

Part 2 Justice for Children submission to the Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions] inquiry

Justice for Children has already forwarded a submission based on the **Family Law Family Violence Amendment Bill 2010** to your office as **Part 1 of the Justice for Children Submission** and you have kindly acknowledged receipt of that material. We haven't had time to look at any submissions from others so we haven't answered any contrary views they may have outlined.

This submission – PART 2 – is primarily a response to the **Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 [Provisions]** and also includes our views on a range of important issues which are not covered by that Bill. Apologies for any duplication or repetition.

Justice for Children agrees wholeheartedly with the ideas expressed by the Attorney-General in many for a including Parliament but we do not agree that the Family Violence Bill sends an unequivocal message that family violence and abuse are unacceptable.

Why are the interests of the child not absolute as recommended by Professor Richard Chisholm's 2010 report? They are still in listed second place after parents' rights and entitlements.

Does parent mean parent or 'father'? "Tim Carmody [former Family Court judge] has described Australian Family Law as 'unashamedly pro-contact and has said that the Family Court will 'bend over backwards to establish or preserve a worthwhile relationship with the poorest of parents', based on the assumption that 'a father is much more than the worst thing he has ever done'. "¹

In the cases we see this admittedly low standard of risk to the child is not applied to mothers. They can lose contact or have it severely restricted for merely hinting that the father might be abusive.

There is still too much discretion allowed to judges and far too much reliance on 'single expert' opinions.

There is still no capacity for decisions affecting children to be reviewed rather than appealed.

There is still no acknowledgment that the method of assessing the 'best interests of the child' is fatally (sic) flawed, despite the deaths occasioned by court decisions (e.g Darcy Freeman).

Many processes are opaque and unaccountable and this does not enhance the integrity of the Family Law system.

For example, what prompted the changes from the Exposure draft Bill introduced in 2010 and the current 2011 version? After the Family Law Family Violence Amendment draft exposure Bill was released in November 2010, 400 people and organisations put in submissions, according to the A-G, Robert McClelland. **73% supported the changes.** This was despite some dealings which could be construed as dodgy e.g. a FR group was allowed an extension of time (one week beyond the deadline) but even though J4C asked, we were not allowed extra time. We were concerned about this, not only because it is not equitable but because the timeframe for comments was during the

¹ Page 189 *Blood Vows* Helen Cummings 2011 Five Mile Press

January school holidays. This is often a very stressful time for many parents but for some is extremely traumatic (as is the approaching Mothers' Day without children) because they can't see their kids at all or only under restricted and unreasonable conditions.

Perhaps we are not in the loop but we did put in a submission in January 2011 and would hope that if there was subsequent activity around the legislation, we would have been advised. We were surprised when the **Family Law Legislation Amendment (Family Violence and other measures) Bill 2011** was tabled at the end of March 2011 and immediately sent to the Committee to which we are addressing this submission.

Incidentally, what is the process which ignores the massive (by our standards) 3 volume report ***Family Violence – a legal response*** by the Australian Law Reform Commission and the NSW Law Reform Commission which included so many submissions made in 2010 and produced many recommendations? Does all this have to be done again?

This is not an open and transparent process because grassroots organisations – let alone individuals – cannot be expected to peruse daily Hansards to find out what's happening. We had visited and contacted many members of Parliament (we had sent numerous emails and letters asking them to support and enhance the 2010 FL FV Bill and postcards to every single one at least once). All politicians and the departments involved in the January submission process had our email address/es, but none of them thought to tell us what was happening and why the changes were made.

This may seem like a small matter but it is a serious indication of the lack of information and communication around Family Law. A-G's media releases and other gloss describes the changes between the 2010 Bill and the 2011 version as 'technical and procedural' and 'The Bill also makes several technical amendments which correct drafting and minor policy oversights and provide other efficiencies for the courts and litigants'. J4C does not see (inter alia) the restoration of Paragraph 60 CC (3) (c) about facilitating shared parenting, the changes to the definition of family violence and the addition of Bankruptcy provisions as 'minor'.

All Family Law judgements should be available e.g on AUST Lii under assumed names. It should not be up to the judge to decide whether the judgement is published or not.

