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

Submission to the Senate Inquiry by the Violence Against Women Advisory Group (VAWAG)

The Role of the Violence Against Women Advisory Group and the purpose of this submission

The Violence Against Women Advisory Group welcomes the opportunity to make a submission to the Senate Committee on the Family Law Amendment Legislation (Family Violence) Bill 2011. The Violence Against Women Advisory Group is an advisory group to the Commonwealth Minister for the Status of Women, The Hon Kate Ellis and formerly to the Hon Tanya Plibersek in that same role. The members of the VAWAG include academics, service providers and lawyers who are drawn together from across Australian because of their knowledge and expertise in the area of domestic violence and sexual assault. (See Attachment A for details of the membership of VAWAG)

VAWAG considers that it is imperative that the Bill as passed by the House of Representatives on 30 May 2011 be passed by the Senate in its current form. The evidence about family violence in the post separation context indicates that the measures contained in the Bill are, as the Bills Digest concluded, a 'relatively cautious and conservative' (Neilsen p32)) response to the 'clear evidence of a need for improvement' in this area (Kaspiew et al 2009). This submission canvasses three main issues. First, the research evidence about the prevalence of family violence among separated families and its impact on children. Second, it considers the evidence about the engagement with legal systems of people who have experienced family violence, including processes for obtaining state protection orders (variously named in different jurisdictions). Third, it considers the background to the insertion of s117AB Family Law Act 1975 (Cth) in the context of recent research findings relevant to the purpose it was intended to achieve.

Family violence post-separation: the research evidence

Recent research evidence has demonstrated that a history of family violence, broadly defined, is common among separated families. The AIFS Evaluation of the 2006 family law reforms found that 26% of mothers and 17% of fathers reported being physically hurt by their partners prior to separation, with 38% of mothers and 34% of fathers reporting emotional abuse before or during separation (Kaspiew et al 2009, 26). These data, from the Longitudinal Survey of Separated Families Wave 1, don't shed light on the more nuanced gender-related issues of whether the respondents were reporting aggressive or defensive acts, nor on issues such as severity, frequency and impact. Nonetheless, they do underline the prevalence of family violence among separated families and the need for policy and legislative

responses to address these issues. Further research recently released by AIFS (Qu and Weston 2011), indicates that family violence does not evaporate after separation, especially in non-physical forms. More than half (53%) of the mothers and just under half of the fathers (46%) surveyed in the Longitudinal Study of Separated Families Wave 2, reported being subject to physical hurt (5% of mothers and 4% of fathers) or emotional abuse (49% of mothers and 42% of fathers) in the preceding twelve months (ie in late 2009, an average of 28 months after separation). Where physical hurt was reported in both survey waves, a majority of parents also reported that children had witnessed violence or abuse (Qu and Weston, 31). The deleterious effects of exposure to family violence for children are well-established (eg Geffner et al, 2003).

The AIFS research also demonstrates the continuing relevance of safety concerns (for the respondent and/or their child) arising from ongoing contact with the other parent. In the LSSF Wave 1, around one fifth of parents (22% of mothers and 17% of fathers) reported such concerns (p27-28), with evidence of significantly poorer well-being for children where there are safety concerns, compared with children with no safety concerns (p263-265). This report also indicated poorer well-being for children in shared care where there were safety concerns (based on mothers' reports), compared with children in other care arrangements (p270-271). Qu and Weston's report on the LSSF Wave 2 shows that safety concerns remain relevant for close to a fifth (20% of mothers and 15% of fathers) of the surveyed parents (p27). The report indicates that a core group of about 10% of parents (11% of mothers and 8.3% of fathers) held safety concerns through both Waves of the LSSF. For about 9% (15% of mothers and 8% of fathers), concerns held in Wave 1 had dissipated by Wave 2. Concerns emerged for a new group, representing about 7% of parents (8.2% of mothers and 6% of fathers) in Wave 2.

In light of the findings about the prevalence of family violence (broadly defined) among separated families in Australia, the measures introduced by the Family Law Amendment Legislation (Family Violence and Other Measures) Bill 2011, are necessary and appropriate. In particular, the broader definition of family violence, recognition of the need to address the exposure of children and the prioritisation of the need to protect children from harm, are supported by the research evidence.

