*

[14] Australia and the U.N. Convention on the Rights of the Child, CHARLES FRANCIS, National Observer No. 42 - Spring 1999

2. Specific to family law and in broader social application, The Convention invades the privacy of the home and drives a wedge between parent and child. Under The Convention the aspirations, care and concern that parents hold for their children must be modified to the "best interests" according to ideologues operating within State Authorities who would purport to know and then demand what is best for other people's children.
3. The Convention removes the primacy of parental authority – it removes the power of parents to protect their children from mental and physical harm, and importantly, to protect their children from invasion and over-reach by State Authorities.

**Creation of de facto Bill of Rights bypassing Parliamentary scrutiny**

4. Before entering The Convention into Australian Statutory Law the matter should be subject to separate House of Representatives and Senate inquiries and debates as well as widespread community consultation.
5. The Convention establishes a de facto Bill of Rights for children, when there is no constitutionally approved Bill of Rights for all Australians. Treating children's rights alone is a distortion that allows State Power to invade the private lives of Australian citizens.
6. The Government should seek approval of all Australians through referendum for a constitutional amendment before imposing The Convention on Australian law.
7. The Parliamentary Joint Standing Committee on Treaties in its 1998 review of The Convention warned of the following dangers; http://www.aph.gov.au/house/committee/jsct/reports/report17/rept17ex.pdf

*"If adopted, the Convention would create scope for bitter disputes between children and their parents, and hence opportunities for public servants and courts to step into family affairs 'to protect children's rights'."*[15]

*"The overwhelming and genuine community concern at the impact and potential impact of the Convention on the Rights of the Child (The Convention) on the family unit (society's fundamental unit) cannot be ignored by the Federal Parliament."*

*"The development of the Convention and its ratification by Australia is a case study in policy elitism and disregard for the democratic process."*

*"Its gross ambiguities allow for interpretations which would undermine and place the family unit at the behest of the prevailing social welfare dogmas of the time."*

*"If there is one thing that the anecdotal accounts in "Bringing them Home", it is the complete incapacity of the latest social welfare fad to substitute for the family unit in the raising of children. With all its faults, a functional family unit is still the best environment for the raising of children. As such the opportunity for the State to interfere ought to be limited to the glaring examples of abuse and neglect."*[16]

[15] UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD, EXECUTIVE SUMMARY,17th REPORT; Joint Standing Committee on Treaties; THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA,(Executive Summary, p70).

[16] Bringing them home: The 'Stolen Children' report (1997); Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families

**Australian Family Law and Social Policy steered by United Nations Committee**

1. Over time the influence of the 18 person UN Committee responsible for The Convention, has been to vary and promote different interpretations of the Articles within The Convention.
2. The changeable meanings of the Articles are of great concern and one of the major reasons the United States of America has not ratified the Treaty.
3. Australian sovereignty would be diminished by allowing an unelected "activist" Committee of 18 persons inside the UN to effectively vary Australian Family Law without due legislative process. The UN Committee's world view and interpretations does not consider the views and voices of stakeholder groups and individuals within the Australian community.

**Risk of losing Religious freedoms like Freedom of Conscience and Home-schooling by Parents**[17]

Under The Convention, Children would have the ability to choose their own religion while parents would only have the authority to give their children advice about religion. Christian schools that refuse to teach "alternative worldviews" and teach that Christianity is the only true religion "fly in the face of article 29" of the treaty.

The government has the ability to override every decision made by every parent if a government worker disagreed with the parent's decision.

**Sex Education and Reproductive Rights for Children**[18]

1. The Convention would extend the right to reproductive health including contraception and abortion to children without necessitating parental permission or even notification
2. The Convention Committee has criticised Britain for allowing parents to opt out of state-run sexual education programs. In Germany, 35 parents have been jailed for doing so.
3. Allowing parents to opt their children out of sex education has been held to be out of compliance with The Convention.

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## 13 At the end of section 60B

~~Add:~~

~~(4) An additional object of this Part is to give effect to the Convention on the Rights of the Child done at New York on 20 November 1989.~~

~~Note: The text of the Convention is set out in Australian Treaty Series 1991 No. 4 ([1991] ATS 4). In 2011, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).~~

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Bringing Them Home is the title of the Australian "Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families". The report marked a pivotal moment in the controversy that has come to be known as the Stolen Generations.