The following is an attempt to present our views on the amendments. This is only a snapshot because time is limited so it's by no means an exhaustive list. We are not legal professionals, nor do we work on family law matters except in a voluntary capacity and in a belief that the system must change NOW to protect children and make their present and future safe and healthy – emotionally, physically, psychologically.

We are also interested in finding ways to help children who may in years past suffered damage from family law decisions and processes which may have forced them to live in an abusive and/or neglectful situation where they may also have been ordered to have restricted (or in worst cases) **no** contact with their previous primary carer.

We have heard from fathers who have been suddenly given what they said they wanted primary or sole residency – and often, total control of their child – that the children are having 'behavioural

problems' because they want to go back to their mother. The lucky ones may get some helpful counselling or a change of heart by the father. The others either get no help or get 'counselling' to persuade them to adapt to their fate. If the father doesn't have primary residency but has significant unsupervised time there is also the risk that the children will have major psychological and emotional problems if they are forced into such contact against their will. Of course, this can operate whoever the parent is but in our experience, it is the mothers who are being slandered and traduced. Not only by the ex-partner but by the courts which label them mad or bad because they want to protect their children.

There are many tragic facets to family breakup. The adversarial court system by its very nature further exacerbates conflict and drives harder and sharper wedges between participants. At the thin end of these wedges are the children. How can they not suffer? How can they not be damaged? What kind of crazy system produces judgements like this?

*"17. The Act makes it clear that the children's welfare is the paramount consideration...The father's history suggests that he would not accept and adapt to a decision which did not suit him. He entered into consent orders but said he was really overborne. After the hearing and the appeal it took only a short time before he had brought the matter back to court with the present situation. If this decision is not to his liking I would expect that there would be further litigation.
20. I have no doubt that they (the children) have been under a great deal of psychological pressure from the husband and more subtly from the actions of the wife's family, to take the husband's side."
24. Unfortunately I think any programme of contact to have the boys regularly see their mother whilst they are living with him and dependent on him, is doomed. The father has no respect for the children's rights to see their mother. They would be interrogated, subtly or otherwise, and be visited with displeasure if they saw their mother."*

And please let's not hear the excuse that this is an exceptional case. It is not. This kind of 'thinking' is the norm in many of the cases we see. The evidence and one could say persona of mothers is discounted. Their past good parenting history is ignored. "Expert' and consultants reports are taken as gospel and there is rarely natural justice giving the right of reply to the subject of these reports. Fathers' parenting ability is often based on the court's estimate of their potential, rather than their past behaviour and allowances are made for them in the pursuit of their rights. What about the child's rights?

Family Law proceedings must be conducted on a case-by-case basis. As Tolstoy said (and I'm sure you've heard a thousand times), **Happy families are all alike**; every unhappy family is unhappy in its own way. This means that Courts must adapt their approach accordingly and not try to force everyone into the same mould.

The courts display a serious lack of understanding of children's psychology and emotional wellbeing. Professor Chisholm's report argued that it is essential to have judicial officers who are skilled, trained and committed to the wide range of demands made by Family Law

Information and legal support are not readily available for lay participants. How can a realistic defence of the child's interests be mounted if the protective parent has no resources and cannot readily find out what they are supposed to do? How can children get a chance to speak?

It is the aim of Justice for Children to ensure children are treated fairly and kept safe. All participants in the family law process should be treated with respect, given correct and relevant information and allowed a voice which is listened to and considered with care and compassion. We support children's rights to have a voice and choice - particularly after parents are separated.

Who will help children?

As we have said elsewhere, child protection services are state-based and in many circumstances they are reluctant to intervene in any family law matter even where children are at risk. Will the 2011 changes make a difference to this? It seems that they provide encouragement for agencies to come forward with information about children under the assurance of a sort of immunity and if so that is good. There remains scope for vexatious and ill-conceived reporting but we hope that this can somehow be weeded out by a quality control process.

J4C recommends that all information concerning children should be assessed by a panel made up of well-qualified and reputable people and that children should be assessed by a much more rigorous and accountable process than is now the case.

There are many organisations in Australia concerned with children's welfare but we have not been able to find any who will support children involved in family law. Our organisation is only in the early stages but we hope that it and others will soon become able to provide tangible and consistent support for these distressed, worried and often damaged children.