None of the recent research reports has established that benefit accrues to children in shared care arrangements as opposed to any other arrangement where contact with the parent occurs regularly (and in the absence of family violence, safety or other concerns), when other factors, such as socio-economic status are taken into account. Measurement of this issue is acknowledged to be particularly complex, with studies consistently showing discrepancies between mothers' and fathers' accounts of child welfare and happiness, particularly in relation to shared care arrangements (Kaspiew et al 2009 p 267, Cashmore et al 2010 p 90). Fathers' estimates of child welfare are consistently higher than those of mothers where there are shared care arrangements. However, taking into account all the evidence, Cashmore et al conclude that 'more time with the non-resident parent does not per

se equate to more beneficial outcomes for children, because there are so many other factors that affect children's well-being' (xiii). Conversely, the recent research provides evidence of detriment to children in shared care in some circumstances, namely where there are safety concerns (on the basis of mothers' reports) (Kaspiew et al 2009), the parents' relationship is marked by significant conflict (McIntosh et al 2010) or the children are under four (McIntosh et al 2010).

Family violence and engagement with legal systems

Various scholarly reports and articles identify the difficulties for victims of family violence engaging with legal systems in ways that achieve safety and justice. These difficulties arise predominantly from: a) the lack of a common understanding of the nature, dynamics and consequences of family violence; b) the lack of co-ordination across legal systems (specifically civil family violence protection order systems, child protection systems and the family law system); and perceptions that women make false allegations about family violence to gain advantage in the family court and/or to punish their ex-partners.

Hunter (2006) demonstrates the "implementation problem" (p737) concerning feminist inspired law reform and its application by judicial officers who have a different understanding of the nature, dynamics and consequences of domestic violence. She notes that "if there is a disjunction between the legal culture of (feminist) reformers and that of (non-feminist) enforcers, then dismal results are inevitable" (p738). Douglas (2008) finds that minimisation by police and prosecution authorities is common in domestic violence cases, exemplified by the decision to charge respondents with 'breaches' rather than more serious offences such as criminal assault. This minimisation is further reflected in the sentencing patterns for breaches –the majority of matters analysed in Douglas' study resulted in lower order fines, with no conviction recorded in forty percent of the cases. This is in contrast to statistics detailing all criminal offending in Queensland, where only 5 percent of cases had no conviction recorded.

While feminist understandings of domestic violence include physical and non-physical abuse arising from masculine culture that seeks to achieve power and control (dominance) over the female victim of abuse, judicial and legal officers tend to focus on recent physical violence and perceive it to be a result of external pressures such as financial stress and relationship problems (Hunter 2006). Similarly, and based on the experiences of women in Australia's family law system, Laing (2010 p11-12) reports that women were dismayed by the lack of understanding of the range of non-physical forms of abuse perpetrated by ex-partners, including abuse through litigation and exerting control through shared parenting arrangements.

Laing (2010) also identifies that women reporting domestic violence were frequently assumed by family court judges, magistrates, mediators, legal practitioners and others to be fabricating the allegations because of bitterness

towards their ex-partners rather than a need to protect their children. These beliefs reflect broader community attitudes regarding false or exaggerated claims of domestic violence to gain an advantage in the family court (Victorian Health Promotion Foundation 2009).

However, these views are not supported by the evidence. A review of 1998/99 applications found that the majority were brought by non-resident fathers, and that the majority were found to be without merit (Dewar and Parker 1999 in Laing 2010). Similarly, Rhoades' (2002) study of enforcement legislation found that only two of 100 cases matched the stereotype of the one-sided, unreasonable, contact-thwarting mother. The most commonly raised contact concern was domestic violence (in 55 of 100 cases) and in the majority of these cases the outcome was changed orders that restricted the father's contact (Rhoades 2002 in Laing 2010, p. 22). Humphreys and Thiara (2003) report that while some women find the law works effectively for them, for others it is just another means by which their ex-partner is able to control them. Wangman (2009) also found evidence in her study of cross-applications in NSW apprehended violence order proceedings that some men appeared to use the process to undermine women's claims for legal protection. More recently this phenomenon has been reported by Miller and Smolter (2011) as "paper abuse" and "procedural stalking".