[17] Nannies in Blue Berets: A Legal Analysis; Understanding the U.N. Convention on the Rights of the Child; MICHAEL P. FARRIS J.D.; December 15, 2008

[18] C-FAM: Catholic Family & Human Rights Institute; SUSAN YOSHIHARA PH.D., Rhode Island Judiciary Committee, CRC Testimony

## Recommendation 5

### Item 17 –after subsection 60CC(2) Court Determining child's best interests

SPCA does not support this amendment whereby the Courts are compelled to consider matters, which by definitions provided in this Bill may be minor, as having significance over the fundamental principle of the Best Interests of the Child. Currently both are equally rated but the court has always interpreted the meaning to give greater weight to protecting the child from Violence (Statutory Interpretation Act).

### Issues:

- 1. The courts currently operate giving a greater weight to matters of family violence.[19]

**Proposed Amendment**

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**17 After subsection 60CC(2)**

~~Insert:~~

~~(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).~~

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[19] Kings & Murray [2009] FamCA 565,Briginshaw v Briginshaw [1938] , M&M [1988] 166CLR69, ***Amador*** and ***Amador*** [2009] FamCAFC 196 [78] to [97]

## Recommendation 6

### Items 18-20 – 60CC – Friendly Parent Provisions

The SPCA recommends against the removal of the operative clauses for this provision as they were resolved after lengthy parliamentary and public inquiry and have been demonstrated to be effective in reducing conflict for children.

### Issues

- This amendment has the capacity to fundamentally eliminate the 'Friendly Parent Provision' and introduces subjective material that may impact on appropriate deliberations by the Judiciary.
- (c) the extent to which each of the child's parents has taken, or failed to take, the opportunity: is inadequate and replaces the extremely successful wording in (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;
- (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parents obligations to maintain the child is unworkable as one angry parent will ensure that there is little if ever any opportunity for the other parent.
- 60CC (k) entices parents to obtain ADVO or AVO's and should be removed

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**18 Paragraph 60CC(3)(c)**

~~Repeal the paragraph, substitute:~~

~~(c) the extent to which each of the child's parents has taken, or failed to take, the opportunity:~~

~~(i) to participate in making decisions about major long-term issues in relation to the child; and~~

~~(ii) to spend time with the child; and~~

~~(iii) to communicate with the child;~~

~~(ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parent's obligations to maintain the child;~~

**19 Paragraph 60CC(3)(k)**

~~Repeal the paragraph, substitute:~~

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

**20 Subsections 60CC(4) and (4A)**

~~Repeal the subsections.~~

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Item 18, 19, 20 60CC(3)(c) and subsections 60CC(4) and (4A)the Family Violence Bill would remove the 'friendly parent' provisions of the Family Law Act, namely, paragraph 60CC(3)(c) and subsections 60CC(4) and (4A).

Removing the existing 'friendly parent' provisions and replacing them with another loose definition the extent to which each of the child's parents has taken, or failed to take, the opportunity: will significantly change the landscape.

It will most certainly water down matters relevant to the care, welfare and development of the child such as a parent's attitude to the responsibilities of parenthood.

Amendments to *s60CC (3) (c)* in its present form is problematic and parliament should revert to the previous definition.

> **(Current Provision) Paragraph 60CC (3) (c )**
> *(c) the willingness and ability of each of the childs parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;*

This is a fundamental principle of the 2006 reforms and the re drafting of this can only be described as inadequate at best. Despite acknowledging that the courts have not been acting improperly Professor Parkinson supports the repeal of 60CC and s117 because some feminists want it that way and they have provided anecdotal evidence. Family law should not be based on questionable anecdotal accounts. Interestingly this rationale was not applied when fathers groups demanded a presumption of a starting point of equal time.

We agree that the working of this provision will be extremely difficult as (c) the extent to which each of the child's parents has taken, or failed to take, the opportunity: and (ca) the extent to which each of the child's parents has fulfilled, or failed to fulfil, the parents obligations to maintain the child;

Finally, by virtue of s68f(2)(j) of the former Family Law Act the court had to consider *the attitude to the child, and to the responsibilities of parenthood demonstrated by each of the child's parents .* This meant that under s68f(2)(j) as is the case with s60CC(2) the courts could consider evidence on the *"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."* Yet this did not stop parents from raising child safety concerns.

As to the question of community understanding the most apparent feature of the proposal to repeal s60CC(2) and S117AB is the message it sends in advance to divorcing parents. A power-play for exclusive child residence, either for purposes of intimidation or to force subservience in divorce negotiation, is likely to be tolerated by the court

In summary, the rationale for the repeal of s60C(2) is unsustainable and is based on mean spirited ideology.