We are extremely concerned about some of the lawyers acting as ICLs who are supposed to represent children. Too many of them do not act impartially, don't talk to the children and do not seem to feel or show a duty of care towards their clients. The children seem to have no avenue for removing or replacing the ICL and parents are also limited in their ability to communicate constructively with the ICL when the latter won't co-operate.

On the government level:

A Minister for Children (not just children's services) and a Children's Ombudsman should be appointed at state and federal levels.

The UN Convention on the Rights of the Child must be made enforceable by bringing in a Bill of Rights or similar otherwise it has no real effect in Family Law.

Counselling – forced or supportive

Counselling undertaken to enhance children's wellbeing and sense of self-worth is obviously a positive process. If however it is a coercive process aimed at making a child accept a relationship that they don't want, then we have grave doubts.

Validation of violence

There is a concerted attempt by certain groups to not to "reduce violence against women and children" (as the government program has it) but to reduce or deny the **existence** of violence and abuse in order to discredit claims made, particularly in Family Law.

"One big questions remains unanswered – why is it that a court **must** consider granting substantial and significant time with children when violence has been found? " ²

² Ibid Cummings

Courts and other agencies such as family relationship centres, consultants etc must not allow themselves to be used as instruments of bullying and abuse and must not take this role upon themselves. This also applies to state-based agencies such as Community Services, Education, Health and Police.

The economics of Family Law (see also Bankruptcy)

This is a billion dollar industry. The unwieldy, self-perpetuating and inefficient structures and systems only create confusion for applicants. Why haven't Federal Magistrates Court and Family Court been amalgamated as was proposed some time ago? Presumably because of territorial imperatives. The systems churn through enormous amounts of money from ordinary people, some of whom are naively trying to achieve justice for themselves and their children. After they've been through the courts, some participants have no resources left and what should have come to the children has been dissipated in the struggle to protect them.

Other participants in the Family Law process are motivated by a desire to reduce their liabilities such as child support. We know of instances where fathers stepped up or even instigated their demands for access to children after the 2006 changes gave them reductions in maintenance if they had more time with the children. CSA has some major issues which need to be resolved.

Access to transcripts is prohibitively expensive and it is hard to get correct information about how and where to find them. Missing documents and tampered evidence are huge problems.

Incidentally recent CSA statistics in media release below show a large increase in mothers presumably losing custody/primary residence. Other information from CSA indicated that mothers are less likely to default on these payments.

Separated mums paying more than ever before [CSA media release]

8 March 2011

The Child Support Agency's Director of Parent Support Services, Toni Brown today used the 100th anniversary of International Women's Day, to release the latest figures on mothers paying child support and highlight support services for families post-separation.

Ms Brown said latest figures released by the Child Support Agency (CSA) show the number of women paying child support is at its highest ever, with over 100 000 (or over 13 per cent of all CSA paying parents) paying child support for their children.

³ Child Support Agency

"The increase in the number of mothers paying child support is a reflection of the general societal trend of more women in the workforce, with many receiving higher incomes," said Ms Brown.

"The figures also show men are more likely to be involved in hands-on parenting. More than 50 000 dads currently registered with the CSA care for their children full-time.

"Research shows children whose parents work well together post-separation are more likely to cope better with life's challenges than those living in high conflict.

"There are many families who experience high levels of tension post-separation. Appropriate referrals, the right services and support at the right time are often the key to prevention and early intervention, especially in times of high stress or vulnerability.

"Child Support Agency staff are trained to identify and support at-risk families, referring them to appropriate crisis and support services and sharing information when necessary," said Ms. Brown.

Separated parents can find out more about support services in their area by visiting www.csa.gov.au or by calling 131 272.

Alternative dispute mechanisms and Supervised contact

While we are glad to see any attempt to take family breakdown problems out of the legal system, any alternative has to demonstrate that it is a **real** alternative. Such an alternative would therefore - as a minimum - be much less confusing, less expensive, less biased, more in tune with children's needs, more flexible, more accessible, more accountable, more consistent and open to review.

In our experience, these attributes do not apply to much of the current system and it is hard to see how – short of a radical overhaul – they can be instilled into it.