The background to the insertion of s117AB and recent research evidence

This section addresses the proposed repeal of FLA s117AB, the provision that obligates courts to make a costs order against a party found to have 'knowingly made a false statement' in proceedings. This provision is broadly worded, applying not just to family violence, but any false statement in proceedings. However, it was explicitly linked to allegations of family violence in the Explanatory Memorandum to the *Family Law Amendment (Shared Parental Responsibility) Bill* 2005. As it stands, this provision has a very broad compass that essentially replicates powers provided in *FLA* s117(2A)(c). The original rationale for its introduction was to achieve a very narrow aim: to address concerns raised in 2006 that 'false allegations' of violence would be made in order to circumvent the provisions requiring parties to attend family dispute resolution prior to filing a court application (*FLA* s60I). The introduction of such a provision was proposed by the House of Representatives Legal and Constitutional Affairs Committee to address the concerns of father' rights groups. The original proposal involved a very narrow application of the power: it was to be contained in and confined to provisions dealing with the filing of affidavit material in support of a court application being filed under *FLA* s60I, the provision that exempts matters involving concerns about family violence from family dispute resolution (House of Representatives Legal and Constitutional Affairs Committee Rec 21). The Senate Legal and Constitutional Affairs Committee recommended s117AB not be introduced at all, until research on allegations of family violence in family law proceedings that was then in train (Moloney et al 2007) was completed (Senate Legal and Constitutional Affairs Committee, 2006).

As the background to the introduction of *FLA* s117AB demonstrates, it is a controversial provision that was enacted amidst significant scepticism as to whether the mischief it was designed to address was a mischief that needed to be addressed at all. In this light, recent relevant research findings suggest that its repeal is justifiable and necessary, for three significant reasons.

First, the research evidence provides no indication that the family violence exceptions to *FLA* s60I are being used unnecessarily. To the contrary, the AIFS Evaluation of the 2006 family law reforms indicates that a significant number of matters involving family violence are being dealt with in family dispute resolution, for a range of reasons, sometimes inappropriately (Kaspiew et al p100-102). The conclusion these data support is that there needs to be more reliance on the exceptions to FLA s60I so that more matters involving family violence proceed to court and less matters are handled inappropriately in FDR processes.

Second, the research evidence provides no indication that 'false allegations' of family violence are commonly made in FDR or court proceedings. As the first section of this submission indicates, family violence, broadly defined, is more common than not, among separated families. Research examining family court files and judgments in children's matters, both pre-reform (Kaspiew 2005, Moloney et al 2007, Behrens, Smyth and Kaspiew 2010) and post-reform (Kaspiew et al 2009), found that a majority of such matters involved allegations of violence. In light the AIFS data on prevalence, such findings are to be expected. Both Kaspiew (2005) and Moloney et al (2007) found that only when the allegations referred to very severe violence, and this was well-supported by evidence, was there evidence of a link between the allegation and the outcome (in the sense of orders for parental responsibility and time). This evidence contradicts claims that parent-child contact may be diminished or severed on the basis of little evidence in court proceedings. In reflecting on the lack of specificity attached to allegations of family violence in court documentation, Moloney et al observe that the 'impact is most likely to be in the direction of a relative downgrading of the violence and child abuse allegations' (p120). Their study found that only three cases out of the sample of sixty that were determined by judges involved allegations found to be false (p108). One of these cases involved allegations by a mother, which the trial judge 'did not expressly find [to be] false' but held reflected embellishment by the mother based on her fear of the father mistreating the child. The other two cases involved allegations by fathers (in one case against a mother and in another against a mother's family) held to be without foundation.

On the broader question of findings about credibility in general in family court proceedings, Behrens et al (2010) analysed 190 judgments from the Family Court of Australia that dealt with applications for one (or rarely both) parties to relocate between 2002 and 2004. In the cases where credibility findings were explicitly addressed by the judge (n=177), a large minority (45%) involved acceptance of the credibility of both parties. A small minority (10%) involved cases where adverse

findings were made against both parties. Where adverse findings were made against one party, this was more likely to be the father (28%) than the mother (17%). It should be noted that the majority of cases (70%) in this sample involved allegations of family violence, but the analysis did not specifically focus on credibility findings in this context.

On the basis of their pre-2006 sample, Moloney et al suggested that the way matters are litigated means that decision making is taking place in the context of 'considerable factual uncertainty'. The findings of the AIFS Evaluation of the 2006 reforms suggest that this observation remains pertinent. Overall, the evidence indicates that legislative measures aimed at discouraging false allegations are unnecessary and misplaced, a point consistent with expert analysis recommending the repeal of *FLA* s117AB to ensure that concerns are disclosed and dealt with (Chisholm 2009, Family Law Council 2009). The findings of the AIFS Evaluation of the 2006 family law reforms similarly underline the importance of identifying families for whom these issues are a concern. Most relevantly, contrary to the intention of the 2006 reforms, the AIFS Evaluation found that families where there were ongoing safety concerns, or a history of family violence, were just as likely as families without these concerns, to have shared care arrangements (p232). This is the issue that legislative policy should be concerned to rectify.

