The Committee Secretary,

Legal and Constitutional Affairs Committee,

Parliament House,

Canberra ACT 2600

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

This submission is on behalf of the Joint Parenting Association

The Joint Parenting Association is strongly opposed to the Federal Government's removal of the many common-sense provisions of the Family Law Act that were enacted in 2006 to bring a much needed balance between protecting families from violence and protecting children's human right to the love of their parents in equal measure following divorce.

It has been said that the catalyst for the Family Law Amendment (Family Violence) Bill 2011 was the tragic 2009 death of 4 year old Darcey Freeman, at the hands of her father. According to critics of current family law favouring shared parenting fathers pose a risk to their children and the selected use of instances where some have harmed their children strongly suggests a blinkered prejudice.

However, they don't. When the divorcing mother Gabriela Garcia jumped off the same Melbourne bridge just seven months earlier, with her 22 month old baby son Oliver there were no tortured calls for a public inquiry. The silence regarding the death of this infant boy by the supposed champions of children's interests was and still is deafening.

The social commentator Bettina Arndt once said "Neither sex has a monopoly on vice or virtue." The heart wrenching murders of Darcey Freeman and Oliver Garcia are the product of incomprehensible madness and should not be a catalyst for gender wars.

Key concern

The reform process

Many of the reports commissioned into the 2006 family law reforms, and how the family law system deals with family violence, contained a reference point that focused only upon women and children thereby excluding the experiences of male victims and their children. Not only did this "research" ignore between one-third and one-half of male family violence victims reported by mainstream Australian studies (e.g. Headey, B., Scott, D., & de Vaus, D. 1999; AIFS 1999, 2006; ABS 2005), it can only be described as gender biased "results orientated" research designed to come to a predetermined conclusion.

Additionally, despite findings by the Australian Institute of Criminology (2008) that almost one in two adult victims of family homicide and over one in three victims of intimate partner homicide in 2006-07 were male, the process used by the federal Government to arrive at the Family Law Amendment (Family Violence) Bill 2010 was based on the false assumption that only women and children need protection. Not surprisingly and in complete disregard of the reams of peer reviewed evidence non legislative measures announced by the government failed to include fathers and their children subjected to family violence and this issue must be corrected and addressed.

For an annotated biography of 275 scholarly investigations: 214 empirical studies and 61 reviews and/or analyses, which demonstrate that women are as physically aggressive,as men in their relationships with their spouses or male partners see
http://www.csulb.edu/~mfiebert/assault.htm

Key Concern

The broad-brush definition of family violence" in part 4(1)

We do not agree that it is desirable to markedly expand the definition of family violence as proposed . Such a broad definition invites vexatious allegations of violence, makes family law more litigious and places greater pressure on already under-funded court and legal systems.

The present definition is *conduct actual or threatened towards the person or property of a family member that causes a family member reasonably to fear or be apprehensive about his or her personal well-being or safety.* This definition is broad enough to cover physical or mental harm. The proposed expanded definition of family violence lists a plethora of disagreeable

behaviours that *may* constitute family violence and *are not limited to* the enumerated examples. A mere allegation that the behaviour caused a family member to "be fearful" would be enough to establish "family violence." This is not the usual legal test or standard of proof and such an allegation would be almost impossible to refute.

Additionally, the proposal fails to distinguish between truly menacing verbal behaviour and transient verbal expressions of anger and put downs that flow both ways in most relationship breakdowns. There needs to be a distinction between this transient behaviour and the pathological menacing behaviour of physical assault before a child can be deprived of a relationship with one of the two most important people in his or her life.

Political extrapolations have sometimes resulted in the conclusion that where there is conflict at the time of divorce (when isn't there?) share parental responsibility should be precluded. Conflict is certainly present in most divorcing situations, but it usually settles with time. Temporary anger is common in reaction to such a powerful psychosocial stressor. It is not ordinarily indicative of pathology and should not result in an abrogation of the child's right to spend time with each parent.

Key Concern

The softened approach to child abuse and neglect

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

(a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or

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

Under the revised child abuse definition ***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.

Despite self serving statements on the need to prioritise the safety of children (a fundamental enacted in the 2006 family law legislation) 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 and is not supported.

A recent University of Queensland study of almost 4000 children published in the December 2010 edition of the medical journal Paediatrics found child neglect is as harmful to children's cognitive development as physical and sexual abuse. Children with a history of reported abuse or neglect scored on average three IQ points lower than children who had not been maltreated. And the children who had been neglected did just as poorly as children with a history of physical or sexual abuse.

Neglect also occurs when a 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 and these abusive behaviours by parents or caregivers should be included in the revised definition.. Further, the revised definition creates a litigation windfall for lawyers as how *serious* (and to whom) does *serious* have to be?

Allied issue

Inside the boundaries of child abuse coverage by government agencies often a gender-neutral term such as 'parent' or 'caregiver' is used and there is no further discussion as to whether it was a natural father or natural mother who perpetrated the assaults or neglect. With this problem in mind the decision taken in 1997 by the Australian Institute of Health and Welfare (AIHW; Broadbent & Bentley 1997) not to publish data indicating the gender of child abuse perpetrators must be reversed.