One example (of many): a mother who has done no wrong, who was a victim of serious abuse and violence, whose only crime was to try to protect her young child, is not allowed to see her child for short periods. Child and mother are at least allowed to meet at the mother's home but they have maximum supervision for which the mother must pay. This costs over \$30,000 for one year.

See attachment C CONFIDENTIAL

Social exclusion

Attached at **A** is a submission made by **Justice for Children** to the federal Minister responsible for Social Inclusion in 2010 about the Social exclusion parents – in particular mothers – and children encounter as a result of involvement in the Family Law system. Again, there is a lot more to say on this topic.

Comments on specific parts of the 2011 Bill (sorry can't cover everything)
Blue = 2010 Red = 2011

(from 2010) 3 Subsection 4(1) (definition of *family violence*) now 4AB Definition of family violence etc

Schedule 1 Item 1. Subsection 4 (1) Violence and abuse

*Unless there is some reason that we've missed why remove these parts marked **?*

(from 2010) Repeal the definition, substitute:

family violence means behaviour by a person (the **first person**) towards a member of the person's family (the **second person**) that:

- **** (a) causes death or personal injury; or
- (b) is an assault; or
- (c) is a sexual assault, or another form of sexually coercive behaviour; or
- **** (d) torments, intimidates or harasses the second person, including (for example) where that effect on the second person is caused by:
 - (i) repeated derogatory taunts, including racial taunts; or
 - (ii) intentionally causing damage to, or destruction of, property; or
 - (iii) intentionally causing death or injury to an animal; or
- **** (e) controls, dominates, deceives or coerces the second person unreasonably, including (for example) where that effect on the second person is caused by:
 - (i) denying the second person the financial autonomy that he or she would have had but for the conduct; or
 - (ii) withholding financial support, if the second person is entirely or predominantly dependent on the first person for financial support to meet his or her, or his or her child's, reasonable living expenses; or
 - (iii) preventing the second person from making or keeping connections with his or her family, friends or culture; or
 - (iv) unlawfully depriving the second person, or any member of the second person's family, of their liberty; or
- (f) causes the second person to feel fear for his or her safety or for the safety of another person; or
- **g**) causes the second person to feel threatened (whether because of a threat to engage in conduct that would be covered by any of paragraphs (a) to (f), or for any other reason); or
- **** (h) involves the first person threatening to commit suicide or self-harm, with the intention of tormenting or intimidating the second person.

Note: None of the paragraphs of this definition is intended to limit any of the other paragraphs, and a particular

E) (iii) ADD deprivation of contact with the mother who has not harmed the child or been convicted of any relevant offence is child abuse whether ordered by the Court or instigated by another family member

(h) is a tricky one because a person under threat or feeling that "it's all my fault " because of ongoing persecution by the partner can be driven in desperation to believe that only by disappearing will the situation be remedied.

It is often the mother who feels like this and thinks that if only she was out of the way (she is told this often enough by her partner) life would be much better for the other family members especially the children.

On the other hand, if a person (usually a man) wielding a gun says for example: "I'm going to kill myself and/or the children if you leave" this seems to fit exactly under (h) and should be retained.

Schedule 2 Item 1 Bankruptcy

We are in principle opposed to bringing any other legislation under the Family Law Act because:

1. The secrecy/suppression provisions of S121 will protect litigants who are trying to bankrupt their ex partner for reasons of revenge (rather than genuinely seeking financial redress because they're in need);
2. If the maxim 'justice delayed is justice denied' applies anywhere, it certainly applies to the Family Law system which is already grossly overloaded and too often is unable to process cases efficiently or effectively. Taking on another field will not help anyone.
3. If the trustee or anyone else not versed in Family Law is involved, they will have to engage expert legal advice which will eat into any assets of the estate.

Item 3. Subsection Family consultants

Family reports should be accessible by interested parties to ensure integrity. Qualifications of consultants must be made known to all.

Items 23 to 25 Contraventions

What is the purpose of Family Law? Is it to arrive at the truth and do the right thing especially for children? If so, it is failing. Many of the processes are far too complicated, devious and inscrutable for the average person to have any hope of justice let alone understanding or compassion.