Conclusion

The Violence Against Women Advisory Group (VAWAG) considers it essential that the Senate passes the Family Law Amendment Legislation (Family Violence) Bill 2011, as it was passed by the lower house of Parliament on 30 May 2011.

Based on the evidence set out above, and in the VAWAG submission to the Commonwealth Attorney-General on the Exposure Draft of the Bill, the proposed amendments are necessary to ensure that the safety and well-being of children is given priority over all other considerations.

Further, the evidence points to the need for a common interpretive framework and multi-disciplinary training and professional development to ensure progressive laws are effectively implemented.

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1 July 2011

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APPENDIX 1

The (Commonwealth's) Violence against Women Advisory Group

(VAWAG) was appointed by Minister the Hon Tanya Plibersek MP in September 2009 to advise the Minister for the Status of Women. VAWAG now advises the Hon Kate Ellis MP, the current Minister for the Status of Women. This body replaced the former National Council to Reduce Violence against Women and their Children that authored *Time for Action: the National Council's Plan to Reduce Violence against Women and their Children*

Membership of the Violence Against Women Advisory Group (VAWAG)

Member	Biography
Libby Lloyd AM, ACT (Chair)	In 2008-2009, Ms Libby Lloyd served as the Chair of the Australian Commonwealth Government's former National Council to Reduce Violence against Women and their Children from which delivered '*Time for Action* - the National Council's Plan to Reduce Violence against Women and Children' to Prime Minister Rudd in April 2009. The outcome of this work is the National Plan to Reduce Violence Against Women, launched in February 2011. She is also a member of the Australian Government's asylum seeker advisory Council (CISSR); and the Foreign Affairs Council for Australian Arab Relations (CAAR). Libby is a former President of UNIFEM Australia. She was actively involved in re-establishing the White Ribbon Campaign in Australia in 2003 and is a founding and continuing Board Member of the White Ribbon Foundation. Libby has worked in the Australian Public Service, with the United Nations High Commissioner for Refugees (UNHCR) in SE Asia and Iraq, in the private sector and with a number of community organisations in Australia**.**
Heather Nancarrow, QLD (Deputy Chair)	Ms Heather Nancarrow is the Director of the Queensland Centre for Domestic and Family Violence Research, CQUniversity. She has extensive experience in the field of domestic and family violence prevention, including in practice, policy and research. Heather's research interests include justice responses to domestic and family violence, particularly as they relate to rural and remote communities and Aboriginal and Torres Strait Islander people. In 2008-2009, Heather was Deputy Chair of the National Council to Reduce Violence against Women and their Children, which produced the blue-print for the Council of Australian Governments current 12 year *Plan to Reduce Violence against Women and their Children.* She is currently Deputy Chair of the national Violence against Women Advisory Group, and Chair of Queensland's Domestic and Family Violence Strategy Implementation Advisory Group.

Member	Biography
Annie Parkinson, NSW	Ms Annie Parkinson is the current President and a longstanding member of Women With Disabilities Australia (WWDA). She has over 30 years experience in activism beginning with her involvement in the early days of the Sydney Rape Crisis Centre. She was involved in the groundbreaking publication 'I Always Wanted to be a Tapdancer', a book of stories from women with disabilities published in the late eighties. She has worked as a research assistant in the disability field and in the 1990s co-founded an organisation called Access Plus, a group that addressed issues which particularly affected gay, lesbian and transgender people with disabilities. Annie is now a member of the reference group for the Australian Family and Domestic Violence Clearinghouse. She is also on the management committee of a small SAAP funded housing organisation that offers short-to-medium term housing for women who have experienced child sexual assault.
Bess Price, NT	Mrs Bess Nungarrayi Price was born at Yuendumu in Central Australia. Her first language is Warlpiri. She also knows Luritja, Western Arrernte and Anmatyerre. Mrs Price has a Bachelor of Applied Science in Aboriginal Community Management and Development from Curtin University and has worked in education and training, public administration, the media, community development, interpreting, translating and language teaching and has experience in small business management. She has represented Central Australia at conferences in Quebec, Beijing, Vancouver and Deerfield Massachusetts. Mrs Price is a partner, with her husband Dave, with Jajirdi Consultants working in cross cultural awareness training, community liaison and Warlpiri language services. In recent times she has built up a reputation as an artist through Warlukurlangu Arts Centre developing a uniquely personal interpretation of traditional themes. At present she chairs the NT Indigenous Affairs Advisory Council and is a member of the management board of Indigenous Community TV, the Indigenous Economic Development Taskforce and has been invited to join the Board of Directors of Outback Stores.
Mick van Heythuysen OAM, NT	Mr Mick Van Heythuysen is a security consultant and adviser on cross-cultural and multi-cultural awareness. Before moving into private work, he was a Superintendent in the Northern Territory Police Service and in charge of the NT Police and Aboriginal and Ethic Services Unit. He has worked in the communities of Lajamanu, Borroloola and Yulara before moving to Alice Springs and Darwin. He is a former winner of the Police Officer of Year award for his work with Timorese refugees and was a member of the Council for Multicultural Australia from 1999 to 2004.