**60 CC (k)**

The proposed s60CC(3)(k) is as follows: *(k) any family violence order that applies to the child or a member of the child's family*. There are many incidents where family violence order applications are completely unjustified yet these are increasing at an alarming rate with a belief that having an ADVO or AVO will be an advantage in the Family Courts. 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[20]

This provision gives litigants in the Family Courts a belief that having a family order gives them an advantage in a family hearing and should be removed.

[20] Apprehended Violence Orders: A Survey of Magistrates, Judicial Commission of New South Wales, Sydney, 1999, p 37.

## Recommendation 7

### Item 23 – Repeal Section 60K – Court to take prompt action in relation to allegations of child abuse or family violence

The SPCA recommends that this section be deleted as repeal will remove certainty in dealing with Child Abuse and Family Violence that the Court will consider, as the current process has demonstrated to be effective in bringing these matters to the Court's attention.

### Issues

- There is no cited research that suggests the Courts have failed to enact or consider these provisions, nor have we seen any evidence to suggest that such provisions have not been effective in dealing with the types of issues that may arise.

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**23 Section 60K**
~~Repeal the section~~

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## Recommendation 8

### Item 32 – 67Z(4) (c) – Any other persons prescribed by the regulations

The SPCA recommends deleting 67Z(4) (c) as this extends the purpose of this section to people unknown outside of the case before the Court and does not sufficiently identify who 'any other person' might be, and leaves this issue unresolved.

### Issues

- This provision is linked to 67ZBA and applies or extends parties in a matter to 'interested persons'
- The explanatory memorandum does not explain what an 'interested person' is
- An 'interested person' may not have all required case detail, and in any event, is prohibited under s121 from identifying information about the case.
- This provision and 67ZBA may extend to allowing proactive case intervention by persons and organisations who are not adequately trained or briefed in dealing with the particular details of the case.

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**32 Subsection 67Z(4)**

Insert:

***interested person*** in proceedings under this Act, means:

(a) a party to the proceedings; or

(b) an independent children's lawyer who represents the interests of a child in the proceedings; or

~~(c) any other person prescribed by the regulations for the purposes of this paragraph.~~

---

## Recommendation 9

### Item 33 – 67ZA (3) – Mandatory compliance on suspicion of abuse or violence

The SPCA recommends that 67Z(2) be amended to effect amendments to the prescribed notification form 4, which should be extended to include issues of drug and substance abuse, alcohol abuse and or any behaviour(s) that is likely to have a physical or psychological effect on the child.

### Issues

- The current form 4 is only used for matters of family violence.
- The courts do not currently have a short, succinct, pre case qualifying form that allows a judicial officer to get a holistic view of matters that may affect the child other than what is provided on a form 4 and in affidavit form.
- S67Z(2) in relation to the prescribed form should be extended.
- The amendment "Note", could be read to mean that persons referred to in 67ZA (1) (a)-(h) must report a suspicion of abuse before commencement of, or external to, "the course of performing duties or functions, or exercising powers, as" registrar, family consultant or counsellor, an arbitrator, a lawyer etc. This could pervert the course of justice in cases where a parent makes allegations to a professional psychologist who must report any suspicion of abuse, but is thereafter made the court expert at the request of the parent. The expert enters the controversy not with "clean hands", but with pre-conceived ideas and having acted against the other parent through lodgement of an abuse report against that parent. This places an unfair burden on the professional to try to be even-handed in the treatment of both parties to the matter. Having lodged a notification of suspicion of abuse, the expert might err through confirmatory bias, to confirm the earlier abuse suspicion just to avoid redacting/retracting the suspicion and appearing to be in error.

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**33 At the end of subsection 67ZA(3)**

~~Add:~~

~~Note: The obligation under subsection (2) to notify a prescribed child welfare authority of a suspicion that a child has been abused or is at risk of being abused must be complied with, regardless of whether this subsection also applies to the same situation~~. The notification should be provided on the prescribed form

prescribed form means the form prescribed by the applicable Rules of Court.

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## Recommendation 10

### Item 38 – 69ZQ (1)(a) – Courts must enquire in all cases if there is any risk of abuse, neglect or family violence

The SPCA recommends deletion of this provision as it will encourage conflict between parties when each party is already free to plead any such conduct. It will also unnecessarily complicate simple procedural matters between the parties.