An example is the unreasonable and impracticable orders which despite the High Court ruling last year are still proliferating. How many people have been able to understand and make use of the Validation of certain Parenting orders legislation passed in November 2010? Situations like these and most contraventions should not have to go to court but should be handled by an administrative agency at least in the beginning.

And what is the point of orders if one party ignores them (e.g refuses to allow child on weekend visit) or contrariwise one party is penalised for the most minor and excusable infringements (e.g car breakdown) and the other is never pursued despite numerous contraventions? The enforcement of orders seems to be entirely dependent on the ability of the 'aggrieved' party to apply to the Court.

Very few women have the energy or financial resources to do this nor do they have the legal assistance required. This does not deter some of the more vexatious litigants (usually in our experience, fathers) from using the courts to further bully and abuse their ex partners.

Item 27 Appeals

Where children's welfare is concerned appeals must not be limited. We have seen far too many cases where the full bench of the Family Court has overlooked, ignored or misinterpreted evidence that is before it and arrived at unsafe judgements.

Judges very rarely revisit their own or other judges decisions, and it is a Catch-22 to ask a judge to remove themselves from a case. Judges also seem to have no enforceable code of conduct and rarely get reprimanded or penalised unless taken before Parliament. How often does this happen?

The throughput of the court system should not be the most important criterion of assessing that system. The quality of judgements and the effect on children should be the absolute paramount consideration.

Attached at B are a couple of examples of issues J4C has raised with politicians, the media and others who we hope will influence policy for the better.

Please excuse errors and omissions.

Without prejudice

ATTACHMENT B

Extract from J4C letter September 2010

The best interests of the child must be the primary consideration. Although this purports to be already enshrined in the law, it is not happening. The actual result of many court decisions is to put children in situations that neither they – or anyone in their right mind -would want to be in. Situations where they are subject to emotional, psychological and often physical and sexual abuse and where they are cruelly separated from their accustomed parent, home and extended family.

None of these children have the right or the chance to get any kind of independent help after they are stuck in the 'home' where they don't want to be. **In fact, the Court itself has ordered that some children should not have access to counselling at all. All the children mentioned above are not allowed counselling.**

The courts awarding these children to these parents are irresponsible. They have no interest or capacity to follow up what happens to the children after they are hauled away (usually from their mothers) and put in a place where most adults – let alone children - would not want to be.

A place where they have no power, no choice, no voice and nobody to care about their welfare and violence is perpetrated every day against their spirits and souls and often, their bodies.

You will probably think this letter is too emotional but what is more important to humans than love and care and compassion? Reason itself is subjective, no matter how it's painted. The system as it stands is not even economically rational. The waste of time, money and resources, the duplication, duplicity and destruction must stop. **Using the legal system to bully women and children must stop.**

Emotions like a mother's love for her child or a child's love for his or her mother are going so cheap that the legal and welfare systems make a mockery of them.

We have a long list of other recommendations to improve the operation of family law and related issues such as child protection and we hope to be able to discuss these with you further in the near future.

MEDIA RELEASE 19 March 2011

Silence is deafening in the Family Court – and children continue to be abused [extract from draft]

This week a worldwide pedophile ring centred on young boys was publicly outed and apparently 'busted'. About 200 children may have been saved, at least 8 in Australia.

Grant Edwards from the AFP is quoted as saying that the total number of children safeguarded around the world would never be known because child porn was "such a limitless crime"...

"At the end of the day, our goal is simple: child safety," he said.

Justice for Children wholeheartedly endorses the goal of keeping children safe. Boys and girls.

Bill Henson's photos of a young girl created hysteria among media and politicians in 2008.

Why are they so quiet about the abuse of girls and boys happening every day in many Australian homes?

Research indicates that as many as 1 out of 4 girls and 1 out of 6 boys will experience some form of sexual abuse. Children are most at risk from family members or someone they know well.

However, because child sexual abuse is by its very nature secretive, many of these cases are never reported.

This is tragic but more tragic still are the cruel and inhumane decisions made under Australian Family Law which push children into the arms of their abusers. Family law in Australia is not working for children at risk and in fact is often placing them in extremely unsafe situations.

State and commonwealth laws and practices need to be changed now to protect children.