Member	Biography
Mr Norman Raeburn, TAS	Mr Norman Raeburn has been Director of Legal Aid since January 2000, coming back to Tasmania after 17 years at the Commonwealth Attorney-General's Department, eleven of them as Deputy Secretary. He was the Chair of National Legal aid in 2002 - 2004 and 2008 - 2010. Before his appointment to the Department, Norman was a legal academic for nineteen years at the Universities of Monash, Tasmania and New South Wales. He is a barrister of the Supreme Courts of New South Wales and Tasmania. He has been the Tasmanian representative on the Criminology Research Council since 2000.
Dr Leigh Gassner, VIC	Dr Leigh Gassner is a partner in Reos Partners, Melbourne, an international organisation dedicated to supporting and building capacity for innovative collective action in complex social systems. Previously an Assistant Commissioner in Victoria Police, Australia became a consultant and executive coach working with private and public sector organisations advising on organisational performance and organisational cultural change, strategy development, and providing executive coaching and development programs. Because of his experience and study Dr Gassner brings both a practical and theoretical mix to his work. He has worked with the Australian Human Rights and Equal Opportunity Commission in north-western China delivering workshops on family violence as part of human rights. Dr Gassner is a Member of the White Ribbon Day Foundation, the Australian Community Support Organisation and the Minister's Advisory Council for the Victorian Mental Health Reform Strategy 2009 - 2019. Dr Gassner holds a Doctorate in Business Administration and a Master of Public Policy and Administration.
Dr Rae Kaspiew, VIC	Dr Rae Kaspiew has extensive experience in socio-legal research applying qualitative and quantitative methods. Her particular areas of expertise are family law, family violence and the overlap between the child protection system and the federal family law system. She has published material in range of areas including sexual violence and has a particular interest in the needs of CALD groups. She joined the Australian Institute of Family Studies in April 2007 to work on the Institute's Family Law Research Program. Dr Kaspiew is a member of Family Law Council, a body that provides policy advice to the federal Attorney General The Hon Robert McClelland. For Family Law Council, she is currently involved in work examining the extent to which the family law system meets the needs of Aboriginal and Torres Strait Islander clients. Admitted to practice as an Australian lawyer in the Supreme Court of Victoria, Dr Kaspiew holds a PhD in family law from the University of Melbourne.

Member	Biography
Victoria Hovane, WA	Ms Victoria Hovane is an Aboriginal woman from Broome in the Kimberley region of WA with family links to the Injibarndi group from the Pilbara as well as the Gooniyandi and Kitja groups from the Kimberley. She holds a First Class Honours degree in Psychology and is nearing completion of a PhD in Forensic Psychology examining child sexual abuse in Aboriginal communities. Her current work focuses on the area of the fall-out from violence - specifically sexual assault, child sexual abuse, child abuse and neglect, family violence and generalised violence. She has worked for both the Victim Support & Child Witness Service, and Department of Corrective Services Offender Services Branch where she has undertaking group therapy with with convicted offenders in both community and prison settings as a Senior Programs Officer and has supervised group therapy programs in community settings as the Aboriginal and Regional Programs Consultant and the Aboriginal Programs Consultant. She also has expertise in policy and program development, implementation, monitoring and evaluation. Over the past 29 years, Ms Hovane has advocated and promoted Indigenous social justice in legal services, social welfare, counselling, offender rehabilitation programs and victims' services.