### Issues

- This will force the court to proactively enquire or invite parties to allegations of family violence against each other.
- It does not require a court to take any other action in any affirmative response.
- Is very poorly drafted in its present form and the explanatory memorandum does not give clear guidance.
- An expanded Form 4 should be used instead of the requirement to ask the parties for any negative or positive response. The use of an expanded form would give the Courts a more holistic view of a range of issues not limited to family violence but extended to cover other relevant matters.
- The Form 4 should be expanded to cover issues of drug and substance abuse, alcohol abuse and or any behaviour(s) that is likely to have a physical or psychological effect on the child.

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**38 Before paragraph 69ZQ(1)(a)**

~~Insert:~~

~~(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~~

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## Recommendation 11

### Item 39 –Subsection 91B (2) Immunity to child welfare authorities

SPCA recommends that this section be removed.

### Issues

- Immunity from prosecution for any officer or entity (including the Commonwealth, State or a Territory) would remove the right to seek justice and compensation for harm caused with deliberate intent, or though abhorrent, mischievous, negligent or incompetent behaviour.
- Welfare and child protection officers and their services delivery have been known to be one-sided. Rather than extend their services equally to both parties of the marriage entity, welfare officers tend to side with one parent and run their advocacy through reports and court appearances. A separating parent who takes the children will be given preferential treatment to the non-custodial / non-residential parent.
- The matter of the Russell Wood case in the Family Court of Western Australia in 2006, was raised as a grievance in the Western Australian State Parliament time due to the then child protection authorities (DCD) keeping the father's children at bay in foster care for 18 months to deny the children re-unification and a proper relationship.
- On obtaining the desired court order to send the children overseas, the DCD then offloaded the children into the care of the father for several weeks, that is, their child protection concerns evaporated and the father was deemed to be "safe" once their desired outcome had been engineered.
- The father should have received compensation and the authorities involved should have faced disciplinary action. Avenues for redress for parents to whom natural justice has been denied should not be extinguished. Nor should immunity from prosecution or cost orders signal to persons in authority that they are beyond reproach and above the law.
- Court appointed expert psychologists are often reported to their registration boards for alleged misconduct by parents or significant others. The SPCA has heard many allegations over the years including bias, confirmatory bias, siding with one parent's wishes, extortion of monies with demands for thousands of additional dollars from parents before proceeding to read material that the court had already required the Expert to read under the court-ordered terms of reference for the Experts investigation.
- Various experts have reputations for being pro-feminist and anti-father. Many are seen to downplay the effects of mental illness including depression in order to prevent mothers from having to share or give up majority care of their children. The problems are myriad and SPCA maintain that a court order for costs is the very least that should be in place for parents whose families are harmed by such behaviours.
- This provision leaves no redress for cases where the child welfare authorities have acted improperly. Where officers have removed one parent from the lives of children and they should not be able to escape possible prosecution where actions have been inappropriate.

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**39 At the end of subsection 91B(2)**

~~Add:~~

~~Note: If an officer intervenes in proceedings and acts in good faith in relation to the proceedings, an order for costs, or for security for costs, cannot be made under subsection 117(2) against the officer: see subsection 117(4A).~~

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## Recommendation 12

### Items 40-42 – Subsection 117 (1), Subsection 117(2) and after subsection 117(4)

SPCA recommends that this section be removed.

### Issues

- The removal of this provision is related to item 43 and should be deleted

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**40 Subsection 117(1)**

~~Omit "117AB,".~~

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## Recommendation 13

### Item 43 – Repeal the section (117AB).

SPCA recommends that this section be removed. These are not for false allegations but they are for false statements. The Act should not encourage false statements of any kind.

### Issues

- The removal of the existing meagre penalty for false allegations will result in more allegations that require the court to proactively enquire and make determinations on.
- That there are no criminal penalties for proved and false allegations is at odds with common law practices.

Item 37 of the Family Violence Bill would repeal section 117AB which deals with false allegations or statements made in proceedings. It not only repeals the section but removes the mandatory cost order provisions. S117 remains but it is little comfort as there are no mandatory penalties for false allegations.

S117AB clearly mandates cost penalties for knowingly made false allegations or statements. Lawyers know this to be the case and if some are advising clients otherwise they are breeching their ethical duties and this is not the fault of the Family Law Act.

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**43 Subsection 117AB**

~~Repeal the section.~~

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# Conclusion

The SPCA supports any improvements that ensure the rights of the child to have a meaningful relationship with both their mother and father are maintained, and in an environment of safety and security. We do not, however, support changes that extend definitions to a point that normal and everyday conduct can arguably be put forward as family violence, or conduct or 'conflict' that is a normal part of some family breakdowns, which often dissipates over time, be terminating relationship events for children.