Family Law is a federal matter but all child protection is farmed out to the states.

The Magellan approach to family law cases clearly show that results for children are greatly improved by a more collaborative and investigative method of assessing the child's 'best interests'.

We also want Working with Children checks extended to prevent known abusers from having unsupervised access to any child – even if they are the parent of that child. Why have mandatory reporting of child abuse if 'authorities are so reluctant to act on reports.

There are far too many cases of children being sent by Family Courts to live with an abusive parent.

Victorian Premier Ted Baillieu is quoted as saying that the Victorian inquiry aims to reduce the incidence and impact of child abuse and neglect.

"Vulnerable children have been at risk in this state for too long and in numbers that are just appalling," he said.

Children are at risk all over this country and it is surely the duty of the law to protect the vulnerable and not – as the family law system too often does – deliberately expose them to harm.

The "best interests of the child" is supposed to be the primary consideration in family law. The reality is very different. Family court decisions are placing children in serious jeopardy. They have to live in situations where they are subject to emotional, psychological and often physical and sexual abuse. After court rulings, they can be cruelly separated from their accustomed parent, home and extended family, without any preparation and may be forbidden to see the person who has been their primary carer (and who has not committed or even been accused of, any crime) or only allowed contact under extremely restricted circumstances.

If this is not child abuse, what is?

You don't know about this? No surprise - suppression or 'gag' orders and the secretive nature of the Family Court means that few cases are reported in the media so the public can't know what's really happening.

Congratulations to the Adelaide Advertiser for publishing *Secrets and sniggers in the Family Court* on 19 March 2011. If Miles Kemp can expose these bad practices, why can't other journalists?

These children need protection. Many structures, jurisdictions, services and systems will have to be reformed to achieve such protection - that will take political will and courage.

<http://www.adelaidenow.com.au/ipad/kids-get-their-day-in-court/story-fn6bqphm-1226024275344>

Justice for Children calls on everyone who cares about children to speak out now.

www.justiceforchildreinaustralia.org Ariel

fixingflaws@gmail.com

Dear Letters Editor [SMH 02/03/11]

George Williams (SMH 01/03/11 Law is no hindrance to locking up children) mentions that 'this legal problem can extend beyond asylum seeker children. ..to other vulnerable minors...'

Too right! Many Family Law decisions are forcing children to live with abusive parents or in households where they are at risk of harm.

The "best interests of the child" is supposed to be the primary consideration in family law but family court decisions are placing children in serious jeopardy. They have to live in situations where they are subject to emotional, psychological and often physical and sexual abuse.

Court orders can cruelly separate children from their accustomed parent, home and extended family, without any preparation. They may be forbidden to see the person who has been their primary carer (and who has not committed or even been accused of, any crime) or only allowed contact under extremely restricted circumstances.

If this is not mandatory detention and child abuse, what is?

Children affected by family law decisions are silenced and their abuse is hidden until some horrendous tragedy occurs. There is no follow up to ensure the child is safe in their new home. Government services and community organisations rarely intervene where the family court is involved.

The Family Law Amendment (Family Violence) Bill 2010 is a first step towards improving protection for children. Please make sure your Member of Parliament and Senators vote for it in 2011.

The court said yesterday the requirement that justice be administered openly was not an absolute rule and that suppression orders were not repugnant to the "institutional integrity of the judiciary". The courts are required to take notice of the "public interest" when deciding to suppress part of the proceedings, but as we know there's a lot of flexibility in that concept.

As to the implied freedom-of-political speech the judges accepted that the legislation did "burden" freedom of communication about government or political matters. However, there was a competing interest, namely the "protection of the community by the effective monitoring of released sex offenders".

Part of Hinch's argument was that by suppressing the names of serious offenders undergoing continuing monitoring, the community's interests were not protected. There was a hope, an expectation, that even with a few minority reasons from the court a toehold could be established and built on, so that suppression orders generally became much scarcer.

Yesterday Hinch said: "The full bench decided seven-nil that the laws covering suppression orders of serial rapists and paedophiles are constitutional. In layman's language it is business as usual. So I guess Melbourne remains the suppression capital of Australia."

From Richard Ackland SMH 110311