The action was taken just one year after the figures were first published in 1996 (968 men and 1138 women). The omission was justified on the wobbly basis that only one state (WA) and two territories (ACT & NT) had furnished statistics and a lack of publishing space (several sentences). Curiously, these lame reasons did not stop the publication of the statistics in 1996. In fact, Angus & Hall (AIHW; 1996) observed that the information base *provide an extra dimension to data previously presented.*

Should the AIHW decision represents one-sided reporting then such slanted views have no place in the Australian landscape. Furthermore, why do state child protection annual reports fail to provide information on the numbers of biological mother and biological father victimisers in each category of established child maltreatment. The designating of perpetrators as "parent" or "non parent" does not suffice and it should not require a Freedom of Information (FIO) request before the statistics are released as was the case in WA. And when the data was disclosed the figures finished off the widely peddled myth that natural fathers present the major risk for their children's well-being.

The Western Australian figures shed light on who is likely to abuse children in families and are in line with overseas findings. The data show there were 1505 substantiations of child abuse in WA during the period 2007-8. Natural parents were responsible for 37% of total cases. Of these, mothers are identified as the perpetrator of neglect and abuse in a total of 73% of verified cases.

Clearly, the non publication or censorship of such vital data by most state and federal agencies can negatively impact on the formation of vital child abuse policy and the appropriate allocation of scant resources. In the U.S child protection authorities are not so coy as their local counterparts and as a matter of routine publish the information for public and legislative consumption

Key Concern

The failure to discourage false allegations or statements

The proposal to repeal of S117AB removes the court's ability to order mandatory costs against a party *who "… knowingly made a false allegation or statement in proceedings."* is not supported. The extended immunity of an *officer of a State or Territory* from costs is also not supported.

According to the Explanatory Memorandum accompanying the proposed revisions S117AB has acted as a disincentive to vulnerable parents disclosing family violence for fear of having costs awarded against them if they are unable to substantiate the allegations.

The argument is not persuasive. Not being able to substantiate an allegation is not the equivalent of a*knowingly made* false accusation. Further, an allegation based on a mistaken view of another party's words or behaviour does not amount to a false assertion and the court is able to discern the difference between good faith and malicious assertions designed to gain advantage in proceedings. Lawyers know this to be the case and if some are advising clients otherwise as critics assert they are in breech of their ethical cannons.

Key Concern

The failure to discourage power plays and parental estrangement

In order to ensure so far as possible that courts exercising jurisdiction under the Family Law Act 1975 consider all factors that judicial and social experience have shown to be particularly relevant to the determination of where the best interests of a child lie, a list of mandatory Primary and Additional Considerations are set out in section 60CC of the the Act.

In determining what is in a child best interests the court must take into account among the 'additional' s60CC(3) considerations, *"each parent's willingness and ability to facilitate and encourage a close and continuing relationship between the child and the other parent."*

Critics of shared parenting laws argue that this provision acts as a disincentive to a parent concerned with the safety of their child as a judge will consider a parent who makes an allegation of suspected child abuse based on flimsy evidence as being litigious and uncooperative. However, this claim does not stand up in the court of honest good faith disclosure.

To be the child of a mother and father who dislike one another is an unfortunate life experience and any parent who subjects their child to conflicting loyalties is less than adequate to their role. The removal of the factor regarding the willingness of each parent to encourage the child's relationship with the other parent moves in the opposite direction from comparable overseas jurisdictions and flies in the face of solid research about the importance of parents encouraging the child's relationship with both parents . Helping the child maintain a positive relationship with the other parent when the parents live apart from each other is considered a sign of good parenting, just as encouraging the child to achieve in school is a sign of good parenting. It falls within the category of meeting a child's emotional needs, which is one factor that courts consider in fashioning the parenting decree and the repeal of s60CC(3)(c) is not supported..

The use of the provision cuts both ways. In the recent Family Court case of Binder & Merza [2010] FamCA 13 (13 January 2010) Justice Barry on an interim basis ordered that child lives with the mother, and made an order for the father to have supervised contact with his child in the meantime because of destructive attitudes and comments emanating from the father.

We too often forget that it is an important function of the law to provide a model of which is generally believed to be desirable. This gives people an indication of what is expected of them and a framework for negotiation. The strikingly apparent feature of the proposals to repeal s60CC(3)(c) 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.

Furthermore, there is a noteworthy lack of evidence that the courts have improperly applied these provisions over the past four years and it often argued policy should not be based on the anecdotal claims of dissatisfied litigants.

Conclusion

In family law matters, fallible human beings are vested with the power to pry into people's private lives and make decisions that will affect them in an intensely personal and sometimes devastating way. Although there seems to be no good alternative to government power in these cases, if changes are based on women good/men bad gender politics, concealed under the *safety of children* smokescreen it will hurt parents and children alike

We advocate that the Federal Government abandon the proposed unnecessary changes to the Family Law Act 1975. Other countries are monitoring Australia as a template for their own

reforms. The Australian Institute of Family Studies (AIFS) positive evaluation of the 2006 Family law reforms together with 81% popular support for the shared parenting approach has established Australia as a leading standard in family law policy.

Thank you for the opportunity to provide comment and input into the development of legal responses to family violence and the protection of innocent children.

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