It is our view that the Courts have been and will continue to put the best interests of the child first, especially in matters pertaining to family violence and we do believe that some of the proposed amendments seem to ignore the protections that currently exist in the legislation, particularly clause 60CC 2(b) and 61DA 2(a).

The current family law legislation did provide for circumstances that were potentially foreseen, and allows family courts to consider relevant matters relating to violence in section 69R and 61DA 2(a). Division 12, 60B(1)(a) and (b), 60CC 2(b), 69ZP, 60CC(3)(k), under s60CC(j), a court can also take into account "any family violence that applies to the child or a member of the child's family" Section 60K, 60CA, Subsection 60K(3) provides that when considering what order (if any) should be made under paragraph 60K(2)(b) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible, one of the matters the court must consider is whether it should make orders under section 69ZW to obtain reports from State and Territory agencies in relation to the allegations. Section 69ZW, 60K(3) does not limit subparagraph 60K(2)(a)(i) and the court may make other orders under that subparagraph as it considers appropriate. Subsection 60K(4) provides that when considering what order (if any) should be made under subparagraph 60K(2)(a)(ii) to protect the child or any of the parties to the proceedings, the court must consider whether orders should be made or an injunction granted under section 68B. Section 68B sets out the types of orders and injunctions the court may make for the welfare of a child. Subsection 60K(4) does not limit subparagraph 60K(2)(a)(ii) and the court may make other orders under that subparagraph as it considers appropriate.

The effect of these combined clauses of the Family law Act, provides a rigorous and supportable process whereby Judicial Officers can act appropriately to protect children. We have not sighted any research that suggests the Courts have failed to enact or consider these provisions, nor have we seen any evidence to suggest that such provisions have not been effective in dealing with the types of issues that may arise, and which is the subject of further amendment in this proposed Family Law Amendment Bill.

However, with consideration and adoption of the recommendations provide in this submission, the SPCA would be supportive of some legislative amendments in this regard.

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[i] *Kelly J B (2000), 'Children's adjustment in conflicted marriage and divorce: a decade review of research',* Journal of American Academy of Child & Adolescent Psychiatry*, 39 (August): p.8.*
*Kelly J B, 'Further Observations on Joint Custody',* University of California Davis Law Review, *Vol 16 p.762. Neff R & Cooper K (2004), 'Parental conflict resolution: Six-, Twelve- and Fifteen-Month Follow-ups of a High Conflict Program',* Family Court Review*, 42 (1): pp.99–114. McKenzie B & Guberman I (2000), 'For the Sake of the Children: a parent education program for separating and divorcing parents' (*Final Reports Phase 2*), Winnipeg: Faculty of Social Work, University of Manitoba.*

*Bacon B L & McKenzie B (2004), 'Parent Education After Separation/Divorce: impact of the level of parental conflict on outcomes',* Family Court Review*, 42 (1): pp.85–98.*

vi Kruk, ibid, p21.

vii McIntosh, J PhD Cautionary Notes on the Shared Care of Children in Conflicted Parental Separation, Journal of Family Studies, March 2008

*viii Kelly J B (2005),* 'Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce'*, Journal of the American Academy of Matrimonial Lawyers, 19: pp.237–254.*

*ix Pruett M K, Ebling R & Isabella G (2004), 'Critical Aspects of Parenting Plans for Young Children: injecting data into the debate about overnights',* Family Court Review*, 42 (1): pp.35–59. Warshak R (2000), 'Blanket Restrictions: overnight contact between parents and young children',* Family and Conciliation Courts Review*, 39 (4): pp.365–371. Kelly J B (2005), 'Developing Beneficial Parenting Plan Models for Children Following Separation and Divorce',* Journal of the American Academy of Matrimonial Lawyers, *19: pp.237–254.*

*x Burrett J & Green M, Shared Parenting, Raising your children cooperatively after separation, Sydney, Finch Publications, 2006.*

***errata***

1. **Page 17**: Professor Dutton's citation: *"Child safety may be compromised* **is** ***(should be*** **if)** *focused solely* ..... Also quotation marks are missing at the end of quote.

2. **Page 31**: *Issues* -at first dot-point, 3rd line - ***or though*** (should be ***through***) ..... *behaviour*.

3. **Page 31:** *Recommendation 11* - at third dot-point - *in the Western Australian State Parliament* ***time ..... The word time should be removed***